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Cape of Good Hope Supreme Court
"CAPE TIMES" LAW REPORT

OF ALL CASES DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1904

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

S. H. ROWSON, B.A., LL.B.,

ADVOCATE OF THE SUPREME COURT.

VOL. XIV.

124

CAPE TOWN :

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1905.

**JUDGES OF THE SUPREME COURT DURING THE
YEAR 1904.**

DE VILLIERS, RIGHT HON. SIR J. H., P.C., K.C.M.G., LL.D. (Chief Justice).

BUCHANAN, HON. SIR E. J., Knt. (Senior Puisne Judge).

MAASDORP, HON. C. J. (Junior Puisne Judge).

HOPLEY, HON. W. M. (Judge of the High Court).

ATTORNEYS-GENERAL:

GRAHAM, THE HON. T. L., to February 21st.

SAMPSON, THE HON. V., from February 22nd.

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Chief Justice, the Right
Hon. Sir J. H. DE VILLIERS, P.C.,
K.C.M.G., LL.D.]

ADMISSIONS.

{ 1904.
{ Jan. 12th.

Mr. M. Bisset moved for the admission of Cecil Edward Bradfield as an attorney and notary. It was stated that owing to the invasion of Dordrecht there had been a break of twelve months in the applicant's service. The Law Society, however, did not oppose.

Application granted, and oaths administered.

Mr. Buchanan moved for the admission of Wilfred Massingham Seymour as attorney and notary.

Application granted, oaths to be taken before the R.M. of Mount Fletcher.

Mr. Nightingale moved for the admission of David Albertus Grundlingh as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Queen's Town.

Mr. Alexander moved for the admission of David Goldblatt as a translator.

Application granted, and oaths administered.

PROVISIONAL ROLL.

BOER V. DELAROU.

Mr. De Waal moved for provisional sentence on two cheques for £25 12s. and £16 2s. 6d. respectively, with interest and costs of suit.

Order granted.

PFRIPFER V. HUBACH.

Mr. De Waal moved for provisional sentence on a cheque for £64, with interest and costs of suit.

Order granted.

STEPHAN BROS. V. RIACH.

Mr. J. E. R. de Villiers moved for provisional sentence on certain promissory notes, less £50 paid on account, and also for interest.

Order granted, subject to one of the notes being stamped.

MOLLER V LLOYD AND POWER.

Mr. Benjamin moved for provisional sentence for £314 upon certain conditions of sale, less £64 paid on account, the defendant having neglected to pay the first settlement.

Order granted.

LIBERMAN AND BUIRSKI V. STAINDIEN.

Mr. Benjamin moved for provisional sentence for £27 16s. on a certain note of indebtedness, with interest *a tempore mora*.

Order granted.

KOCH V. CLAEYS.

Mr. Sutton moved for provisional sentence on certain conditions of sale for £58, with interest, the plaintiff tendering transfer.

Order granted.

EPSIKEN V. PRIEM.

Mr. Gardiner moved for provisional sentence for £370 on a certain promissory note, with interest and commission for collection.

Order granted.

SIBERT, MAISTER AND ANOTHER V. MULLER.

Mr. Gardiner moved for confirmation of a writ of arrest granted for certain

sums due to the plaintiffs, viz., £145 18s. 7d., and balance of moneys disbursed, and £37 for commission upon sale, also judgment in terms of summons, and costs.

Defendant said that he had not received a statement of account, and he did not know what he really owed.

De Villiers, C.J., said that the matter must stand over until to-morrow, and in the meantime the defendant's attorney should be communicated with, as the defendant would be in custody.

DUMINY V. VINK.

Mr. Gardiner moved for provisional sentence on certain promissory notes for £304 and £33 respectively, and for judgment for £21 10s., goods sold and delivered.

Order granted.

MOSTERT V. ROUS.

Mr. Benjamin moved for a decree of civil imprisonment on a judgment of this Court for £32 7s., with interest *a tempore moræ* and £19 5s. 2d. costs, less £6 paid on account by the co-defendant.

Order granted.

TEMPLEMAN V. ROBINSON.

Mr. Struben moved for provisional sentence for £300 on a promissory note, with interest at the rate of 6 per cent.

Order granted.

HARDY V. WILKS.

Mr. Benjamin moved for a decree of civil imprisonment against the defendant on a judgment of this Court for £60, together with £38 14s. 6d. taxed costs. Counsel put in copy of the return of *nulla bona*.

Defendant said he was absolutely without cash at the present time. He had a number of important agencies from Home. He had no furniture. He lived at Walmer-road, Woodstock.

Cross-examined by Mr. Benjamin: The agencies were not producing any money for him at present, as he was instructed not to take orders on credit when the money market was so bad here. He had been to England since he received the money from the plaintiff. The plaintiff advanced £60 on account, in order that they should take up certain partnership transactions in the Argentine cattle trade. It was not borrowed by witness on the strength of witness finding the plaintiff employment. He was now living by the help of his wife's sister. She provided the money

for his return to England. His passage Home was partly paid by friends.

Mr. Benjamin: You must have a good many charitable friends. Have you been living upon them?

Defendant: No, not by any means; my friends have been living on me. I have helped men who have not had £50, but thousands. I have not got 5s. in the world now.

The application was refused.

ALFORD, WILLS AND ABBOTT V. COOTES AND CO.

Mr. Struben moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

LAWRENCE AND CO. V. BRUHNS.

Mr. Russell moved for provisional sentence on two bills of exchange for £28 17s. 4d. and £42 11s. 4d. respectively, dishonoured at the bank by non-payment, and also for judgment, under Rule 329d, for £5 7s. 6d., goods sold and delivered, with interest *a tempore moræ* and costs.

Order granted.

LAWRENCE AND OTHERS V. SEGAL.

Mr. Russell moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

HEYDENRYCH V. SALODIEN.

Mr. Close moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

JOSEPH AND CO. V. PRETORIUS.

Mr. M. Bisset moved for provisional sentence for £405, with interest and costs.

Order granted.

WESTERN WINE AND BRANDY CO. V. NORMAN.

Mr. De Waal moved for judgment, under Rule 329d, for £345 17s. 6d., balance of price of goods sold and delivered, with interest *a tempore moræ* and costs of suit.

Order granted.

WAKELIN AND CUNNINGHAM V. FROST.

Mr. Benjamin moved for a decree of civil imprisonment for £51 4s. and for certain costs. The defendant, he added, had offered £2 a week, which the plaintiffs were prepared to accept.

Decree granted, to be suspended pending payment of £2 a week, first payment to be made on the 1st February.

MARCUS V. GOODMAN.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

The defendant said that he was not prepared to pay the money. All his money was invested in property.

De Villiers, C.J., said that unless the defendant was prepared to pay the money at once, he did not see that he had any option but to make the order asked for.

Order granted.

CONTINENTAL CORONETLUM COMPANY
V. TRYE AND COMPANY.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

TRUTER V. McMULLEN.

Mr. M. Bisset moved for a decree of civil imprisonment for £200, together with interest and £9 1s. 9d. costs.

The defendant admitted that he owed the money, but said that he could not make a settlement at present. He should, however, be prepared to pay the interest of £1 a month, and then in April of next year he would pay off the capital in instalments of £50 a month.

Cross-examined by Mr. Bisset: He left Beaufort West in September last. He sold his practice to Dr. King. He had not got the price (£200), but he could not get his money owing to the action of Mr. Truter, who was acting for Dr. Darter. Dr. King found that the rent was being raised, and then withdrew his offer. The other doctor (Darter) had done them all down. He had gone, and the landlord was left with an empty house. Witness had taken over Dr. Seller's practice in Cape Town. His earnings had been about £90 a month. He had worked for twelve months in Beaufort West without money, because the farmers, owing to the drought, had no money. He had had a claim against the C.G.R. for £200 for an operation upon a railway servant, but he had been unable to secure payment up to the present. The C.G.R. wanted to make out that the man was playing at the time, and repudiated all liability. He

had been a personal friend of the plaintiffs, and had gone there every week for twelve months along with the magistrate and the assistant magistrate. They had played bridge together. He did not know that Mr. Truter was disloyal to him until he received from him an offer of £200 on behalf of Dr. Darter for his practice. The conditions on which he had taken over Dr. Seller's practice provided that he should pay £50 a month to Dr. Seller until March, 1906; if he failed any month Dr. Seller might step in and take over his practice again.

Decree granted, with costs, decree to be suspended pending payment of £3 a month from the 1st February, and an additional payment of £50 a month from the 31st March until the debt and costs had been cleared off, leave being given to the plaintiff to apply in the meantime for an increase in the instalments.

KANNMEYER V. CHETTY BROS.

Mr. Buchanan moved for a decree of civil imprisonment against the defendants upon an unsatisfied judgment for £600 rent less £69 18s. 6d. paid on account.

Order granted.

THE MASTER V. EXECUTOR OF THE
ESTATE HOFFMAN.

Mr. Howel Jones moved for the usual order calling upon the defendant to file an account.

The usual order was granted, account to be filed within one month.

CUNHA AND CO. V. SHALOW- (1904.

SKY AND TEIXARA BROS. (Jan. 12th.

Mr. Buchanan moved for the final adjudication of the estate of the defendants as insolvent. Counsel said there was due for goods supplied by the plaintiffs to the defendants £2,385 3s.

Mr. Benjamin, who appeared for the defendant, Gabriel Teixeira, read an affidavit by his client, in which he stated that he was no longer a partner in the firm, having retired therefrom in pursuance of a deed of dissolution. He had never put any money into the firm, and had received no share of the profits, excepting a sum of £200, which he put in the property at Johannesburg. He had kept the books.

The defendant Joseph Teixeira said he gave a promissory note for the partnership for £6,000. He was authorised by the firm to draw notes in favour of the petitioners and other creditors. The firm at present owed him £6,000. His brother Gabriel had been a partner in the firm. He (Joseph) complained very much about the mismanagement of the business.

Another of the defendants said that he had not been a partner in the firm since July last.

De Villiers, C.J.: The deed of dissolution was executed in November, 1903. By this deed the three brothers all acknowledge themselves to be partners; two of them from that date retiring, one was to remain a partner. The debt in respect of which the plaintiff claims was incurred some time before this dissolution. The plaintiff now, as the creditor, claims that the members of the firm which incurred the debt shall have their estate sequestered. It is quite clear that the plaintiff is entitled to that.

BRADFORD ROOLE AND CO. V. HAYWARD.

Mr. De Waal moved for provisional sentence for £80, under certain conditions of sale.

Order granted.

MILLER AND CO. V. MCFADYEN AND THOM.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

HANAU V. BUCHANAN.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

The defendant said that a deed of assignment was made, and was signed by the creditors, but a certain creditor afterwards attached part of his stock, and an application was then made by the present plaintiff for the compulsory sequestration of his estate, so as to prevent one of the creditors from claiming all the property. It had now been agreed that the matter should stand over, so that the estate should not be wasted.

Mr. Bisset said that the defendant had admitted that he was hopelessly insolvent.

The further hearing of the matter was ordered to stand over until the 1st February.

DOMINICUS V. TAYLOR AND STERNER.

Mr. De Waal moved for the order for the sequestration of the defendants' estate to be superseded.

Application granted.

THE MASTER V. EXECUTOR IN THE ESTATE LIEBENBERG.

Mr. Howel Jones moved for the usual order for an account to be filed.

Usual order granted.

MABERLY V. BROCKLEBANK. { 1904. { Jan. 12th.

Mr. M. de Villiers moved for provisional sentence on a mortgage bond for £500 upon certain land and buildings situate at Woodstock, less £50 paid on account, and for the property to be declared executable, the bond having become due by reason of notice given to the mortgagee.

Order granted.

SUBURBAN ESTATES V. MUZLAK AND ANOTHER.

Mr. Struben moved for provisional sentence for £35, under certain conditions of sale, less £10 paid on account.

Order granted.

ST. SAVIOUR'S CHURCH, CLAREMONT V. FRIEDMAN.

Mr. Sutton moved for provisional sentence on a mortgage bond for £2,100, less a certain sum paid on account, the bond having become due by reason of the non-payment of interest, and by notice calling up the bond having been given.

Mr. Benjamin read an affidavit by the respondent in support of his application for postponement of execution, the defendant's explanation being that he had been away in Namaqualand, and that he had only just returned, and consequently had not been able to attend to the matter previously.

De Villiers, C.J., said that an order would be granted as prayed. He could not direct a postponement, but he would remind the plaintiff that it would not be advisable, for his own sake, to press for execution.

WHITE, RYAN AND CO. V. COHEN.

Mr. Benjamin moved for provisional sentence on certain promissory notes, and also for judgment under Rule 323d, for £49 11s. 3d., for goods sold and delivered.

Order granted.

LOCHNER AND ANOTHER V. GROMAN.

Mr. M. Bisset moved for provisional sentence upon certain conditions of sale, for £306, balance of the purchase price of certain land, together with interest.

Order granted.

ESTATE MARSH V. SMITH.

Mr. P. S. T. Jones moved for provisional sentence on a certain mortgage bond for £200, together with interest, and for the property to be declared exe-

cutable, the bond having become due by reason of the non-payment of interest.
Order granted.

ESTATE MARSH V. COLYN.

Mr. Alexander moved for provisional sentence on certain six mortgage bonds, amounting in all to about £2,900, and for the property to be declared executable, the bonds having become due by reason of the non-payment of interest.
Order granted.

DUMINY V. DREYER.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £3,000, less £700 odd paid on account, and for the property to be declared executable.
Order granted.

CLARKE V. MACKEY.

Mr. Gardiner moved for provisional sentence on a certain promissory note for £300, made in favour of the African Banking Corporation.

The defendant said that there had been a partnership between himself and the plaintiff. He looked upon the money as an advance, and as part of the money that would be owing to him by the partnership when the purchase was completed of certain property that they had acquired at Muizenberg.

The matter was ordered to stand over until the 1st February, and the Chief Justice advised the defendant in the meantime to engage counsel.

JOHNSON V. LACY.

Mr. Sutton moved for provisional sentence on a promissory note for £50, with interest.
Order granted.

ROSENBERG V. LURIE.

Mr. Sutton moved for provisional sentence on a promissory note for £117 10s. with interest.
Order granted.

SCOTT V. HEESSEN.

Mr. J. E. R. de Villiers moved for provisional sentence upon certain conditions of sale, plaintiff tendering transfer of the land.
Order granted.

ROSS AND CO. V. ROUS.

Mr. Alexander moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £65 9s. 6d.
Decree granted.

ESTATE MARSH V. NOTTGE.

Mr. Russell moved for judgment for costs upon a summons for provisional sentence. The debt was paid after the summons had been issued.
Order granted.

EPSTEIN V. SIERADSKI.

Mr. Benjamin moved for a decree of civil imprisonment upon an unsatisfied judgment for £123 9s. 10d.

Mr. Gardiner called

The defendant, who stated that he had no means whatever. He was willing to pay £5 towards the discharge of the debt. He had already sent £5 to the plaintiff, but it had been returned.

Cross-examined by Mr. Benjamin: He had been sued by another firm since he made his first offer of £10 a month in October last. The debt related to money lent to him to enter into a partnership. He would be able to pay £7 10s. from the 1st August.

Decree granted with costs, decree to be suspended pending payment of £5 a month from the 15th inst., and £7 10s. from the 15th August.

SECCOMBE V. HALL. { 1901.
{ Jan. 12th.

Services of minors—Contract with parents—Manager of operatic troupe.

The applicant was the manager of a juvenile operatic troupe, consisting of girls under age, who had been engaged by H. in Australia by agreement with the parents for a tour in South Africa. During the tour H. died, and his wife was employed after his death by the applicant (who claimed to have been a partner of H.) as matron of the children. The applicant having dismissed her, she started an operatic troupe of her own, which was joined by several of the girls.

Held, in the absence of any indication of the parents' wishes, that the applicant had no better right to the services

of the children than Mrs. H., and that he was consequently not entitled to an order that they should return to his service.

This was a motion for an interdict against the respondents, who are associated with the theatrical company known as Hall's Australian Juveniles.

A rule nisi had been granted by his lordship on the 5th January, calling upon the respondent, Mrs. Hall, to show cause why an order should not be granted compelling her to restore to the applicant, one Seccombe, the custody of certain minor children, and requiring the said children to return to the applicant.

The affidavit of Mrs. Hall set out that she was the widow of Henry Lawrence Hall, who died in Johannesburg in October last. Her husband formed the theatrical company known as Hall's Australian Juveniles, composed of children brought out from Australia to tour in South Africa. She knew that applicant had advanced certain money to her husband to enable him to continue touring with the company. She believed that a certain understanding was entered into between them, but she was not aware what the terms were. At first she was instructress of the dancing and matron, and she received a weekly wage. Applicant had informed her that her services were dispensed with. She denied that notice had previously been given to her. On January 2 the applicant came to the Opera House, Cape Town, and demanded to examine the parcels of the company. He also brought a policeman, and caused some of the children to be frightened. The children were entrusted to the care of her husband and herself in Australia. She was the only person at present in this country, who was acquainted with the parents of the children. The children refused to go back to the applicant, stating that they were frightened of him and did not know him. She denied that she had refused to allow them to return to the applicant, and said that they had come to her voluntarily. She denied that he had any right to regard himself as their guardian. She had been promised substantial financial support in connection with the company. An affidavit by Leslie Herring, a member of the company, stated that she was one of the respondents, she would be frightened to go to the applicant, and prayed to be allowed to remain with Mrs. Hall. Other affidavits by respondents were couched in similar terms. Counsel also read several letters sent by the children's parents to Mrs. Hall.

De Villiers, C.J., asked where the Juveniles were now?

Mr. M. de Villiers, for the respondents, said it was the intention of Mrs. Hall to bring them to the Court, but it was not expected that the case would come on till the following day (Wednesday). [De Villiers, C.J.: Couldn't they be sent for?]

Mr. M. de Villiers said he believed the Juveniles were residing at Sea Point. The respondent, Mrs. Hall, was anxious that the Court should see them.

The affidavit of one of the Juveniles, who had joined the section that had returned to the applicant, stated that she had not the least complaint to make in regard to the applicant's treatment. "We have," she added, "always regarded him as our friend and guardian." Another deponent said that Mrs. Hall had been gradually drifting into drinking habits, and had exhibited an undue partiality for the society of other men than her husband while he was living.

Mr. M. de Villiers objected that the applicant's answering affidavits introduce new matter which should have been brought forward on the original application.

[De Villiers, C.J.: Yes, they do introduce new matter.]

[The new matter complained of consisted of certain personal charges against the respondent.]

Mr. Benjamin (for applicant): I will pick out the passages which are in reply to the affidavits on the other side.

[De Villiers, C.J.: It would seem that the contract was entered into between the late Mr. Hall and the parents of these children. Who stands in Mr. Hall's place?]

The contract was between the parents and the company.

[De Villiers, C.J.: How can the children be bound by that? They are not apprenticed. On what grounds. Mr. Benjamin, do you claim the right to remove the children from Mrs. Hall's care?]

Because the contract was between the parents and the company, and Mr. Seccombe is the manager of the company. Mrs. Hall is only a paid servant of the company. Then we have no guarantee that Mrs. Hall will be able to look after these children. If they are to remain with her a new contract should be drawn up, and a curator appointed to assist the children in making it. Then again there are not enough children with her to form a full company. The applicant is quite willing to send the children back to Australia. In any case, he is the surviving partner, and as such is entitled to all the benefits of the contract with the parents of the children.

Mr. M. de Villiers said that Mrs. Hall and several members of the company were now in court.

De Villiers, C.J., said he would like to ask them a few questions.

Nellie Finlay (19) and another girl, her sister (14), gave evidence to the effect

that they preferred to stay with Mrs. Hall, though they said they would not object to going to Australia. They were quite satisfied with Mrs. Hall's treatment, and they would not care to join Mr. Seccombe's company. They had 16 members of the company (including 12 girls) with Mrs. Hall, while ten others had entered the applicant's service. They intended in future to play vaudeville and not to give opera.

Mrs. Hall said that as long as the children remained with her she intended to treat them fairly, and at the end of the tour to take them back to Australia. They had been performing at Sea Point and Simon's Town since the rule was granted, but had made no profits. She denied the imputations with regard to her conduct.

[De Villiers, C.J.: I think the sooner you send the children back to their parents the better. The parents gave them over to Mr. Hall, and Mr. Hall is dead, and I think they should go back to their parents.]

Cross-examined by Mr. Benjamin, witness said she had money to carry through the tour. The money had been put up by a friend of her own and her husband's, Mr. Alexander. She had 16 of the performers with her still, out of a total of 25.

Mr. Benjamin submitted that Mrs. Hall had simply been an employee of the company, that the children were under an engagement to the company, and were under the control of Mr. Seccombe as manager.

De Villiers, C.J.: It is extremely difficult to know how to deal with a case of this kind. A contract was made in Australia by the parents of the children with Mr. Hall. He took these children to South Africa, and during the tour in South Africa Mr. Hall died. After his death his widow continued to be with the company, not only as matron, but also as a dancing teacher to the children. After a time Mrs. Hall was dismissed, and thereupon some of the children chose to go with Mrs. Hall, and application was made to me in chambers by the present applicant for an order to compel Mrs. Hall to deliver up the children, and for an order upon the children to go back to him. I felt the difficulty at the time that there is no clear proof that the contract was for the benefit of the children, or that, even if the contract were binding on the children, the applicant had any *locus standi* to enforce it. The contract was made with the parents by Mr. Hall. One of the conditions of the contract was that a salary was to be paid direct by Mr. Hall to the parents, and that the children were to get only some pocket money. I think something like 3s. a week was to be paid to them while on tour. There certainly does not seem to be a clear benefit to the minors; but still the children are here, and there is

no one else to take charge of them. The question to be decided is whether it would be for the benefit of the children that I should order them to go to the applicant, or whether it would not be better for them to remain in the custody of Mrs. Hall. In the original affidavit, no charge was made against the moral conduct of Mrs. Hall, but in the replying affidavits, very serious charges are made, which, if true, would certainly tend to show that Mrs. Hall was not a fit and proper person to have the custody of these children. If these statements are true, they ought certainly to have been made in the original affidavits. We have now the statement made by Mrs. Hall on her oath that there is no truth in the charges made against her. In my opinion, as between the two, the person who has the custody of the children should continue to retain them. There was no contract with Seccombe, and clearly he is not entitled to the custody of the children. If I am asked what would really be best in the interests of the children, I should say they should go back to their parents in Australia, but that is not the matter before the Court. At present, without knowing what the wishes of the parents are, I have to decide whether the applicant is entitled as against Mrs. Hall to claim custody of the children. In my opinion, he has no better right than she has upon the facts before me. If the applicant thinks he has a right, he may bring his action. But upon the motion, with the facts before me, I am of opinion that the application should fail. If he is advised to bring an action, I think he should give notice of such action to the parents of the children in Australia, so that they may have an opportunity of informing the Court what they wish to be done. It will also be competent for any of the children, if dissatisfied with the treatment of Mrs. Hall, to approach any of the judges, and make complaint. For the present, I think this application should fail. Plaintiff must, if he thinks fit, bring an action. This application must be refused, with costs.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorneys: Friedlander and Du Toit.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

COATON AND LOUW V. { 1904.
ERASMUS. { Jan. 13th.

Mr. Gardiner moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

At a later stage his lordship said that an affidavit had been put in by the defendant to the effect that he was doing his utmost to pay his creditors. Though he challenged some of the statements made in the affidavit of Coaton and Louw, he did not set up any legal defence. The order already made would stand, though the statement of the defendant might perhaps be kept in mind by the petitioners.

SIBERT, MAISTER AND ANOTHER V.
MULLER.

Mr. Gardiner moved for confirmation of a writ of arrest, and for judgment in the sum of £182 2s. 7d., balance of moneys disbursed and commission for certain potatoes sold for defendant. The matter was before the Court on Tuesday, and was ordered to stand over.

The defendant now said that he had not been supplied with a proper statement. He thought he was entitled to receive something from the transaction, whereas the plaintiff had sued him for money. He had transferred his business to another man. He admitted that he was arrested aboard the Saxon, when about to leave for Europe.

Buchanan, J., said the writ of arrest would be confirmed, but judgment would not be given, and the plaintiffs must bring an action for the amount in question.

VAN DER BYL AND W. AND G. SCOTT V.
SMUTS.

Mr. Nightingale moved for the provisional order for the sequestration of the defendant's estate, as insolvent to be made final.

The defendant admitted that he could not pay his debts.

Order granted.

DUMINY V. VINK.

Buchanan, J., informed Mr. Gardiner who was counsel in this matter, heard on Tuesday, that he would not be entitled to judgment, under Rule 329d, until the

19th inst., and the order which had been granted for provisional sentence, and judgment must be altered accordingly. For the present, therefore, only provisional sentence was given. The day for entering appearance was the 15th.

ILLIQUID ROLL.

INSOLVENT ESTATE LUCKE { 1904.
V. ANDERSON. { Jan. 13th.

Mr. Rainsford moved for judgment in terms of citation for payment of £128, with interest, being the purchase price of certain properties, or an order cancelling such sale in the event of the defendant's failure to pay such purchase price within the period specified. Counsel also asked for damages.

Judgment as prayed, except as to damages.

SHEPPARD AND CO. V. STEER.

Mr. Gardiner moved for judgment, under Rule 329d, for a proper, true, full, and detailed account of all matters entrusted by the plaintiff to the defendant, and all transactions and moneys disbursed by him, debate of account, delivery of all, and every title deed; diagram, mortgage bond, and other document belonging to the plaintiff.

Mr. Close, for the defendant, said that the present application was made in default of appearance. There was also a motion on the roll for an order authorising the defendant to purge his default. Certain affidavits had been filed, and counsel asked that the matter should be allowed to stand over.

The matter was ordered to stand over till the end of the roll.

FORTUIN V. WEINTROB.

Mr. Benjamin moved for judgment, under Rule 319, in default of plea for £73 18s. 9d., balance of account for work and labour done, and materials supplied and money disbursed on behalf of the defendant.

Order granted.

COOKE AND OTHERS V. BETHELL.

Mr. Close moved for judgment, under Rule 319, for £272, purchase price of certain lots of land, plaintiff tendering transfer.

Order granted.

HERMANS V. McMULLEN.

Mr. Gardiner moved for judgment, under Rule 319, on a declaration claiming

judgment for £30, rent due, and £9 4s. 3d., price of certain goods sold and delivered and for costs of suit.
Order granted.

PEROLD AND LEWIS V. SILVERUS.

Mr. Russell moved for judgment, under Rule 329d, for £60 16s. 6d., professional services rendered and moneys paid, with interest *a tempore morae*, and costs.
Order granted.

DU PLESSIS V. MINNAAR.

Mr. M. Bisset moved for judgment, under Rule 329d, for £142 5s., goods sold and delivered, with interest *a tempore morae*, and costs.
Order granted.

MILNE AND SLADDIN V. JACKSON AND CO., LTD.

Mr. Fremont moved for judgment, under Rule 329d, for £31 19s., rent due from September to December last, with interest *a tempore morae*, and costs.
Order granted.

PHILIP'S TOWN MUNICIPALITY V. WENTWORTH.

Mr. De Waal moved for judgment, under Rule 329d, for £3 2s. 6d., being arrears of rates, and for costs of suit. The parties resided in different districts.
Order granted.

BOOSEY AND CO. V. SIMMONDS.

Mr. Benjamin moved for judgment, under Rule 319, for an order interdicting the defendant from selling or dealing in any pirated or counterfeit copies of certain musical productions, and requiring him to deliver up forthwith all such copies as are still in his hands, or control for the purpose of having the same destroyed, or destroying the same forthwith. There was also a prayer in the summons for £500 damages, but this, counsel said, he could not ask for at present. He applied for judgment in terms of prayers (a), (b), and (c) of the summons.
Order granted accordingly.

WHITE V. GIBBONS AND CO.

Mr. Alexander moved for judgment, under Rule 329d, in terms of paragraphs (b), (d), and (e) of the summons, i.e., for an account of the amount realised by the sale of certain goods entrusted to the defendants, and payment of the sum found to be due, and alternatively in case of non-sale, for delivery of the goods, to-

gether with interest and costs. So far as prayers (a) and (c) were concerned, a settlement had been effected.
Order granted accordingly.

COLONIAL GOVERNMENT V. POOLE.

Forum citandi.

The Colonial Government may cite a defendant to appear in any Colonial forum.

Mr. Howel Jones moved for judgment in the sum of £5 1s. 6d., quitrent and stamp duty on a certain farm at Vryburg, and £31 1s., quitrent of another farm.

[Buchanan, J.: Are the parties in different districts?]

Mr. Jones: The Government, I should imagine, would be in every district in the territory, though the plaintiff, who is the Treasurer of the Colony, is in Cape Town.

Order granted.

CAPE PRODUCE AGENCY V. PEAKE.

Mr. Rainsford moved for judgment, under Rule 329d, for £101 16s. 4d., goods sold and delivered and moneys disbursed on behalf of the defendant, with interest *a tempore morae* and costs.
Order granted.

QUIN, CRUGER AND CROZIER V. LALOR.

Mr. Buchanan moved for judgment, under Rule 329d, for £23 9s. 1d., for professional services rendered and money disbursed for and on behalf of the defendant, in connection with a suit which he had instituted in the High Court of the Witwatersrand, and which he afterwards abandoned.
Order granted.

SILBERBAUER, WAHL AND FULLER V. STEPHAN.

Mr. Buchanan moved for judgment, under Rule 329d, for £169 15s. 8d., balance of account for professional services and moneys disbursed at the instance and request of defendant, and for costs of suit.

Order granted.

SILBERBAUER, WAHL AND FULLER V. CAPES.

Mr. Buchanan moved for judgment, under Rule 329d, for £47 1s. 7d., for professional services rendered and costs of suit.

Order granted.

WATSON V. PILBROW.

Mr. Close moved for judgment, under Rule 329d, for £22 10s., rent of certain property, with interest and costs.
Order granted.

ARDERNE AND CO. V. STEPHAN.

Mr. M. Bisset moved for judgment, under Rule 329d, for £145 13s. 1d., goods sold and labour performed, with interest *a tempore morae* and costs of suit.
Order granted.

SOUTH AFRICAN BRICKFIELDS V.
WILSON AND ERLINSON.

Mr. Sutton moved for judgment, under Rule 329d, for £100 17s. 5d., balance of account for goods sold and delivered with interest *a tempore morae* and costs.
Order granted.

HERMAN V. O'BREE.

Mr. Alexander moved for judgment, under Rule 329d, for £39 rent, in respect of certain houses and premises in Cape Town, together with interest and costs, and also to make absolute the rule nisi restraining the respondent from removing or disposing of furniture from the said premises, pending an action for the recovery of rent.
Order granted as prayed.

KROONEN V. OUTRAM.

Mr. De Waal moved for judgment, under Rule 329d, for £124 1s. 2d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs of suit.
Order granted.

ARIEPIEN V. SIBBETT AND STEPHAN.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for delivery of certain deeds of transfer belonging to the plaintiff and handed to the defendants, for payment of a certain sum, and costs of suit.
Order granted.

COLONIAL GOVERNMENT V. PADDON.

Mr. Howel Jones moved for judgment for £39 7s. 6d., quitrent and stamp duty, in terms of citation.
Order granted.

BARNETT V. SEIDENER.

Mr. De Waal moved for judgment, under Rule 329d, for costs, the capital

amount and the interest having been paid since the summons was issued.
Order granted.

REHABILITATIONS. (1304.
(Jan. 13th.

Mr. C. W. de Villiers moved for the rehabilitation of David Klaas, whose estate disclosed a deficiency of £360 odd. The debtor was in partnership with another man. The trustee's report contained one or two unfavourable remarks, one being that the partners had given credit most recklessly. The estate was sequestrated nine years ago.

Application granted.

Mr. Gardiner moved for the rehabilitation of William Daniel van der Vliet van Es, whose estate showed a deficiency of £9,489. The estate was sequestrated in 1889. There was no trustee's report attached to the record.

Ordered to stand over until the 1st February, pending information as to the trustee's report.

Mr. Close moved for the rehabilitation of George Madley Walden, whose estate disclosed a deficiency of a little over £1,600. The trustee, in his report, stated that the debtor's books were incomprehensible.

Buchanan, J., said that in this case the insolvent had not kept proper books, and it was not usual where proper books had not been kept to grant rehabilitation. The application must be refused. However, he had been insolvent so long that he might apply again in three months.

GENERAL MOTIONS.

Ex parte BLOMFSTEIN.

Mr. Buchanan moved for the release of the insolvent's estate from sequestration. The estate was placed under sequestration in August last, meetings of creditors were convened, to be held before the Resident Magistrate of Piquetberg, but no creditors appeared, no debts were proved, and no trustee elected.

The matter was ordered to stand over until the 1st February, and it was pointed out that the facts of the case should be placed on affidavit.

Later in the day Mr. Buchanan said that he had a document from the petitioning creditors, who caused the estate to be sequestrated, consenting to the present application.

An order was accordingly granted as prayed.

Ex parte W. AND G. SCOTT, LTD.

Mr. M. Bisset moved for a rule granted under the Derelict Lands Act to be made absolute.

Rule made absolute accordingly.

Ex parte THEUNISMEN.

Mr. J. E. R. de Villiers moved for a rule granted under the Derelict Lands Act to be made absolute.

Rule made absolute accordingly.

SWART V. SWART.

Mr. Benjamin, for the applicant, moved to have a rule *nisi* granted against the respondent made absolute, calling on him to show cause why a decree of divorce should not be granted, on the ground of his failure to return to the applicant. Counsel put in the affidavit of the applicant, Susannah Swart, which set out that up to the present her husband had not returned to her, and she claimed a decree of divorce, custody of the children, a division of the estate by reason of being married in community of property, and a reasonable sum for the maintenance of the children.

Buchanan, J., had granted an order for the return on October 30, and failing compliance therewith, defendant to show cause on the 12th January why the bonds of marriage should not be dissolved, with costs, why the plaintiff should not be entitled to the custody of the children, and why the defendant should not pay £4 per month for the maintenance of each child until it reached the age of sixteen years.

Mr. Alexander, for the respondent, said he did not oppose the divorce being granted, but he opposed the amount claimed for the maintenance of the children. Counsel submitted defendant's affidavit, which set out that he was only making £20 a month out of a small store at Vrede, in the Orange River Colony, and was only able to pay £2 a month for each child, which counsel contended was a very reasonable offer.

Mr. Benjamin pointed out that the matter had been fully gone into at the trial, and how difficult it was to know what a defendant's income was in such a case. There was no allegation that the wilful desertion of the plaintiff was any fault of the defendant.

Buchanan, J.: The plaintiff sued the defendant, her husband, for a decree of restitution of conjugal rights, the custody of the children, and alimony for the support of the children. An order was issued calling upon the defendant to return to the plaintiff on or before 31st December, 1903. He has not done so, and the plaintiff is therefore entitled to a decree dissolving the marriage and an order for the custody of the children. The only question in dispute is the amount the defendant can pay for the maintenance of the children. At the trial there was no evidence as to the defendant's circumstances, except what was said by the plaintiff, that as far as she knew, he had a good business as general dealer

in the Orange River Colony. The plaintiff said it cost her £16 a month to support the children, and the Court accepted that amount at the trial. It was stated that the defendant was taken prisoner during the war, and had been confined at Green Point, and afterwards sent to India. It is therefore probable that he is not in very affluent circumstances. The defendant now states that he is carrying on a small store in the Orange River Colony that only brings him in about £20 a month. I think that, under these circumstances, £8 a month would be a fair amount to allow for maintenance. However, in making the rule absolute, and ordering the defendant to pay £2 a month for each of the children, leave will be reserved to the plaintiff to make a further application in the matter. The rule will be made absolute, with costs.

LAITA V. HESSEN.

Mr. Benjamin moved upon a notice of motion calling upon the respondent to show cause why he should not be ordered to hand over two children to the custody of the applicant, and why he should not be further ordered to contribute to the support of the children.

The applicant's affidavit set forth that in July, 1898, she was married to the respondent according to the rights of the Mahomedan Church. She lived with him until September, 1902. In October, 1903, he divorced her according to the rights of the Mahomedan Church. She was now desirous of having the two minor children, of the ages of two and four, handed over to her custody.

Mr. Buchanan said he would read the affidavit of the respondent, subject to his objection that the matter could not be decided on motion. The affidavit set out that the applicant had agreed to leave the children with the respondent, under whose care they were being well treated. The affidavit of the nurse was put in, and it stated that the applicant had repeatedly neglected the children, and had refused to administer medicine which the respondent had purchased for the children.

Mr. Benjamin read a replying affidavit repudiating the alleged neglect.

Mr. Benjamin: There was no civil marriage between the parents, therefore in the eye of the law the children are illegitimate, and the mother is their natural guardian.

[Buchanan, J.: But is it quite clear that the children are illegitimate?]

Yes; see *Brown v. Brown's Executors* (3 Searle, 313). The Marriage Ordinance provides for the appointment of marriage officers for Malays and others, but as regards Malays, none have been appointed.

[Buchanan, J.: The Court might recognise their marriages for purpose

connected with the custody of the children.]

If the children are illegitimate, the mother should have the custody.

[Buchanan, J.: What is the special urgency of this case?]

The mother naturally wishes to obtain the custody of such young children as soon as she can. One of them is only two years of age, and the other is four.

Buchanan, J.: Unless the matter is urgent it cannot be heard in vacation time. Let it stand over till the 1st of February.

LYONS V. KELLAWAY.

Mr. C. de Villiers, for the respondent, moved for a postponement in this matter.

Mr. Benjamin, on behalf of the applicant, offered no objection. The respondent was to show cause by the 12th January, but in the meantime he died, and an executor had been appointed, and he wished for time. At the time the application was made, it was not known that subsequent to the assignment of his rights to the applicant, the respondent had made an assignment to a third person. The name of the third person was George Withinshaw, of Wynberg.

The matter was ordered to stand over until February 1, the name of George Withinshaw to be added as a co-respondent.

Ex parte WOOD.

Mr. Russell moved to have made absolute a rule calling on all persons to show cause why an order shall not be granted authorising the Registrar of Deeds to cancel a certain mortgage bond.

Rule made absolute accordingly.

RETIEF V. RETIEF.

Mr. M. Bisset, for the petitioner, Susan Retief, moved for a rule *nisi* to sue the respondent *in forma pauperis* for a decree of divorce.

Rule granted, returnable 1st February, personal service to be effected.

Ex parte GYSBERT HENRY (STOCKENSTROM, PAUL)
WILLEM MICHAU, AND
MICHIEL JACOBUS PRETORIUS.) 1904.
Jan. 13th.

Legislative Council election —
Accounts—Act 26 of 1902.

Even if a member is returned unopposed, he is bound to file an account of election expenses within 50 days.

This was a petition under the 25th section of the Illegal Prac-

tices Prevention Act of 1902. The applicant did not file his accounts within the time required by the Act, and because he was returned unopposed he did not think it necessary. The three petitioners were returned unopposed at the recent election in the North-Eastern Circle for the Legislative Council, and the petitioner was not furnished with the necessary election return before December 4, 1903, when he immediately signed it, and returned same to the Returning Officer at Cradock. Counsel quoted the case of *Robson*, under the English Municipal Law, where it was held that, although no expense had been incurred it was necessary to file a declaration, but, inadvertence having been established, the candidate was excused. Counsel submitted that the present case was on all fours with that of *Robson*, and that it was purely a case of inadvertence on the part of the applicant.

Mr. Benjamin for G. H. Stockenstrom; Mr. De Waal for Michau and Pretorius.

Mr. De Waal said his clients stood on exactly the same footing, except in one case, where the candidate himself acted as his own agent.

Buchanan, J.: The 25th section of the Act requires a candidate to make certain returns within 50 days of his election. The candidates in this circle were returned unopposed for the Legislative Council, and they did not make the returns required. It is stated in affidavit the reason was that they thought it unnecessary, there being no contest, but I think it is clear from the Act, that whether there is a contest or not, these returns are required, and for the reasons stated in the English case cited, namely, that the declaration is to show that money has not been spent by the candidate or on his authority by anyone on his behalf. The 25th section, however, provides that where through inadvertence and in good faith, these returns have not been made within the time required by the law, it is open to the candidate to apply to the Court to allow him further time within which to make the returns. From the correspondence it is clear that there has been perfect good faith on the part of these candidates, and the Returning Officer himself did not apply for a return until he received an opinion from the Attorney-General that they should be sent in. This is the first case that has arisen under this Act, and it is desirable to lay stress on the necessity of good faith. I think that the good faith required by the Act has been shown to exist in this case. As the candidates live some distance from Cape Town, they will be given three weeks in which to transmit the declaration required by the Act.

[Applicants' Attorneys: Van Zyl and Buissinés.]

HARDY V. MCSWEENEY. { 1904.
{ Jan. 13th.

Landlord and tenant—Landlord's
lien.

This was a motion to have made absolute a rule calling on the defendant to show cause why he should not be compelled to deliver up certain clothing, the property of the applicant. The affidavit of the applicant set out that he had lodged at the respondent's house in Tamboer's Kloof, and that he had been assaulted by him on 21st December. The applicant subsequently left the house, and tendered £3 0s. 6d., being the amount of his board to that date, but this the respondent refused to accept, holding out for the full amount for the month of £4 5s., and further detaining the applicant's clothing and baggage, which contained some important correspondence.

The replying affidavit of the respondent set out that the applicant climbed the balcony of the house early on the morning of the 19th December, and at breakfast next morning struck the deponent, after demanding a latch-key which had been promised him.

Mr. M. De Villiers (for respondent): As to the law on the subject of a landlord's lien, see *Van Leeuwen's Cens Foren* (4-37-9). It is common cause that the applicant was a monthly boarder at £4 10s. a month; he is therefore liable for a month's rent. He says that he was assaulted, but it is for him to prove that: it is denied by the respondent, and the question as to whether an assault was committed or not cannot be tried on an application of this kind. He should either have prosecuted criminally, or have sued civilly in respect of the assault. He has done neither, and I submit that all the presumptions in the case are in our favour. I submit I have shown cause why the rule *nisi* should be set aside.

Mr. Alexander (for applicant): It is not common cause that my client was a monthly boarder. Our letter of December 23rd, and the medical certificate prove that we were assaulted. The respondent clearly took the law into his own hands. A boarding-house keeper must come to Court to enforce his *jus retentionis*. He is in no better position than a landlord. Then again, the respondent must show a clear right, and this he has not done. He has not shown that anything was owing to him. I submit that the rule should be made absolute.

Buchanan, J.: The applicant obtained a rule *nisi* calling upon the respondent to show cause why he should not be compelled to give up the applicant's goods now in the respondent's possession. He alleges that he was lodging with the respondent, and was assaulted by him whilst at breakfast on

December 21, and thereupon he left his lodgings. He demanded his goods, and tendered the amount which would be due up to the date of his leaving the house. I see that when the matter came before the Judge in Chambers, no notice was given. Now, upon the rule being served, and affidavits being filed, a different complexion is put on the whole affair. It would seem that there had been a dispute between the parties early in December, and the applicant himself left a note stating he would leave the premises on the 1st January. He remained on, and on the 21st December, after the defendant had in the early morning gained access to his room by means of the balcony, the parties had some row, and there was an exchange of blows between the applicant and the respondent. In the affidavits, each charges the other with being the aggressor, and it is by no means clear that the applicant was free from blame. The applicant gave notice that he would terminate his lodgings by the end of the month, but he left before this month expired, and refuses now to pay for his monthly lodgings. Mr. De Villiers has shown that a landlord has a lien on his lodger's goods for the amount of his rent, and the applicant must pay that rent before he can get his goods. I do not think that the rule would have been granted in the first instance if all the facts had been then set forth. The rule will now be discharged, with costs.

[Applicant's Attorneys: C. E. P. Hughes; Respondent's Attorneys: Friedlander and Du Toit.]

GREEN AND CO. V. KRETZSCHMAR.

Mr. Gardiner moved as a matter of urgency for the attachment of the defendant *ad fundandam jurisdictionem*. Applicants stated that the defendant was indebted to them in the sum of £34 11s. 5d., in respect that the debt was contracted in this colony, and that they had reason to believe that he would shortly be returning to the Transvaal, where he was domiciled.

Order granted for personal attachment *ad fundandam jurisdictionem*, not to be executed provided the respondent give security for the sum of £50. to abide the result of the action to be instituted by the applicants forthwith.

DARTER BROS. V. KRETZSCHMAR.

Mr. Gardiner moved as a matter of urgency for the attachment of the defendant *ad fundandam jurisdictionem*, pending an action to be brought by the applicants to recover a debt amounting to £12 14s. 5d., for goods sold and delivered. Applicants believed that the

respondent shortly intended to return to the Transvaal, where he was domiciled.

Buchanan, J., said that this was a debt that should be dealt with in the Magistrate's Court, but he would grant a similar order to that in the last case, security being fixed at £20.

COLONIAL GOVERNMENT V. } 1904.
BECHUANALAND ESTATE } Jan. 13th.
SYNDICATE.

Mr. Howel Jones moved for leave to sue by edictal citation for £666 17s. 6d., quitrent and stamp duty in respect of certain farms in the division of Kuruman, against the Bechuanaland Estate Syndicate, and for £240 odd against John Francis Connolly, for his half-share in the said farms; and for leave to attach the said farms *ad fundandam jurisdictionem*. Connolly was at present believed to be in Jamaica. The syndicate's registered address was care of Ingie, Holmes and Co., London, and the trustees were Messrs. Max Langerman, Robert Tennant, and S. Paddon.

Buchanan, J., said he should have thought there would be no difficulty in ascertaining the address of such a well-known public man as Mr. Max Langerman. He supposed that his address was Johannesburg.

Mr. Jones said they had no definite information as to his whereabouts.

Leave was granted to attach half the farm Povall *ad fundandam jurisdictionem* so far as Connolly is concerned, personal service to be effected, if possible, failing which publication once in a Jamaica newspaper, the "Daily Telegraph" (London), and the "Government Gazette." Leave was also granted to attach the other half of the farm as far as the syndicate is concerned, personal service to be effected, if possible, upon the respondents, Messrs. Langerman, Tennant, and Paddon, and also at the offices of Messrs. Ingie, Holmes, and Co., failing which, one publication in the "Johannesburg Star," the "Daily Telegraph" (London), and the "Government Gazette," citation to be returnable on the 15th April.

Ex parte MBULWANA.

Mr. Pyemont moved for an order authorising the Registrar of Deeds to register in the petitioner's name certain land, viz., the farm Modderfontein, in the district of Mount Curry, East Griqualand, left by the petitioner's father, Jantje Mbulwana. Jantje died intestate, and no legal proceedings had been taken in connection with his estate. In accordance with native custom, the petitioner applied for transfer of the property as the eldest son of the first or principal marriage of the deceased. A certificate

was also put in in support of the application signed by the Chief Magistrate of the territory. The application was made under Act No. 18 of 1854. The consent was signed by all the surviving wives and children. Counsel quoted in support of the application the case of *Green v. Chiell* (V. Juba, p. 330), and *Ex parte Mabuya* (13 C.T.R. 970).

Rule was granted, calling upon all persons concerned to show cause why an order should not be made as prayed, rule to be published once in a Kokstad newspaper, and once in "Imvo," and to be returnable on the 12th March.

Ex parte SCHELTEHA.

Mr. M. Bisset moved on behalf of the petitioner for leave to pay out certain money from the Guardians' Fund, in order to enable minors to acquire certain shares in three farms at the price at which it was bequeathed to their father. The sum of £840 was required in order to provide the purchase price, and the cost of transfer and other charges. The Master's report was favourable.

Order granted in terms of the Master's report.

GLASS V. GLASS.

Mr. Buchanan moved on behalf of the plaintiff (Agnes Glass), of Cape Town, for leave to sue her husband by edictal citation for restitution of conjugal rights, failing that, divorce. The petitioner stated that they were married in London in 1887, that the defendant deserted her in Cape Town in November last, and that she had reason to believe that he did not intend to return to her. He had proceeded up-country.

Buchanan, J., said that the petition seemed to be very loosely drawn, and it afforded no evidence of jurisdiction. There was no indication of domicile. The petition must be amended. Leave would be given to mention the matter again tomorrow (Thursday).

Ex parte RATHFELDER AND ANOTHER.

Mr. Buchanan moved on behalf of petitioners, husband and wife, who reside at Belle Ombre, Wynberg, for an order authorising an amendment of the husband's name in the Deeds Registry in certain transfers, mortgage bonds, and the antenuptial contract. It appeared that the first-named petitioner was baptised Emanuel Otto Rathfelder, and his name appeared in the aforesaid documents as "Otto Emmanuel Rathfelder." The matter had arisen in consequence of the proposed partition of the estate Belle Ombre, as between the first-named petitioner and his brother, under which the former wished to execute a mortgage bond in favour of his brother. The Regis-

trar declined to register this without an order of Court.

An order was granted, authorising amendment of the first-named petitioner's name in the ante-nuptial contract, the transfer of the 24th February, 1903, the mortgage bond of the 15th May, and the cession of a later date.

Ex parte SLABERT AND ANOTHER.

Mr. Russell moved for an order authorising the registration of certain property. The petitioners were legatees under the joint will of their parents, and the will provided that except for one or more sums of £50 the property could not be alienated. Certain of the legatees had disposed of their shares, but the Registrar remarked that Raynier Slabert did not appear to be able to take over under the will, and that it did not appear that the property could be disposed of to anyone except a co-heir, and that a mortgage could not be effected. A consent paper was put in signed by all the heirs.

The matter was ordered to stand over. The Registrar of Deeds to report.

KELLER V. STEYN AND OTHERS.

Mr. Russell moved for the making absolute of a rule calling upon the respondents to show cause why they should not be ejected from the applicant's farm, in the district of Oudtshoorn, and to restrain the respondents from trespassing on the property.

Order granted.

Ex parte KRUGER.

Mr. M. de Villiers moved for an order authorising petitioner to sign all the necessary papers, to give transfer of a farm to the legatee, without consent of the other executors.

The petitioner was joint executor of his father's estate with one Johannes Willem Horne, who had not been heard of for ten years, and whose whereabouts at present are unknown.

Order granted.

Ex parte THEUNNISSEN.

Mr. Benjamin moved on behalf of the petitioner, as executor in the estate of the late Elizabeth Frederica Theunissen, for leave to sell certain landed property in the division of Beaufort West. Testatrix had left five children, and petitioner had been unable to re-let the property. He asked for leave to sell the land by public auction, and for the proceeds to be paid into the Guardians' Fund, the master to be authorised to pay such sums as might be found necessary for the maintenance and education of the chil-

dren during their minority. The proceeds of the lease of the property had formerly been devoted to the payment of interest on the mortgage bonds, and maintenance and education of the children.

Order granted in terms of the Master's report, the sale not to be effected until the purchase price has been approved by the Master.

Ex parte HEYDENRYCH.

Mr. J. E. R. de Villiers moved for an order for the removal of the petitioner's name from the roll of advocates, in order that he may take steps to be articulated as an attorney.

Order granted as prayed.

Ex parte SMITH.

Mr. Russell moved for the appointment of a *curator ad litem*. The petitioner lived at Constantia, and his wife had had to be removed to the Valkenberg Asylum on account of lunacy. She was the owner of certain property at Beaufort West, which had been provisionally sold to one Nel. The property was at present in charge of Mr. Benjamin T. Pritchard, of Beaufort West.

An order was granted, appointing Advocate Struben as *curator ad litem*, pending proceedings to be taken to have the respondent declared of unsound mind, summons to be served on the alleged lunatic and the curator, and Mr. B. T. Pritchard to be *curator bonis* pending the proceedings.

MOORE V. MOORE.

Mr. J. E. R. de Villiers moved on behalf of the petitioner for leave to sue her husband by edictal citation for restitution of conjugal rights, failing which divorce. The defendant maliciously deserted petitioner in June, 1901, leaving for the front with a company of the Royal Engineers. He had not since returned to her. He was now supposed to be in Johannesburg.

Leave granted, personal service to be effected if possible, failing which, one publication in the "Johannesburg Star" and the "Government Gazette," citation to be returnable on the 29th February.

Ex parte MCATEER.

Mr. Buchanan moved on behalf of the petitioner, of Port Elizabeth, as executrix testamentary in the estate of her late husband, for leave to raise certain money on mortgage on landed property. Testator left property of the value of £8,000 odd in Port Elizabeth, to the

daughter of his former marriage, and the five daughters of his marriage with petitioner, with usufruct to the petitioner. The property was in bad repair, four of the children (all majors) were dependent upon petitioner, and all the children consented to the application. The property was already mortgaged to the amount of about £2,000, and petitioner sought authority to raise a further loan of £750 on the property. On account of the bad repair of the Caledonian Hotel, the licence had been lost. The Master, in his report, said that the usufructuary ought to have kept the property in repair out of the proceeds.

Buchanan, J., said that the usufructuary's first duty was to keep the property in good repair.

Mr. Buchanan said that she had evidently had insufficient funds.

Buchanan, J., said that leave would be granted to pass a mortgage bond to carry out necessary repairs, subject to the amount of the bond being approved by the Master. It must be understood that the interest was to be paid out of the annual income, and if necessary the petitioner must reduce her expenditure to make it balance.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte LUMB. { 1904.
{ Jan. 14th.

Mr. Alexander moved, as a matter of urgency, for a rule *nisi* restraining one Muller from disposing of or otherwise dealing with the goods of the African Mercantile Co., now or presently in his possession, pending an action to be brought by the petitioners. The petitioner was Edwin Barron Lumb, acting for and on behalf of the liquidator of the African Mercantile Co., Ltd., in liquidation, and for the chairman and others. The petitioner stated that one Gottlieb Goerne, of Hamburg, was until the 21st August last general manager of the company for Europe, that, acting in such capacity, he sent various orders for goods by the company to Europe and elsewhere to be executed, and also caused large sums of the company's moneys to be distributed, ostensibly in payment of the goods ordered. In August last he disappeared, and a close examination into the company's books revealed that the said Goerne had been dealing in his own name with the com-

pany's moneys, and that a large sum was still unaccounted for. Goerne was now believed to be in German South-west Africa. A writ had been issued for his arrest for embezzlement. Certain goods had been sent by him to the order of one Basson, of Somerset West Strand, who had received a letter signed by Richard Oberg, formerly bookkeeper in the employ of Mr. Muller. It was believed that the said Oberg was acting in collusion with the said Goerne, and that various other parcels of goods belonging to the company had come into Mr. Muller's possession since Mr. Goerne's dismissal, and were held by him at present, or had been disposed of.

Rule *nisi* granted restraining the said R. Muller from disposing of or otherwise dealing with the goods mentioned in the invoice, or any other goods sent to him on behalf of the said Goerne, pending an action to be forthwith instituted in this Court, the rule to operate as an interdict in the meantime, leave being reserved to the respondent Muller to move, if so advised, to set aside the rule.

GLASS V GLASS.

Mr. Buchanan said that this matter was before the Court on Wednesday. His lordship was not then satisfied as to whether the parties were domiciled in the Colony. Counsel said that a reference to a previous application in the matter, which was a record in the Registrar's Office, showed that paragraph 3 of her petition contained an allegation as to domicile which was admitted by the husband. The petitioner there stated: "My husband came to Cape Town in or about the year 1896, and settled in Cape Town with my daughter and myself." She also stated that they had carried on business as boarding-house keepers in Cape Town. The first application was for maintenance, but the defendant subsequently deserted petitioner, and the last tidings she heard from him took the form of a letter, written by him in the train at Aliwal North. Hence the present action for restitution of conjugal rights, on the ground of the desertion.

Leave to sue by edictal citation granted, personal service to be effected if possible, failing which, one publication in the "Johannesburg Star," "Cape Times," and "Government Gazette," citation to be returnable on the 12th March.

Ex parte HUSKISSON AND ANOTHER.

Will, privileged—Administration—Survivor's election.

Mr. Benjamin moved for an order authorising the petitioners, as execu-

tion in the estate of the late Harry Hushison (brother of one of the petitioners) to issue letters of administration. The testator died at Port Elizabeth, leaving a widow and three children, and property of the approximate value of about £15,000. He had executed a document purporting to be his last will and testament. This was written on two sheets of paper, and in addition to the signature of the deceased, only bore the name of one witness. On the first page there was no signature, either of testator or witness. The document was entirely in the handwriting of the deceased, but it was not witnessed, in accordance with the provisions of Ordinance 15 of 1845. Application was now made to the Court for the will to be recognised as a privileged will, in accordance with the decision in *Steer's case* (5 Supreme Court Reports, p. 313).

[Buchanan, J.: Then the legacies are not valid?]

Mr. Benjamin said that that was not the question now before the Court. They were merely asking for an order authorising the issue of letters of administration.

[Buchanan, J.: Has notice been given to the widow?]

Mr. Benjamin said he did not think so. The present application was brought by the executor and executrix.

[Buchanan, J.: The widow ought to be informed. You see she has a life interest. She might chafe to have the will set aside altogether, and take her half-share in community.]

Mr. Benjamin said he did not see how she could do that, seeing that the testator was only disposing of his half-share of the estate. The question now is, "Is this a valid will?" We now ask only for letters of administration, and, of course, the executors will be responsible for their administration. The case of *Executors of Eaton v. Eaton* (1875, 173), has been followed in several subsequent cases.

Buchanan, J., in giving judgment, said that an order would be granted authorising the letters of administration to be issued, but it must be clearly understood that this order did not in any way affect the rights of the widow under community of property, nor did it in any way affect the provisions as to usufruct or the legacies.

Ex parte THOMPSON.

Mr. Fremont moved for an order authorising an amendment of the petitioner's late husband's name in a certain deed of transfer and letters of administration by the Registrar of Deeds, in accordance with his baptismal name.

Buchanan, J., said it was not clear that the seller of the property did dis-

pose of it to the petitioner's husband. He thought the Court should have more information. Certainly it was at present insufficient upon which to give an order. He should like to know what position the Registrar took up. The matter must stand over for further information.

Ex parte THEUNNISSEN AND OTHERS.

Will — Purchase of estate by beneficiaries—Transfer.

This was a motion for an order authorising the Registrar of Deeds to pass a clear transfer of certain property which, the applicants said, they had inherited from their father. The petitioners were Marthinus Aegidius Theunissen, of Smithfield, Orange River Colony; George Nicolaas Theunissen, of Middelburg, Cape Colony; and Dirk Cornelis Theunissen, of Edensburg, Orange River Colony. They stated that by the last will of their father, Nicolaas Hendrik Theunissen and surviving spouse, and codicils attached, the farms Zeekoegat, alias Oorlogspoort, situate in the division of Coleberg, and measuring 11,301 morgen, and the farm Popkloof, situate in the division of Middelburg, measuring 1,827 morgen, were bequeathed to the petitioners. They had applied to the executrix for transfer, and she had signed the necessary documents for transfer of the said land. Upon the deeds being lodged for registration, the Registrar of Deeds objected to pass the same, on the grounds that he considered that the transfers should be made subject to the conditions mentioned in the several codicils to the said will. Petitioners submitted that the points raised by the Registrar would not now apply, inasmuch as (a), the condition of sub-section (a) of the codicil No. 1, relating to the life interest of the survivor, had been waived by her in accordance with formal consent; (b) that with regard to the condition referred to in sub-section (b) the petitioners submitted that this would not apply to themselves, and, as they had agreed amongst themselves to waive the rights given to each of them thereunder, there would be no need for the same to be embodied in the transfer; (c) that, with regard to sub-section (c), petitioners had complied with this, as would appear from an acknowledgement given by the executrix. With regard to codicil No. 2 petitioners submitted that it could not have been the intention of the testators that the conditions therein contained should apply to the said ground for the following reasons: (a) That in a later codicil (No. 3) a portion of the said ground was bequeathed to them free from the conditions of the said codicil No. 2; (b) that the ground was bequeathed to petitioners subject to their paying into the estate specific sums for

the same. The petitioners, therefore, prayed for an order directing the Registrar to allow the said transfers to them, to be passed from the estate free of the said conditions.

The affidavit of Gus. Trollip, of Cape Town, stated that he was acting as local attorney to the petitioners. A sale had been effected of the properties referred to to the R., B. and B. Syndicate, whereby the purchasers were to pay as the purchase amount thereof the sum of £26,250. Petitioners contended that the said sale was made subject to the conditions set out in the will of their late father in respect of the properties sold, but as a result of a refusal of the purchasers to take transfer in such terms, he had been instructed to present to the Court the foregoing petition with a view of overcoming this difficulty, which would, otherwise, result in the abandonment by the purchasers of the said sale. The purchasers had notified them through their attorneys that unless transfer were passed within six weeks from that date (16th November), they would consider the advisability of cancelling the said sale. If such sale were abandoned, the properties would far from realise the same sum as that to be paid by the R., B., and B. Syndicate who were compelled to pay an exceptionally high figure, owing to the fact that the properties were essential to enable the said syndicate to carry through a certain scheme with an eye to farming on an extensive scale, which scheme, without the property now sought to be transferred, would be impracticable. Furthermore, a judgment had been obtained in this court for £5,600 at the instance of the mortgagees of the property, and a writ of execution had been issued, and the property had been attached. The petitioners could not anticipate such sale in execution through lack of the necessary funds.

Mr. Buchanan moved.

Buchanan, J., said that the Registrar had taken sixteen objections, and he would like to know what was to be said about those not dealt with.

Mr. Buchanan said there was really only one point of vital importance left now, and that was in regard to the *fidei commissum*. He pointed out the three brothers were in a very awkward position, as, in expectation of this sale going through, they had bought other ground, and contracted other liabilities.

Buchanan, J.: The property in this estate is large, and it appears to have been mortgaged by the testator during his lifetime for a very considerable sum of money. Judgment has been obtained on the bond on the property, the property is now declared executable, and may be sold to pay debts. The petitioners are the beneficiaries under the will, and to avoid the loss to themselves, they propose taking

the property, paying off the bond, and selling it to a syndicate, by which means they will obtain a considerably better price than if the property is sold in execution. Under all these circumstances, and considering the authority given by the will to the legatees to sell the property, provided that it is submitted to one another, I think the Registrar of Deeds may be authorised to pass free the transfers to the petitioners of their respective bequests. This order is, however, subject to any objections that the Registrar of Deeds may have on other grounds which are disregarded.

[Applicants' Attorneys, G. Trollip.]

Ex parte SKELTON AND } 1901.
OTHERS. } Jan. 14th.

Will—Foreign executor—Security
—Rule 397.

Mr. Close moved for an order authorising the Master of the Supreme Court to issue an order sealing and signing the English probate without the security of the executors. The petitioners were domiciled in England, and the South African property was held in trust for the beneficiaries under the will. The property was vested in the trustees.

Mr. Close: The case of *Human v. Human's Executors* (10 Juta 172) shows that the executors in this case need not necessarily give security.

[Buchanan, J.: There have been many subsequent cases.]

Yes, there is, for instance, *Re Pentz's Estate* (2 C.T.R., 65).

[Buchanan, J.: The ordinary rule is that an executor testamentary need not give security, but an executor dative must do so, and so must a foreign executor.]

But here all the beneficiaries consent to the Master granting letters of administration, and undertake to indemnify him.

[Buchanan, J.: Then do you say that Rule 397 is *ultra vires*?]

I do not think the Act supports it. The difficulty here is that if the executors have to give security, they will only be able to get it from one of the Trust Companies at very great expense.

Buchanan, J.: I see no reason why the ordinary Rule of Court should not be followed. Security should be lodged, with application to have the letters of administration recognised, and I see no reason why the estate should not be administered by the trustees in due time.

Ex parte THE EXECUTOR IN THE ESTATE
OF THE LATE ANNIE SARAH HALL.

Mr. J. E. R. de Villiers moved for an order authorising the petitioner to pass a mortgage bond of £2,500 on certain landed property, situated in Bree-street.
Order granted.

ESTATE DE JAGER V. TRYSE AND OTHERS.

Mr. Buchanan moved for an order of ejectment against the respondents from the applicant's farm at Buffelsdrift, for a division of the crops, and for an order restraining the respondents from trespassing on the property. The affidavit of one of the executors set out that on the death of Carl Johannes de Jager, respondents were allowed to continue their occupation of the land as tenants, and under the same conditions, which included a division of the crops. A considerable quantity of oats was at present on the farm, the respondents had refused to divide the harvest, and had set up a claim to the property which had frightened intending purchasers.

An order was granted, restraining the respondents from removing any crops until a division of the same has taken place, and one half handed over to the applicant. No order was granted on the application for ejectment.

BAILEY V. COLONIAL GOVERNMENT.

Mr. J. E. R. de Villiers applied, under Rule 359, sub-section (e), for an order setting aside a certain judgment against the applicant, and for leave to defend the action. The applicant had been convicted of theft at the Paarl, and sentenced to six years' imprisonment, with hard labour. Judgment was given against him in the Supreme Court in December last for the sum of £600 odd, but the Chief Constable at the Breakwater informed him that he did not think there would be time, under the prison regulations, to obtain the necessary consent of the Colonial Secretary in order that an appearance might be entered.

Mr. Howel Jones, for the respondents, said that it was apparent that the prisoner had not had an opportunity of communicating with his attorneys.

Application granted, costs to be costs in the cause.

Ex parte LOUBSER.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to amend the name of the petitioner on certain title deeds to his correct name, Coenraad Hendrik Adriaan Loubser. The name on the title deeds was Coenraad Adriaan Hendrik Loubser, and it was only recently that the mistake was discovered on the baptismal register.

Order granted.

Ex parte VICE.

This was an application on behalf of Heppsbah May Vice for leave to raise £300 on mortgage on the estate of her

late husband, in which she was executrix testamentary. Under the will, the petitioner had a usufruct of the farm, and on her demise the property was to be equally divided among the children. The farm had been let, but petitioner and her son proposed taking it over on the 1st January, and the money would be required to renovate the place and for the purchase of farming implements. The Master held that under the will the surviving spouse could not raise a mortgage.

Mr. Buchanan moved.

The matter was ordered to stand over for further information, which his lordship suggested should be shown to the Master.

HYND V. AFRICAN BANKING CORPORATION.

Mr. Close moved to make absolute a rule nisi restraining the African Banking Corporation from paying out certain moneys in their possession belonging to the applicant. Summons had already been taken out in the Magistrate's Court for the recovery of debts, which it was alleged the applicant owed on certain three cheques, and counsel asked that the Magistrate's Court should be granted leave to attach the moneys.

Rule made absolute, and leave was granted to attach the moneys on writ issued by a competent Court, on judgment for the day mentioned in the petition.

Ex parte WILLIAMS.

Mr. M. Bisset moved for the appointment of a *curator ad litem* to enable the petitioner to institute proceedings against his mother-in-law, Sarah Ann Jupp, to have her declared of unsound mind and incapable of managing her person and property. Petitioner's wife was one of the next-of-kin of seven to Sarah Ann Jupp, who had become entitled to a certain policy of insurance, value £300, and, further, was entitled to the payment of certain pension funds from the C.G.R. She had been for a considerable time suffering from chronic melancholia, and at present was confined in Valkenberg Lunatic Asylum.

Order granted, and Mr. J. E. R. de Villiers appointed as *curator ad litem*. Summons to be served on the curator.

Ex parte BEYERS AND OTHERS.

Mr. Buchanan moved, as a matter of urgency, for a rule nisi interdicting the petitioners' brothers, from selling, letting, or incumbering in any other way certain property left by their father until satisfactory security had been given for the payment of £600, to which they were entitled under the will. Mr. Buchanan

said it seemed that the survivor (who was the usufructuary), had not waited until she had died, but had waived her life usufruct in favour of the sons and given them transfer immediately. It seemed there was some ground for fear, because one of the sons, who was entitled to the share in the property, had refused to take possession unless his sisters were first secured. The others, however, seemed to have no such scruples.

Rule granted, restraining the respondents from selling or incumbering the property bequeathed without first giving security to the petitioners, rule to be returnable on the 11th February.

Ex parte SUTTON.

Mr. Gardiner moved for the release of the petitioner from imprisonment, under a writ for failing to obey a judgment. The petitioner said that in September last the plaintiffs, Philip Bros., obtained a decree of civil imprisonment against him. He was arrested on the 6th October, and lodged in the gaol at East London, where he still remained. He had been very ill during his detention in gaol. He had been in the employ of His Majesty's Customs, and received a salary of £9 a month, out of which he had to support a wife and family. In consequence of his arrest, his salary had been stopped. He was willing to make a small monthly payment towards the discharge of the debt, but he was now unable to earn anything. He was without property.

His Lordship asked what the amount of the debt was?

Mr. Gardiner said there were two sums, viz., £26 7s. and £56 10s.

Mr. Buchanan, who appeared for the petitioning creditors (Messrs. Philip Bros.), said that a copy of the affidavit did not appear to have been served upon Messrs. Van Zyl and Buissinne, who were their town attorneys, but had been served upon the plaintiffs direct.

Buchanan, J., said that the applicant ought not to have gone behind the plaintiffs' attorney in this way. The matter would stand over until Tuesday next.

Ex parte NAGGS.

Partnership—Death of partner—
Directions to surviving partner to carry on business for benefit of a third party.

Mr. M. Bisset moved for an order enabling the petitioner to acquire absolutely a certain business in which he was now a partner. Petitioner was executor testamentary in the estate of the late Wm. Cornwall, with whom he had carried on business at Sterkstroom, under

the style of Wm. Cornwall and Co. Each partner owned one half-share of the business. There had been no division of the profits. Under his will deceased bequeathed his share in the business to his nephew, Frank Cornwall Pearson, aged 14 years, and directed that the petitioner should continue the business for the mutual benefit of himself and the said nephew. No curator, tutor, or guardian had been appointed on behalf of the minor. His father was dead. His mother had married again. Petitioner contended that deceased had no power to direct him to continue the business for the mutual benefit of the nephew and himself, and that at Cornwall's death the partnership ceased. He proposed to acquire the other half share in the business, and for that purpose had had the assets valued by a sworn appraiser. He was willing to take over all the liabilities, and to pay over the sum of £334 14s. 2d., which was half the value of the assets, to the mother of the minor as his natural guardian. The mother consented. The Master, while approving the petition, suggested that payment of the money should be made into the Guardians' Fund.

Order granted in terms of the Master's report.

Ex parte REES AND OTHERS.

Mr. Gardiner moved for an order authorising the petitioners to cause a certain roadway in the Municipality of Cambridge, East London, to be surveyed, and portions deducted for the purchasers under the sub-divisions of the quirent land, and empowering the Registrar of Deeds to pass transfer thereof.

[Buchanan, J.: The Registrar of Deeds can transfer the land with consent of parties.]

I thought the Registrar might feel a difficulty in doing so without an order of Court.

[Buchanan, J.: I do not think the matter is ripe for the Court to consider, and no order, therefore, will be made.]

Ex parte ELTON AND OTHERS.

Mr. Gardiner moved for leave to sell certain property settled by petitioner under an ante-nuptial contract upon the children of the marriage. The petitioner stated that he settled on trust a certain piece of freehold land, situate at Port Elizabeth. On that land was a building which had cost £325. It was proposed to accept an offer of £500 for the property. Petitioner had been unable to carry out his undertaking to reduce the bond on the property, on account of his household expenses. He was willing, however, to cede his two life insurance policies for the benefit of the children,

and he undertook during his lifetime to pay the premiums. He asked for an order authorising the sale of the property by the trustee under the ante-nuptial contract for £500, the trustee to pay off the mortgage bond from the proceeds, and after the payment of all legal expenses (inclusive of costs of this application), the balance to be invested for the benefit of the children.

Order granted as prayed.

Ex parte THE CAPE TOWN HEBREW CONGREGATION.

Mr. Alexander moved for a rule *nisi* to be made absolute, authorising the amendment of certain trust deeds. Publication of the rule had been given in accordance with the order of Court.

Rule made absolute accordingly.

Ex parte THE PRESIDENT AND VICE-PRESIDENT OF THE PORT ELIZABETH QUOIT CLUB.

Mr. Buchanan moved, on behalf of John Algernon Willetts and another, as president and vice-president of the Port Elizabeth Quoit Club, for leave to sell a certain piece of ground, No. 20, in the division of Port Elizabeth. The petitioners stated that the club was formed in 1842. The ground in question was acquired for the purposes of the club. The original purchase price was £175, which was paid as to £162 thereof by certain proprietary members whose names were endorsed on the deed, and the balance of the purchase price and the transfer expenses, it was believed, had been paid out of the ordinary funds of the club, though there was no record of such payment. Of the original members, five only were now living, as far as was known. There were sixteen ordinary members of the club, one of whom was also a proprietary member. Owing to the lack of interest in the club, the present members had resolved to wind up its affairs. The estimated value of the said piece of land was about £700. The petitioners desired to wind up the club's affairs, to realise the said piece of land, and divide the proceeds amongst the proprietary members or legal representatives of such as may be dead, in proportion to the amount subscribed by them, or invest the shares of those who cannot be found or are unknown in some substantial trust company.

Buchanan, J., said that the balance, instead of being invested, should be paid to the Master as dividends of unknown claimants. A rule would be granted calling upon all concerned to show cause, on the 12th March, why an order should not be granted, rule to be published once in the "Eastern Province Herald," "Port Elizabeth Advertiser," and "Government Gazette."

BIRK V. EDMENBOROUGH AND BEWSTER.

Mr. Close moved to make absolute a rule *nisi* restraining the respondents from selling or in any way parting with six horses purchased by them at auction on the 6th December last, on the condition that the animals were not to be removed from the yard until they had been paid for. It was alleged that the respondents bought the animals at auction for £105 15s., that they had removed five of the horses, and had not paid the purchase price. Steps were being taken to institute an action for recovery of the price.

Rule made absolute, pending payment of the purchase price, or result of action to be brought forthwith, costs to be costs in the cause.

REX V. GREENING. { 1904.
{ Jan. 14th.

Culpable insolvency—Ordinance No. 6, 1843—Act No. 38, 1884.

An insolvent failing to attend any one of the three statutory meetings of his creditors may be convicted under the 71st section of Ordinance No. 6, 1843, of the crime of culpable insolvency. (Vorster v. Lillienfeld, 5, E. D. C. Rep., p. 254, approved of.)

An insolvent was convicted of contravening the 71st section of the Insolvent Ordinance in having failed, when thereto required by the Master, to give a sufficient explanation of the causes of his insolvency. The evidence showed that it was the trustee, and not the Master, who had required the explanation. The Crown did not support the conviction, and the same was quashed.

The 10th section of Act No. 38, 1884, makes it culpable insolvency, when, on being required thereto in writing by the trustee, the insolvent fails to give a sufficient explanation, punishable under the 71st section of the Ordinance.

This was an appeal against a decision of the R.M. of Cape Town, in which the appellant was sentenced to two months' imprisonment, with hard labour, for culpable insolvency.

The appellant's estate was seques-

trated on March 20, 1903. He was subsequently charged before the Resident Magistrate with fraudulent and culpable insolvency. The Magistrate took a preparatory examination, and the Crown dropped the charge of fraudulent insolvency and remitted the prisoner for trial by the Magistrate on the charge of culpable insolvency. The charge consisted of three counts: (a) That he wrongfully and unlawfully failed to attend a third meeting of his creditors; (b) that he failed to keep such reasonable and proper books as would clearly indicate the nature of his business transactions; and (c) being insolvent on March 20, 1903, he had failed to give the Master an explanation of his insolvency. Counsel took exception to the charge on the third count on the ground that there was no allegation that the appellant had been served with notice by the Master or the Resident Magistrate, and as to the other counts, that there was not sufficient evidence to support the conviction. The evidence at the trial and the correspondence that passed between the insolvent and the trustee were read. In his letter to the trustee the day before the third meeting, the insolvent gave a history of his financial misfortunes. When he came to this country first he was doing a "roaring" business, which necessitated the employment of six clerks. An unfortunate speculation at Sea Point did him a lot of harm, but the real cause of his downfall was a man with whom he had a lot of legal work, and who had failed to pay counsel's fees over a recent action. This man told counsel that the fees had been given to appellant, and that resulted in the bar black list, and his immediate extinction, for he had to suffer absolution from the instance in an action he instituted against this man. The prisoner was convicted, and sentenced to two months' imprisonment with hard labour.

Mr. Gardiner (for appellant): My appeal is chiefly against the first and third counts. He was not required to attend the third meeting, nor was he called upon by the Master to give a satisfactory account of the causes of his insolvency. As to the second count, and the case in general, there is not sufficient evidence to support the conviction. The first count charges the prisoner with having failed to attend the third meeting of his creditors; but there is no allegation that he was called upon by the Master to attend this third meeting. (See Section 71 of the Insolvent Ordinance.) The whole section must be read together; notice must be given of each meeting, and failure to attend "the first, second, and third meeting" is not the same thing as failure to attend the first, or the second, or the third.

[Buchanan, J.: Then if an insolvent attends any one of the three meetings, that is enough?]

I can hardly hold that in view of *Vorster v. Lütjenfeld* (5, E.D.C. 254). I confess that that case is against me, but I felt bound to bring the prisoner's contention to the notice of the Court. He got no notice from the Master, and the notice he did get did not specify the hour of the meeting. The evidence shows that he attended at 10.30. As this Court had at that time recently changed its hour of sitting from 10 a.m. to 10.30, his mistake was very natural. As to the second count, failure to keep proper books, there is absolutely no evidence. The trustee does not say in what way the books were incorrect or incomplete; and at most the evidence only shows that the trustee did not regard them as sufficient; that, however, was a point on which the Magistrate should have formed his own opinion, and not have blindly accepted the opinion of the trustee. He should have been called upon to produce his books, and then the trustee should have pointed out any inaccuracies.

Lastly, he is charged with not having given the Master a satisfactory explanation of the causes of his insolvency, but he was never asked to do so. Of course, he might have been charged under section 10 of Act 38 of 1884 with not having given his trustee a satisfactory explanation, but he was charged under the Insolvent Ordinance.

Mr. H. Jones (for the Crown): I do not wish to press the third count.

[Buchanan, J.: What do you say about the sentence, Mr. Jones?]

The Magistrate could have sentenced the prisoner separately on each count to six months' imprisonment with hard labour. Had he done so, of course, the sentence on the third count must have been quashed. He, however, pronounced a general sentence in respect of all the counts, and I submit that if the conviction of two out of the three counts be upheld, that sentence was by no means excessive.

Buchanan, J.: In this case the appellant was charged before the Magistrate on three counts with culpable insolvency: (1) With not having attended the third meeting of creditors; (2) with having failed to keep proper books; (3) with having failed to give a proper explanation of the cause of his insolvency. As to the third count, the 71st section makes it an act of culpable insolvency if the insolvent, after being thereunto required by the Master or Resident Magistrate, fails to give a true and satisfactory explanation of the causes of his insolvency, and that is the charge laid. As a matter of fact, however, the evidence shows that the insolvent was called upon by the trustee to give this explanation. By the subsequent Act of 1884, section 10, the trustee could have called upon the insolvent to make this explanation, and had the charge laid been

that the trustee called upon him, the conviction might possibly have been sustained. The learned counsel who appears for the Crown is not now prepared to support the conviction on the charge as laid in this third count. It is certainly only a technical objection to the conviction, and I think it shows the fairness of the Crown in not pressing a charge when technically it is incorrect. The conviction on the third count, therefore, will be quashed. As to the first and second counts, the evidence is so ample, so sufficient, and so satisfactory that the Magistrate had no option but to convict the prisoner on these two charges. As, however, the Magistrate has given one collective sentence on the three charges, the case will be returned to the Magistrate, with instructions to pass such sentence as he thinks adequate on the first and second counts. As to the third count, the conviction will be quashed.

[Appellant's Attorney: W. G. Coulton.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte BUTTON. { 1914.
Jan. 19th.

This was an application for an order releasing the applicant from civil imprisonment. Mr. Gardiner was for the applicant, and Mr. Buchanan was for the respondent.

Mr. Gardiner said that the applicant was arrested on the 6th October last, on a decree of civil imprisonment for debt, granted on the 18th September. The applicant had a wife and six children to maintain, and while he was in prison, his salary of £9 per month was being stopped by the Customs Department.

Mr. Buchanan said that he was instructed to oppose the motion, and read the affidavit of the plaintiff's law agent, which set out that the applicant had ceded to his wife, to whom he was married in community of property, shares to the value of £1,000. The debt had been owing for several years, and the plaintiffs would not agree to payment by instalments.

Mr. Gardiner pointed out that it seemed unlikely that a man possessing property would remain three months in gaol.

The matter was ordered to stand over until 4th February, in order that an answering affidavit might be put in on the question of the property.

SHEPPARD AND CO. V. STEER.

Mr. Gardiner, for the plaintiff (respondent in the application), moved for judgment, under Rule 32nd, for a full and detailed account of all the matters entrusted to the defendant by the plaintiff and their clients, and for the delivery of all title-deeds, etc., belonging to the plaintiff.

Mr. Close, for the defendant (applicant in the application), moved for an order authorising the defendant to purge his default, in order that he might enter appearance. Counsel read the affidavit of the applicant, which set out that at different times since November he had handed over papers and statements to the plaintiff's attorneys, and on the 6th inst., he handed over all the papers in his possession.

Mr. Gardiner read the affidavit of Edward Sheppard, the general agent of Sheppard and Co., which set out that since the beginning of 1903 he had tried to get a proper and detailed account of the matters entrusted to the defendant, who had made repeated promises, which were never carried out. He respectfully claimed his rights under the Rule of Court.

Mr. Close then read the replying affidavit of the applicant, which stated that he had always been ready and willing to comply with the plaintiff's request. His default was due to the fact that negotiations were going on at the time with the plaintiff's attorneys.

Leave was granted to enter an appearance, on condition that the defendant goes to trial next term, the question of costs to stand over.

EXECUTORS OF ESTATE { 1914.
BLACK AND OTHERS V. { Jan. 19th.
JACKSON AND CO, LTD.

This was an application on notice of motion for an interdict restraining the respondents, who are engaged as contractors on the new Dock-works for the Admiralty at Simon's Town, from causing or allowing stones to be rolled down from a certain quarry now being worked by the respondents, the ground of the application being that the operations thus carried on were dangerous to life and property. The respondents were also called upon to show cause why they should not be ordered to pay the costs of this application.

The affidavit of Mr. William Runci-man, of Simon's Town, said that he was one of the executors in the estate of the late William Black, whose estate comprised a considerable extent of ground near to the main road at Simon's Town. The respondents were contractors, carrying on certain works at Simon's Town on account of the Admiralty, and in connection with such

work, they had opened up a quarry on the hillside. Since operations had been carried on, stones had rolled down the mountain side on to the applicants' land. Applicants desired to cut up their land into plots for building, but could not do so owing to the stones rolling down on the ground.

The affidavit of Mr. G. Trollip, applicants' attorney, stated that on April 3rd, 1903, he wrote a letter on behalf of the applicants to the Rear-Admiral (Sir Arthur Moore), complaining of the way in which the quarrying was being carried on. The contractors, in their excavations, liberated heavy boulders of rock, which had rolled down, and had torn up fir-trees of many years' growth in their path, and had it not been for the forest of trees, would have gone through the houses below. This work of destruction was going on daily, with utter disregard of his clients' rights, and apparently with callousness to the danger to human life. His clients' property had been depreciated, and he requested that the works should be stopped. Replying on the 6th April, the Secretary to the Commander-in-Chief at the Simon's Town Station said that the complaint was being inquired into, and that a further communication would be made on the subject. This further communication was made on the 16th April, and stated that the work referred to had been carried out as far as possible without injury to the surrounding property; but in opening up the quarry, it had been impossible to prevent occasional stones rolling down the hill. Now that substantial benching had been provided, it was thought there would be no further cause for complaint. Any further communication should be addressed to the firm of Sir John Jackson, Limited, to whom the land on which they were carrying out the quarrying had been transferred. The works being necessary for Imperial defence purposes, the Commander-in-Chief was quite unable to give orders that they should be stopped. A letter in identical terms was also addressed to Sir John Jackson, Limited.

The answering affidavit of Messrs. Tredgold, McIntyre and Bisset of the 2nd May, said that the applicants appeared to have greatly exaggerated the position of affairs. At the commencement of the excavation referred to, some stones did roll down on to the applicants' property, but no serious damage was done. The applicants' assertion that "the work of destruction is going on daily, etc." was without foundation. A considerable amount of benching had been done at the face of the quarry, which removed the possibility of further stones rolling down. For the actual damage done by stones rolling down occasionally on to the applicants' land, the company were prepared to pay reasonable compensation, but they (the

writers) must point out that, for building purposes, the stones would enhance the value of the land.

The replying affidavit of Mr. G. Trollip stated that the estate had suffered damage, because they had been prevented from selling the land.

The affidavit of Mr. Runciman stated that, in consequence of the assurance given by the contractors as to protective measures being taken, they decided to see what the result would be. That was in the month of April last. Nearly nine months had since elapsed, but no improvements had been made; in fact, more stones had come down from the quarry since April last than previously. Last month (December) a huge boulder rolled down from the quarry, weighing several tons. On the 24th December he wrote to the Vice-Admiral (Sir A. Moore), pointing out that the anticipated result from the benching had not been realised, and that on the previous day a huge boulder crashed through the plantation. No one would think of purchasing land under existing circumstances. In order to protect the heirs of the estate, he should at once apply to the Supreme Court for an interdict to stop the work, unless he were assured that full compensation would be paid for the injury of the land. He also pointed out the danger caused to human life by the fall of the stones. The Secretary to the Vice-Admiral wrote that the letter had been referred to the Superintending Civil Engineer for communication to the contractors. The letter added that the Commander-in-Chief fully appreciated the importance of this matter to the public, and considered that there were good grounds for the representations that had been made. On the 28th December the Superintending Civil Engineer (Mr. Macfarlane), in a minute, said that the quarrying operations, as now carried on, were a source of danger to the inhabitants of dwellings lying at the foot of the hill, and great depreciation to the surrounding property, and it was considered that if the matter were taken to Court, there was sufficient evidence to warrant an injunction being given. It was anticipated that, after the benching had been provided at the front of the quarry, and with due care in regulating the blasting charges, accidents would not occur, but it was quite clear that other steps should be taken to protect the surrounding property. In answer to the Superintending Civil Engineer, the managing director of Sir John Jackson, Ltd. (Mr. Edwards) said that the last stone that came down from the quarry previous to the one now complained of was on the 7th August. Just after that date they constructed a rampart to prevent further stones rolling down. Since then no stone had come down into the private property, except the one on the

23rd December. This stone passed the eastward corner of the rampart. They were now extending the rampart, and they thought that the risk of further stones coming down would be obviated. The risk of stones coming down was also being lessened by the benching being widened. The Superintending Civil Engineer in a further minute said that the trench already cut had stopped a good many stones, and it was thought if it were further extended the danger would be lessened. Mr. Runciman, in a letter to the secretary of the Commander-in-Chief, on the 4th January, said that the statement as to this being the only stone which had come down since the 7th August was incorrect. The matter was still as bad as ever, and the property was still decreasing in value. Mr. Runciman, in his affidavit proceeded to say that the statement in the respondents' letter as to the stones was untrue, and only showed the gross and culpable and careless manner in which the operations were carried on on behalf of the respondents. From personal observations he had made he was positive that a good many stones had rolled down since April last, and he believed that the damage had increased since the respondents assured him that steps would be taken to remedy the same. He considered that, had it not been for the fir forest, some of the stones would have rolled into the main street.

An affidavit by the Town Clerk of Simon's Town stated that the matter had been brought under the notice of the Council, and that a resolution had been adopted to support the present application for the safety of the inhabitants. He also called attention to negotiations which had taken place, with a view of having a road opened below the quarry. It was stated that the operations jeopardised the lives of the school children and people using the main road.

An affidavit by Mr. Ernest W. Attridge, the town engineer at Simon's Town, stated that a number of boulders had come down on the fir forest, and described the damage done by the big masses of rock which fell in August and December. He did not consider that the present rampart afforded sufficient protection again accident.

An affidavit by Mr. Miller, builder, stated that the rock which fell in August would have crashed into his house had not its course been stayed by the forest. Several other rocks had since descended.

An affidavit by Mr. W. D. Barrabells, builder, also testified to the danger and damage effected by the operations, and mentioned that one of his tenants had given notice to leave because his wife had become nervous.

An affidavit by Mr. John Richard Black, shipping agent, Simon's Town, was also a similar effect.

The replying affidavit of Mr. H. C. W. Edwards, managing director for the respondents in South Africa, stated

that the works were of the very greatest importance, and any hindrance in quarrying would seriously affect and delay the completion of the works for the Admiralty. As to Mr. Runciman's affidavit, Mr. Edwards said that the quarry was of considerable extent, and only one portion of the same was joined up to the estate of the late Mr. Black. Great care had been exercised throughout the operations, but at the commencement a certain number of stones did roll down the mountain side. Considerable benching had now been provided, and this had proved effectual in conjunction with other steps which had been taken to prevent stones rolling down the mountain side. On the 7th August a somewhat larger stone than usual rolled down the mountain side, and deponent then had a rampart erected. In December another large stone fell from the quarry and passed outside the rampart. Deponent then gave instructions for the rampart and the trench to be extended and enlarged to prevent any further accidents arising. He was strongly of opinion that the steps which had been taken were sufficient to prevent any further large stones rolling down the mountain side. He was quite prepared to take any further steps which might be thought necessary in conjunction with the superintending civil engineer and the town engineer. They had gone to great trouble to provide against the descent of stones down the mountain side, and they were quite prepared to incur further reasonable expense, which would have the effect of rendering the position more secure. He was convinced that no stones had descended between the 7th August and the 23rd December. They were willing to meet the Mayor (Mr. Runciman) and others to consider what other steps should be taken to render the position more secure.

The affidavit of Mr. Brooks, agent for Sir John Jackson, Ltd., stated that the benching had been considerably widened. He knew of no stones falling between the 7th August and November, when he was laid up with illness. On his recovery he found that the rampart had been considerably extended. He considered that the precautions now taken were amply sufficient.

The affidavit of Mr. A. A. Frieslaar, Admiralty Inspector of the Works, said he had seen all the blasting which had been done at the quarry between 6.30 a.m. and 6 p.m., but he had not seen any stones pass the benching while he had been at the works. The rampart and ditch constructed below the quarry were, in his opinion, sufficient to prevent any stones from getting over. He considered that every precaution had been taken to prevent any stones from rolling down the hillside.

The affidavit of Mr. C. Baker, assistant foreman, stated that the stones which fell on the 7th August and the 23rd

December were the only ones that descended during that period.

The affidavit of Mr. Frank Davis, foreman in charge of the quarries, stated that no stone had passed beyond the rampart except those on the 7th August and the 23rd December, and a small one which just rolled over the side.

The affidavit of Mr. H. J. Petts, Admiralty Inspector at the Dock Works, stated that he had seen no stone come down the mountain side beyond those of the 7th August and the 23rd December.

Mr. Buchanan for applicants; Mr. Close for respondents.

Mr. Close said that he also had an affidavit by Mr. Macfarlane, which was really in the nature of a reply to the answering affidavits. He did not know whether his learned friend would object to this document being put in.

Mr. Buchanan said his instructions were not to consent to this being done.

In an answering affidavit, Mr. Runciman stated that he was convinced that the provision as now made by the respondents to prevent stones rolling down the mountain side was totally inadequate, and that sooner or later great damage to property and loss of life would result.

A replying affidavit by the Town Engineer stated that he was still of opinion that the rampart and benching below the quarries would not prove adequate to prevent stones being hurled over the rampart down the mountain side. He added that blasting operations had been conducted on one occasion at 2.30 a.m. He was convinced that as the operations extended westward municipal property and other property below the quarries would be subjected to great risk.

Mr. Buchanan said that the applicants did not ask for these works to be stopped, but for protection to life and property. They did not seek to stop the quarrying, but they submitted that the respondents had no right by their operations to endanger life and injure the property below. That position, they contended, was quite a reasonable one. One of the deponents, Mr. Barrabells said that the large rock of the 7th August passed within fourteen feet of his house. The position was one that the Municipality and the executors of Black could not tolerate. The proceedings were brought under the Act 25 of 1898 (section 16). Neither the Admiralty nor Sir John Jackson, Ltd., were authorised by any Act of Parliament to quarry up there at any risk. They must respect the lives of other people and the property of other people. He submitted that the applicants' affidavits had made out a clear case for an interdict. It might be said that respondents were now taking measures to prevent further stones coming down. Well, they said that in April last, and yet on their own admission three stones had descended the mountain side

to the danger of the public. The rampart did not do all that it was expected to do. The precautions did not at all seem sufficient. Was it necessary that some injury should be done to life, and more depreciation caused to the property before the respondents were interdicted?

Mr. Close said that, so far from his clients being callous in disregarding human life, they had gone to considerable expense in erecting the rampart. The respondents were quite willing to take any steps suggested to them by experts, and were prepared to carry out the suggestions made to them by representatives of the applicants the previous day. The work was of the greatest public importance, and it was being carried on at a site decided upon by the Colonial Government and the Admiralty. Any unforeseen blasting accident would come within the wide scope of the order asked for by the applicants. He submitted that Mr. Runciman's statements were exaggerated, and that they would not for a moment weigh with the testimony of the other side. His clients, he contended, had taken all precautions that could reasonably be expected of them, and in carrying out the Municipal Engineer's suggestion that the rampart should be lengthened and raised, it proved that the respondents were certainly not callous of the danger to human life. If the Court was in doubt on the evidence produced, counsel submitted that a scientific expert might be appointed to determine whether or not the precautions were sufficient.

Buchanan, J.: The Legislature of this Colony, by the Act 25 of 1898, authorised the construction of certain docks and other works by the Admiralty at Simon's Town, and to carry out these works, the Admiralty entered into a contract with the respondents in this case. It became necessary, in the execution of this contract, for the respondents to open a quarry and to obtain materials, which under the Act they were authorised to take. The quarries were opened on Crown lands, and at a place where they were legally entitled to work. But, in opening these quarries, it would seem from the correspondence that at first a certain amount of these stones were allowed to roll down the hillside, to the prejudice of the applicants, and also to the danger of the inhabitants of Simon's Town. As far back as April of last year representations were made to the Admiralty in reference to the nuisance, and it was then pointed out by the respondents that it was impossible to prevent occasional stones rolling down the hill. Whether it was impossible or not is not a question for me to consider, but I may make one remark in passing. I do not think that the respondents were entitled to open up a quarry to the injury of private property or to the dan-

ger of the lives of the inhabitants of the town. However, after the complaint was made in April, steps were taken to put a stop to the nuisance, by means of what is called a benching running along the face of the quarries, which benching was then considered sufficient by the respondents to aver the danger. This benching seem to have allayed alarm, until on the 7th August a large stone, which was loosened by quarrying, came down the hill; and, according to the affidavits, caused great fear among the residents in certain houses situated below the quarries, and might have caused serious injury to life and property. The respondents then erected what they called a rampart, below the benching. This rampart seems to have answered its purpose until the 23rd December, when another large stone missed the rampart and came down the mountain. As the precautions taken were thus shown not to be wholly effective, the applicants now come to the Court and ask for an interdict restraining the respondents from causing further danger to the public. No doubt, when the correspondence commenced, the applicants objected to any quarries whatever being opened on the hillside, but now they limit their application by objecting only to the operations being carried on by the respondents in such a way as to cause danger to life and property. Since the last stone on the 23rd December, the respondents have taken further precautions, but it is not clear on the affidavits whether these precautions are sufficient completely to avert danger. It is alleged that interviews have taken place between the parties since the notice of motion, but what passed between the parties at these interviews is not on affidavit. I think I ought to say that the operations being necessary, and authorised by Act of Parliament ought not to be stopped, but at the same time the respondents are not entitled to carry out the work in such a way as to cause injury to applicant's property, or to create a risk to the lives of the inhabitants, and they will have to take such precautions as will render their working secure. It seems to me quite possible, as stated on affidavit, that the respondents can take such steps; but it is clear that the precautions they have up to the present taken are not sufficient, and, therefore, I am of opinion that the applicants ought to have an order restraining the respondents from causing or allowing any stones to roll down from their quarries on the property of the applicants. This interdict will continue for one month, unless an action be brought in the meantime to make the interdict perpetual, with costs of the application. In that month the respondents will, I suppose, take such further precautions as

to render it reasonably certain no future danger need be anticipated
[Applicant's Attorney: G. Trollip;
Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

{ 1904.
Feb. 1st.

Mr. Alexander moved for the admission of Alfred Owen Balleine Payne as an attorney and notary.

Admission granted, the oaths to be taken before the Resident Magistrate of Idutywa, Transkei.

Ex parte KILFOIL.

Articled clerk—Continuous service.

Where there had been two or three breaks in the continuity of service of Articles, amounting in all to four months: the Court condoned these breaks, but ordered that the applicant should complete four months' extra service, although he had already served five years, and during one of the breaks had been employed by his principal in the management of a branch office.

Mr. Gardiner moved for the admission of William Kilfoil as an attorney. Applicant had served the requisite term, but during a period of four months his principal had been absent in connection with the starting of a branch office.

Mr. C. W. de Villiers appeared for the Law Society.

Mr. Gardiner: The applicant was articled for one year to Mr. Attorney Squire Smith. Then he left, and studied law privately, and then went to Mr. Goddard's office in East London. I must say that in view of *Ex parte Gush* (11 C.T.R. 160), that management of a branch business, such as the applicant appears to have had charge of for some time, cannot be regarded as service of

articles; but I would ask the Court to condone the two or three breaks of service in consideration of the long period (five years) during which the applicant has served; or that at all events the break of four months should be condoned.

Mr. C. W. De Villiers raised no objection to the latter course being followed, provided that the applicant was ordered to complete four months' extra service.

It was ordered that the application should stand over, applicant to serve a further period of four months.

Mr. Gardiner moved for the admission of Alexander John McCallum as an attorney.

Admission granted, and applicant took the oaths.

PROVISIONAL ROLL.

DOUGLASS V. GLASS.

Mr. Rainsford applied for the discharge of the order for compulsory sequestration, granted on October 5, 1903.

Granted.

ESTATE OF MARSH V. SAVAGE.

Mr. Rainsford asked for provisional judgment for £900 on a mortgage bond, due by reason of non-payment of interest.

Granted.

BENNING V. COWLING.

Mr. J. E. R. de Villiers asked for provisional judgment for £2,500 on a mortgage bond.

Granted.

BATE V. ALCOCK.

Mr. Rainsford moved for provisional sentence on a mortgage bond, and for property specially hypothecated to be declared executable.

Granted.

HUTTON V. STREYDOM.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £400, and for property specially hypothecated to be declared executable.

Granted.

BEKLER V. COLE.

Dr. Greer moved for provisional sentence on a mortgage bond for £300, and for property specially hypothecated to be declared executable.

Granted.

FAURE AND ZIETSMAN V. WEINTROB.

Dr. Greer moved for provisional sentence for the sum of £63 on two promissory notes.

Granted.

EATON, ROBINS AND CO. V. MILLER.

Mr. Nightingale moved for a final order of sequestration.

Granted.

BARTRAM V. BURRILL AND ANOTHER.

Mr. Gardiner moved for a decree of civil imprisonment in respect of a debt of £190, with £9 costs.

The first respondent, Alexander Burrill, appeared, and made an offer of £1 per month in settlement. He said he had been out of employment for two months, and had only now succeeded in getting a situation. He was beginning work that day at a salary of £14 per month, out of which he had to support a wife.

Mr. Gardiner said that an offer of £2 per month had been made previously. Applicant wrote agreeing to accept this amount, provided that the respondent agreed to pay all costs, etc., but no reply was received.

The respondent said that at the time that that offer was made, he was in receipt of a salary of £20 per month at Port Elizabeth. Since then he had been out of employment, and had come to Cape Town.

[De Villiers, C.J.: Can you manage to pay £2 per month?]

Respondent replied that he would probably be able to do so in two months' time, as he expected to get an increase on his present salary in two months—that was the agreement with his employer.

[De Villiers, C.J.: When will you make the first payment?]

Respondent: To-day.

A decree was granted to be suspended on payment of £1 per month for the first two months, and £2 per month thereafter, the first payment to be made that day.

ALFORD, WILLS AND ABBOTT V. MARKS.

This was an application for a provisional order of sequestration to be made final.

Defendant appeared to oppose.

There was no appearance for applicants, and the provisional order was discharged.

Subsequently, before Buchanan, J., Mr. Benjamin said he had just been instructed in the matter to move for plaintiffs. He applied that the Court would allow the provisional order to stand pending a fresh summons being issued for the 11th inst.

Defendant was not at this time in court.

Counsel said he understood defendant had come from Somerset Strand.

Luchanan, J. said he thought the man's expenses ought to be paid.

Counsel said he would represent that to the attorneys.

The application was granted.

DE WET V. BENADK.

Mr. Benjamin moved for a final order of sequestration.

Granted.

TABORSKI V. HOFFENBERG.

Mr. Gardiner moved for provisional sentence on a Magistrate's Court judgment for £5 13s. 6d., and £3 9s. 7d. costs, and for a decree of civil imprisonment. Defendant had left the jurisdiction of the Magistrate.

Granted.

ARDERNE V. PINKUS.

Mr. Struben moved for provisional sentence on a mortgage bond, which had become payable by reason of the non-payment of interest, with interest and costs, and for certain specially hypothecated property to be declared executable.

Defendant appeared to oppose judgment. He said he made the bond in favour of a man named Groman, by whom it was ceded to the present plaintiff. It was arranged that Groman should not be paid interest on the bond.

Provisional sentence was granted, defendant being told that if he had any complaint against Groman, he must settle it with Groman.

ARDERNE V. MANSCHESSTER.

Mr. Struben moved for provisional sentence on a mortgage bond for £300.

Granted.

METROPOLITAN ADVERTISING CO. V. TAYLOR.

Mr. Russell made application for provisional sentence on a promissory note for £17 5s., with interest and costs; also for judgment under Rule 319 for £4 10s. for work done.

Granted.

EBROIKEN V. VINK.

Mr. Benjamin moved for provisional sentence on a promissory note for £196 2s., with interest, costs, and a commission of 5 per cent., which had been agreed upon for collecting the money.

De Villiers, C.J., said the money had not been collected, and plaintiff had not had to pay 5 per cent. for collection.

Mr. Benjamin: It may look, my lord, like taking the pound of flesh, but I submit it is legally due.

Provisional sentence was granted as prayed, less the 5 per cent. claimed for collecting.

CONSTEIN V. LEWIS.

Mr. C. W. de Villiers moved for provisional sentence on four promissory notes for £100, £75, £50, and £100.

Granted.

SADLER V. SECCOMBE.

Mr. Struben moved for provisional sentence on a promissory note for £52 1s.

Granted.

WIPNER V. HOLLAND.

Mr. C. de Villiers made application for a decree of civil imprisonment upon a judgment of the Court for the sum of £46 3s. 6d., and £19 7s. 4d., taxed costs.

The respondent appeared, and stated that he was an architect, but had no money to discharge the debt. He was married, but had no furniture. He had several sums of money owing to him, but was unable to obtain payment, and cases, in respect of these, were pending in the Supreme Court.

Cross-examined by Mr. De Villiers: He had landed property in England, valued at about £500, but he could not obtain any money in respect of it, because the probate duty had not been paid. He could not collect his outstanding debts. He had plenty of work, but could not proceed with it, owing to the want of the necessary funds. In November last he had offered to pay £5 per month, but he could not now renew that offer, because his position had become worse.

Decree granted, to be suspended on payment of £2 per month, the first payment to be made on March 1, 1904, leave being reserved to the applicants to move again in the matter.

JACOBSON V. DU PLESSIS.

Mr. Benjamin applied for provisional sentence on a mortgage bond for the sum of £400, and for specially hypothecated property to be declared executable.

Granted.

DEMPERS AND VAN REYNEVELD V. ISAACS.

Mr. De Waal moved for provisional sentence for £400 on a mortgage bond,

and for certain hypothecated property to be declared executable.

Granted

DEMPERS AND VAN REYNEVELD V. PETERSON.

Mr. De Waal moved for provisional sentence on a mortgage bond for £83 14s.

Granted, specially hypothecated property being declared executable.

[Before the Hon. Sir JOHN BUCHANAN.]

MOOLMAN V. BENADE AND DE WET.

Mr. P. S. T. Jones asked for provisional sentence against the second defendant on a promissory note for £750 5s.; Benade's estate having been sequestrated.

Granted.

AKTERORSKE V. STEPHAN.

Mr. C. W. de Villiers moved for provisional sentence on a promissory note for £106.

Granted.

HUGO V. PENDERIS.

Mr. Alexander applied for provisional sentence on a mortgage bond for £300, and for specially hypothecated property to be declared executable.

Granted.

ESTATE WALKER V. KANNES.

Mr. Alexander moved for provisional sentence on two mortgage bonds for £200 and £100, and for specially hypothecated property to be declared executable.

Granted.

WESSELS V. COHEN.

Mr. De Waal moved for provisional sentence on a promissory note for £41 9s. 5d.

Buchanan, J., pointed out that the promissory note was not stamped. It had, however, not been negotiated, and provisional sentence would be granted subject to the note being stamped.

S.A. ASSOCIATION V. CLEWS.

Mr. De Waal applied for provisional sentence for £160 10s., interest on a mortgage bond and for judgment under Rule 329d, for £15 11s. 8d., insurance paid by plaintiff for defendant on the property mortgaged.

Buchanan, J., said that the insurance was usually granted in the provisional sentence. Provisional sentence would be granted as prayed.

POWRIE V. WALKER.

Mr. Alexander moved for provisional sentence for the sum of £25, balance of the purchase price of certain land, with interest.

Granted.

RIMER V. WHITE.

Mortgage bond—Penal clause—
Estoppel by conduct—Equitable principles.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £4,000, with interest at 6 per cent. from the 1st July, 1903, and costs of suit, and for property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest.

Mr. Buchanan appeared to oppose the motion.

It appeared from the affidavits that in 1901 the respondent, John Joseph White, purchased from the plaintiff certain property at Newlands for the sum of £7,000, of which he paid £1,000 in cash, the remainder being secured under bond of the property. The bond provided that the capital sum should not become due for a period of four years, reckoned from December, 1902. Subsequently, plaintiff paid instalments amounting to £2,000 and there remained due a capital sum of £4,000. Interest became due amounting to £120 on the 31st December, which was not paid on the due date. Defendant stated on affidavit that he sent a cheque for the amount on the 5th January in response to a letter from plaintiff's agents. Two days afterwards plaintiff's agents denied having received his cheque. Defendant had tendered all interest due, but plaintiff's agents demanded the capital. They had allowed the interest due on June 30 to remain unpaid till July 22nd.

The affidavit of A. J. Chiappini (plaintiff's agent) stated that a notice demanding payment of the interest had been sent to defendant on the 30th December. Deponent had written to the defendant on January 7th, and on the same evening he received the cheque from a post office official. At no time did he agree to give the defendant any extension of time.

Mr. Buchanan: The plaintiffs are estopped by their conduct from calling up this bond for non-payment of interest. They gave the defendant till nearly the end of July to pay up the June interest. Their practice is to send out a memo., calling upon their debtors to pay up their interest as it falls due, but they usually give time. The defendant sent a cheque to Chiappini Brothers immediately he received the memo., and some days afterwards he called and asked whether they had received the cheque. They did

not then say it was too late to pay the interest, they merely denied having received the cheque. Having lulled defendant into a feeling of false security, they cannot now insist on the letter of their bond. In cases of insurance where a premium has to be paid within a certain time, if the course of dealing goes against this, time is given. *Porter on Insurance* (p. 100). I submit that the plaintiff is not entitled to provisional sentence.

Mr. Gardiner: Porter cites only the case of *Attorney Gen. v. Continental Life* (33 Hun. N.Y. 138), and this does not show that the terms of a bond can be varied by other evidence. In the present case there were only two occasions on which it is said that time was given, and there is considerable doubt as to one of these. One isolated instance cannot constitute a course of conduct. Nothing save a power of attorney signed by the plaintiff could vary the terms of the bond, but here plaintiff's power of attorney is even more in our favour than the bond itself. I submit that provisional sentence should be granted.

Buchanan, J.: The plaintiff sold to the defendant certain landed property, according to written conditions of sale, for the sum of £7,000, of which £1,000 was to be paid before transfer, and for the remaining £6,000 the purchaser was to pass a kusting brief, or mortgage bond. By the conditions of sale this balance was to be paid four years after the date of purchase, with an option to the defendant to pay off the whole in one sum, or any portion in instalments of not less than £500, on giving three months' notice of his intention so to do. In pursuance of the contract transfer was given, and a mortgage bond passed, containing not only the conditions just recited, but also an additional clause not in the conditions of sale, stipulating that interest on the unpaid purchase price should become due and payable without further notice. The defendant had availed himself of the condition to anticipate the time of payment of the balance, and had reduced the bond by £2,000, leaving £4,000 still unpaid. On the 30th June last he received a memorandum from plaintiff's attorney, showing the amount of interest due to that date, which sum the defendant paid on the 28th July. Plaintiff's attorney deposed that on the 30th December—his clerk stated that it was not later than the 31st December—he sent a memorandum showing the amount of interest due to the end of the year. This memorandum the defendant states in his affidavit was received by him on the 5th January, whereupon defendant the same day sent his cheque for the amount. Owing to some mistake on the part of the postal officials the letter containing the cheque was not delivered till the 7th, when it was returned with an intimation it could not be received, but that the whole amount of the bond must be paid up forthwith,

and on defendant through his attorney again tendering the interest, the plaintiff sued for the bond, claiming the enforcement of the penalty. It has been argued for the defendant that he is entitled to rely on the conditions of sale as against the mortgage bond; and that as the conditions of sale contain no reference to a penalty on a default in due payment of the interest, the plaintiff is not entitled to succeed; in other words, that the decision of the Court must be given on the conditions and not upon the bond. But I am of opinion the Court cannot now go behind the bond. The bond was passed subsequently to the conditions, and upon a power given to the defendant authorising the insertion of the clause. There have been no steps taken to rectify the bond if it is erroneous, and it now governs the relations of the parties. One thing, however, the conditions of sale make clear, and indeed the same conclusion could be drawn from the bond itself; and that is, that the stipulation was inserted as a security for the due payment of the interest. It is not the principal obligation of the bond, nor is it of the essence of the contract. Nor is it a case of liquidated damages payable on a breach of a covenant. The English Courts of Equity frequently grant relief in such cases. They have applied the doctrine to cases of leases, where a forfeiture of the estate, and an entry for the forfeiture is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment, on the ground that the right of entry is deemed to be intended to be a mere security for the payment of the rent. *Storry*, in his *Commentaries on Equity Jurisprudence* (section 1.316), says: "If it be said that it is his own folly to have made such a stipulation it can equally well be said that the folly of one man cannot authorise gross oppression on the other side. And law, as a science, would be unworthy of the name if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, recklessness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by Courts of Equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty of forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity

jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury." Here the correspondence shows there was an ulterior motive for claiming this penalty, quite apart from the non-payment on the due date. *Storey* further shows that the equitable doctrine of relief is founded on the Civil law. He says (section 1,317), that the Roman law took notice, not only of conditions, strictly so-called, but also clauses of nullity and penal clauses. "The general doctrine of that law was, that clauses of nullity and penal clauses were not to be executed according to the rigor of their terms. And therefore, covenants were not, of course, dissolved nor forfeitures or penalties incurred, if there was not a punctilious performance at the very time fixed by the contract. But the matter might be required to be submitted to the discretion of the proper judicial tribunal to decide upon it according to all the circumstances of the case, and the nature and objects of the clauses. Indeed, penalties were in that law treated altogether, as in reason and justice they ought to be, as mere security for the performance of the principal obligation." Under the circumstances disclosed in this case, I think it would be altogether unreasonable that the bondholder should be entitled to insist on the penalty simply because his interest was offered to him on the 5th January instead of the 31st December. He had previously taken his interest after the due date, and he had not intimated that he expected payment to the day in future. There was no long delay, or considering the holidays, any unreasonable failure on the part of the defendant. I think there have been previous cases in this Court where there has been a refusal to enforce a similar penalty where interest has not been actually paid on the due date. On the broad, equitable ground that this is not a case for the Court to aid in the enforcement of a penalty, provisional sentence will only be given for £120, the amount of interest due, and has this has been repeatedly tendered before summons, the plaintiff must pay the costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendants' Attorneys: Herold and Gie.]

CROYDON BRICK CO V. LANCE AND CO.

Mr. C. de Villiers asked for provisional sentence on a promissory note for £22 6s., for value received.

Granted.

HOFMEYR V. VALENTYN AND CO.

Mr. Benjamin asked for provisional sentence for £800 on a mortgage bond,

due by reason of non-payment of the interest, with interest and costs.

Granted.

HEYDENRYCH V. SONNING.

Mr. C. W. de Villiers asked for provisional sentence on a promissory note for £58, for value received.

Granted.

HANAU V. BUCHANAN.

Mr. M. Bisset asked for the discharge of a provisional order of sequestration in view of payment.

Discharge granted.

ILLIQUID ROLL.

ZIEDERBERG AND DUNCAN (1901.
V. SAYERS (Feb. 1st.

Mr. Benjamin asked for judgment, under Rule 329d, for £41 13s. 10d., being balance of account overdue.

Judgment as prayed.

CAVANAGH V. THOMAS.

Mr. Benjamin asked for judgment, under the same rule, for £21, in respect of rent due.

Judgment granted as prayed.

GERICKE V. WAGEMANN.

Dr. Greer asked for judgment, in terms of the declaration under Rule 319, for an order on the Criminal Investigation Department, calling upon them to deliver up certain goods.

His Lordship asked if notice had been given to the C.I.D.

Dr. Greer replied that he had no instructions on that point.

His Lordship said that notice had better be served on the C.I.D., and the matter mentioned the following day.

Postea (February 14): This matter was ordered to stand over for proof as to who acted as attorney for the C.I.D.

LAWRENCE AND CO. V. HARTFORD.

Mr. Russell asked for judgment, under Rule 329d, for £56 19s. 6d., with interest and costs, less £7 10s., paid on account.

Granted.

CAPE TIMES, LIMITED V. GIBBONS AND CO.

Mr. M. Bisset asked for judgment, under Rule 329d, for £39 3s., for advertising charges, with interest and costs.

Granted.

LATTE V. PEREGRINO.

Mr. Alexander asked for judgment, under Rule 329d, for £125, for the hire of machinery, with interest and costs.
Granted.

GULLEY V. GAVIN.

Mr. M. Bisset asked for judgment, under Rule 329d, for £53 0s. 6d., being balance of account for goods sold and delivered, with interest and costs.
Granted.

S.A. MINERAL WATER CO. V. CHETTY.

Mr. Buchanan applied, under Rule 319, for the cancellation of the sale of a certain piece of land sold, situated at Elsie's River Halt, with costs. Respondent had been sued by edict to show cause why cancellation should not be ordered.
Granted.

S.A. MINERAL WATER CO. V. VINCENT.

Mr. Buchanan made a similar application in this case, which was granted.

S.A. MINERAL WATER CO. V. COHEN.

Mr. Buchanan made a similar application in respect of certain other property
Granted.

MCCRUM V. DULCKEN AND CO.

Mr. Alexander asked for judgment, under Rule 329d, for £425 9s. 6d., with interest and costs, in respect of money lent.
Granted.

BOYCE V. DON.

Mr. Gardiner asked for judgment in default of plea for £42, for rent due.
Granted.

WILL V. SHEA.

Mr. C. de Villiers asked for judgment in default of plea for £46 16s. 4d., with interest and costs.
Granted.

SCHAR V. NORMAN.

Mr. Benjamin asked for judgment under Rule 329d, for £112 15s. 6d., less £50 paid on account, for goods sold and delivered.
Granted.

VAN RIET V. MURSETT AND ANOTHER.

Mr. M. de Villiers asked for judgment in default of plea for £216, less £5, with
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interest and costs, in respect of a certain sale of land.

The respondents now appeared, and stated that the land had been bought on the condition that if they were unable to fulfil the contract, the same would be cancelled on forfeiture of the amount paid as deposit. They had no money to instruct counsel.

Buchanan, J., said that if the respondents could prove that there had been such an agreement, they could enter an action, but, in the meantime, as they were in default, he was afraid he would have to give judgment against them.
Judgment accordingly.

COOK AND CO. V. CHANCE.

Mr. Rainsford asked for judgment, under Rule 329d, for £666 13s., with interest and costs.
Granted.

VICTOR V. ESTATE OF DU PLESSIS.

Mr. Buchanan asked for an order, under Rule 329d, calling on the respondent to pass transfer of certain property purchased by the applicant.
Granted.

ESTATE OF WESTERMAN AND PINKIN V. BLOWS.

Mr. Struben asked for judgment, under Rule 329d, for £30, for rent, with interest and costs, less £10 paid on account.
Granted.

JOHNSON V. SCARR.

Mr. Sutton asked for judgment under Rule 329d, for payment of the sum due in respect of the purchase of certain shares.
Granted.

TOTHILL V. MARSHALL.

Mr. Buchanan asked for judgment, under Rule 329d, for £35, being balance of account due for rent of certain premises, with costs.
Granted.

MICHAU AND DE VILLIERS V. HONIKELSKY AND ANOTHER.

Mr. De Waal asked for judgment, under Rule 329d, for £71 17s. 9d., less £20, being balance of account for disbursements made by the applicants in respect of the transfer of certain property, with interest and costs.
Granted.

COLONIAL GOVERNMENT V. HOOLE AND CO.

Mr. Howel Jones asked for judgment, under Rule 329d, for £142 12s., being the amount of outstanding accounts for dip supplied.
Granted.

REHABILITATIONS.

Mr. Buchanan moved for the rehabilitation of Clarence Reginald White. The trustee in his report referred to the fact that applicant had not kept books.

Buchanan, J., said it was desirable to have more information.

The application was refused, leave being given to apply again in six months.

Mr. Gardiner applied for an order for the rehabilitation of Wm. Daniel van der Vleit van Es.

Granted.

GENERAL MOTIONS.

SAUNDERS V. SAUNDERS. { 1904.
{ Feb. 1st.

Mr. Benjamin moved for an order for a decree of divorce, this being the return day of an order on the husband to make restitution of conjugal rights.

The rule was made absolute, as prayed, with costs.

Ex parte MEYER.

Mr. Russell moved for an order authorising petitioner to assist his father as *curator bonis* in certain business matters. This was the return day of a notice served on the father, and the eldest son, calling on them to show cause why the former should not be adjudged to be incapable of managing his own affairs, and why petitioner, the second son, should not be appointed *curator bonis*. The replies of the father and eldest son favoured the appointment of petitioner.

Granted.

RETRIEF. V. RETRIEF.

Mr. M. Bisset moved to make absolute a rule calling on the respondent to show cause why applicant should not be allowed to sue *in forma pauperis*.

Granted, Mr. Bisset being appointed counsel, and Messrs. Faure and Zietsman attorneys.

Ex parte TWENTYMAN.

Mr. Bisset moved for leave to execute a mortgage bond on property belonging to an estate of which petitioner was ex-

ecutor. The petition set forth that there were no funds in the estate, with which to pay off certain bonds.

Authority to pass a bond was granted.

NATHAN V. LIPMAN.

Mr. Gardiner moved to make absolute a rule nisi calling on respondent to show cause why he should not be compelled to give up possession to applicant of certain premises.

Granted.

KRYNAUW V. HYTE.

Mr. Buchanan moved for leave to attach certain money in the hands of the Master to found jurisdiction, and for leave to sue by edictal citation. Defendant was a farmer in German South-west Africa.

Leave was granted as prayed, personal service to be effected, the return day being the 15th April.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

STORK V. STORK. { 1904.
{ Feb. 2nd.

Mr. M. Bisset appeared for the plaintiff, the husband, in an action for divorce on the ground of respondent's misconduct. Affidavits were read to the effect that the respondent was addicted to drink, and had misconducted herself while she had ill-treated the children. The parties lived at Kokstad. Plaintiff, who is a contractor, stated that he had previously tried to obtain a divorce in Natal, where he and his wife had lived for some years, after the marriage, which took place in October, 1891, but a decree was refused, the Court holding that he was domiciled in Griqualand West.

A decree of divorce was granted, plaintiff to have the custody of the children, with forfeiture of the benefits arising out of community.

SHERIFF V. SHERIFF.

Mr. Benjamin moved for an order on the respondent, the wife, to make restitution of conjugal rights, failing which for a decree of divorce, with custody of

the minor children, and forfeiture of benefits. The parties were married at Caledon on the 10th August, 1897, and it was alleged that the respondent left her husband in 1899, and was now living at Kroonstad, Orange River Colony. Defendant still resided at Caledon.

Evidence having been led in proof of the marriage.

Richard Sheriff was called, and stated that until about five months after his marriage he lived happily with his wife. The cause of their quarrel was that he objected to certain of her actions. She said that she would do as she liked. In July, 1899, she left him, and had not been back since. He treated her kindly. She was now living in the Orange River Colony. If she behaved herself he would take her back; if she did not return he would sue for divorce. He wanted the custody of the one child of the marriage.

His Lordship granted an order for restitution of conjugal rights, the respondent to return before February 28, or to show cause upon March 12 why decree of divorce should not be granted.

Postea (March 15): The decree was made absolute.

SIVERTSEN V. AUSTIN.

Seller and purchaser—Claim in reconvention—Independent contractor.

This was an action to recover the purchase price of certain ground. The declaration set forth that the parties both resided at Observatory-road. On or about the 17th March, 1903, plaintiff sold and defendant bought certain landed property at Observatory-road for the sum of £650, whereof £200 was to be paid forthwith, and the balance six months after the date of the sale. Defendant had only paid £100, and though plaintiff had tendered transfer of the property, defendant refused to pay the balance of the purchase price. Plaintiff claimed judgment for the amount, with 6 per cent. interest, and costs. In his plea the defendant stated that plaintiff had wrongfully and unlawfully made excavations on the property, and removed certain foundations existing thereon at the time of the sale, and carried away certain materials. He claimed that by reason of plaintiff's action, the property had been damaged to the extent of £162 10s. He tendered payment of the balance of the purchase price, less the sum of £162 10s. In his replication plaintiff denied that he had done more than to remove certain stone and debris from the surface, and stated that it was a condition of the sale that he should do this.

Mr. Gardiner appeared for the plaintiff; Mr. Buchanan for the defendant. S. C. Sivertsen was called, and stated

that on February 9 he put up certain land for sale. There were the remains of an old building on the land. At the sale, the auctioneer stated that the ruins would be removed by witness. Austin purchased some land by private sale after the auction. Witness had carried out his obligations as regards the removal. He let the work out to Parker, who in turn let it out to a man Brown. Austin objected to the excavation of the foundations of the ruins; but subsequently Austin expressed himself as satisfied; the foundations had been taken out at that time. Austin said that he had arranged with Brown—the man who was performing the work—that he (Austin) was to get one-half of the stone, and Brown the other half.

Cross-examined by Mr. Buchanan: Mr. Parker had purchased the lots of ground in question at the sale, but the sale was subsequently cancelled. The broker's note, sent to Austin, made no mention of the condition that the owner should remove the ruins.

Barry Heatlie, broker, stated that he attended the sale. He had heard the conditions of sale: the debris was to be removed and put into a hollow in another part of the property. The debris was to be removed to the level of the surrounding ground. He took it that the arrangement, agreed to by Austin, permitted the excavations to go below the surface.

Cross-examined by Mr. Buchanan: He understood the conditions of sale as to be that the debris should be removed from the surface.

James Parker, contractor and builder, of Mowbray, stated that he arranged with Mr. Sivertsen to get someone to remove the debris; he gave the work to Brown. Witness arranged with Brown to remove the debris according to the conditions of sale. Brown had to remove the debris to the natural level of the ground. The ground was originally lower than the adjoining roadway, but he believed that the level of the road had been raised lately. Mr. Austin made complaints, and witness, in order to satisfy him, told him that he (Austin) and Brown could share the stone. Austin appeared quite satisfied. The land was now much more valuable with the debris removed. The cost of removing the debris was greater than the value of the stuff removed. Later on Mr. Austin complained of the removal of the stone, stating that he wanted it all back.

Cross-examined by Mr. Buchanan: A lot of this stone had not been taken from below the natural level of the ground. Brown had excavated only very little below the natural level of the ground.

John Brown, builder and contractor, of Observatory, stated that he had undertaken to remove the debris. He

started work at the lowest point of the debris. He took some stone out a few inches below the natural level. After having raised some objections to the work, Austin went to see Parker. He returned and told witness that he could go on excavating, and that he (Austin) was to have half the stone. Where witness had taken up stone he had filled in the holes. The debris would have to be removed before Austin could have built on it.

Cross-examined by Mr. Buchanan: Austin had told him he could take out all the stone. Wrensch-road was above the level of the property.

Mr. Gardiner closed his case.

Mr. Buchanan called

Wm. John Austin, the defendant, who said that during the last twelve months he had been a builder and contractor. Witness did not know plaintiff was the seller at the time of the sale. Mr. Heatlie showed witness a diagram of the property, across which the name of Mr. Parker was written. Witness was at the sale, and saw the property knocked down to Parker. Witness saw Brown at work on his property. He was willing to have the debris lowered down to the general level, but he found that more than this should be done. Witness wrote to Mr. Heatlie, and afterwards saw that gentleman, who referred him to Mr. Parker. The latter said that he had come to an arrangement that Brown was to level the ground, and that Brown was to get half the stone and £15, and he (Parker) the other half. Witness agreed to take Parker's place in regard to the agreement, his impression being that the land should be levelled to the level of the road. He never agreed that the land should be excavated, as it had been, 18 inches below the level. The earth had been taken from below the ordinary surface to fill up the hole. Brown took away the stone on Good Friday, and witness had not got half the stone. The land was not better for building upon now. It would be more expensive to build now. He bought the ground for the purpose of building. Witness did not agree with Brown that the latter should take all the stone; the agreement was that half the stone should be left on the ground, and this was never varied.

Cross-examined: Witness had no objection to Brown excavating the land, so long as he was left half the stone. He estimated the half of the stone to be worth £33. When witness's attorneys wrote in May claiming cancellation of the sale, the ground had been excavated. Witness did not then mention as a reason for cancellation that the ground had been injured and the stone taken. The letter claimed that the contract of sale should be rescinded, on the ground that there had been misrepresentation as to the seller. His

reason for claiming on this ground was because he had been "diddled" into seeing Parker about the land, while Sivertsen had kept in the background all the time. Witness estimated the building clay removed to be worth £75, and the stone to be worth £33; while the cost of putting the ground in order would be about £60.

Edward James Sherwood, architect, said he knew the old buildings that stood on the land. After Mr. Brown's operations had been completed, witness was called in by Austin to see the ground. The ground had deteriorated in value considerably. About 320 loads of material had been taken off. He estimated that the value of the material taken away was about £120 or £130. This did not include the debris above the natural conformation of the soil. Brown had gone down in many places 3 feet 3 inches below the level of the road, but subsequently he levelled the whole of the ground to 16 inches below the crown of the road. This had been done with loose material, and before he could build, Austin would have to go down 3 feet 3 inches to the solid ground, whence Brown had taken the stone.

John Rainer, builder, said the excavations had been of serious detriment to the value of the land. Witness estimated that the damage done amounted to £188. The damages he had calculated only concerned the operations below the crown level of the road.

Wm. Ellis, foreman to defendant at the time of the excavations, said he took measurements of trenches made by Brown, and found they were 2 feet 6 inches below the present level.

The witness Brown, re-called, stated, in answer to the Court, that he did not take any of the natural soil. Parker agreed that witness should take the whole of the stone. Witness could not now give defendant half the stone, but he would forfeit to him the £15 he was to have received from Parker. Witness had no knowledge of defendant's concern in the matter when he came there on the Good Friday.

Mr. Parker, re-called, said he informed Brown of the agreement between him (witness) and Austin before the Good Friday.

Mr. Heatlie was also re-called, and stated that when the brokers' note was signed, Sivertsen's name was given thereon as the seller.

Mr. Buchanan having been heard in argument, the Court gave judgment for the plaintiff, as prayed.

De Villiers, C.J.: The defendant admits that he bought the property in question for £650. He has paid £100, and there is, therefore, due under the contract of purchase the sum of £550. The defendant, however, claims the right of deducting from this £550 the amount of the damages alleged to have

been done to the land by the plaintiff after the sale. In strictness there should have been a claim in reconvention, because it is not a claim of such a nature as to be set off against the plaintiff's claim. The defendant would, therefore, have no right of deduction, and in strict practice there should have been a claim in reconvention. But that is a purely formal matter, and no objection was raised to the defendant's proceeding. I shall, therefore, simply consider the question whether, assuming there had been a claim in reconvention, the defendant has made out a good case for damages. A broker's note was executed at the time of the purchase, and upon the face of that broker's note appeared the names of the purchaser and seller. It is suggested that the defendant was not aware that he purchased from Sivertsen, but that he believed he bought from Parker, but the document itself contradicts that view, because upon the face of the broker's note there is an acceptance by the defendant, and the broker, Mr. Headie, informs the Court that at the time this acceptance was signed by the defendant, the name of the plaintiff was on the broker's note. Therefore, if the plaintiff had taken the trouble to read the broker's note he would have known that he was purchasing from Sivertsen, the plaintiff, and not from Parker. It is not denied that it was understood between the parties at the time of the sale that it should be the duty of the plaintiff to remove certain debris, the ruins of some old buildings, from the property, and to transfer it to a hole in the neighbouring ground. That appears clear from the defendant's own letter of March 19, in which he says: "I am perfectly willing to abide by the conditions of the auction sale, namely, that my ground, lots so-and-so, shall be levelled and filled up, but I shall not permit any excavations, and, further, the contractor employed has taken so much stuff off the surface, which I shall have to have replaced." Now, the material removed was of two kinds: there was the debris on the surface, and there were foundation-stones. In regard to the debris on the surface, I am by no means satisfied that either the plaintiff or the contractors employed by him ever removed more than the surface debris. In the course of removing such debris it is quite possible that a small portion of the natural soil may also have been removed, but that in the nature of things it would have been impossible to avoid. It would have been impossible to remove the debris without taking some portion of the natural soil upon which the debris lay. But I am satisfied that only an infinitesimal portion of the natural soil was removed. The plaintiff has derived no benefit from removal; he undertook to do this purely for the benefit of the purchasers of the

lots. He could not, however, do it personally, and he employed a contractor—well, in one sense, perhaps, the contractor was his agent, but he was his agent simply for the purpose of removing the debris, and nothing more. He employed Parker as contractor, and Parker employed Brown as sub-contractor. In the course of the removal Brown came to the foundations, and was going below the surface, but the defendant complained to the broker who had been employed for the sale. Parker spoke to the plaintiff, and in a conversation with the plaintiff Parker was told that he was not to go any deeper. Defendant went to see Parker, and the result of their interview was that it was arranged that Parker should continue to dig the foundations, but that the half of these foundation-stones were to be given to the defendant. That was an agreement made by the defendant with Parker, quite independently of the plaintiff. It was not an agreement made with Parker, as the agent of the plaintiff. The employer had nothing to do with that arrangement. If Parker did not carry out the agreement made between himself and the defendant, that is a matter entirely between Parker and the defendant, with which the plaintiff had nothing to do. The contractor made a certain agreement on his own behalf with the defendant, and, in my opinion, the plaintiff cannot be held responsible for Parker breaking his agreement, an agreement which he had made, not in his capacity as agent for the plaintiff, but in his capacity as the person who had contracted to remove certain materials. In fact that is the position the defendant himself took up at one time, because he issued a letter of demand not against the plaintiff, but against Parker, who had not carried out the terms of the agreement with him. I am not satisfied that any substantial damage was done by Parker by the removal of these stones. I have no doubt that the equivalent of the stones will be given by Brown on behalf of Parker to the defendant, but in my opinion, the plaintiff has nothing to do with that. He has endeavoured to carry out the agreement made, as I have said, for the benefit of the purchasers. He did everything he could to carry out this agreement, and I do not think any of the evidence shows he has done anything which would entitle the defendant to claim damages as against him. For these simple reasons, I think that the plaintiff, as vendor, is entitled to the purchase price, and that any remedy the purchaser may have he must seek against the person who made the agreement quite independently of the seller. Judgment of the Court must be for the plaintiff, with costs.

[Plaintiff's Attorneys: Horold and Gie; Defendant's Attorney: G. Trollip.]

APPEAL CASES.

GREEN V. LE ROES. } 1904.
 } Feb. 2nd.

Repudiation of contract.

The plaintiff entered into a contract for the purchase of 100 bottles of milk a day from the defendant. The milk was to be fetched by the plaintiff, but on the day on which the first delivery was to be made, the plaintiff did not appear, nor on the second day. From this and other circumstances the defendant came to the conclusion that the plaintiff had repudiated his contract. The plaintiff having subsequently found a purchaser of the milk at a profit, claimed it from the defendant. The Magistrate having found from the whole of the evidence that the plaintiff repudiated the contract; the Court, on appeal, refused to disturb the finding.

This was an appeal from the decision of the Assistant Resident Magistrate of Wynberg.

In the Magistrate's Court the appellant sued Le Roes for £100 damages, reduced to £20 for the purpose of jurisdiction. It was alleged that on the 20th September last, the parties entered into an agreement, whereby defendant undertook to supply plaintiff with 100 bottles of milk per day, at 2d. per bottle, for a period of six months. Thereupon plaintiff entered into an agreement with one Searle to supply him with 100 bottles of milk per day, and deposited £100 with Searle as security for the performance of the contract. Defendant failed to supply the milk, and plaintiff was unable to carry out his agreement with Searle, whereupon the latter took possession of the £100. The defence was that it was verbally agreed that delivery should commence on the 1st October, and that for two mornings thereafter plaintiff failed to come to defendant's farm to take delivery. Thereupon defendant told plaintiff that he considered the contract broken. Plaintiff stated that the verbal agreement was that the milk should be taken on the 1st October, or any later date, providing that plaintiff paid for the milk from the 1st October. The written agreement stipulated that the milk should be paid for every fourteen days. Judgment was given for the defendant, the Magistrate, in his reasons, stating that no date was stipulated on

the agreement on which the contract was to commence, and the case depended upon the credibility of the witnesses. He had no hesitation in accepting the evidence of the defendant, who was a respectable farmer, and his wife, in preference to that of the plaintiff and his witness, who were Jews of not a very respectable type.

Mr. Gardiner for the appellant. Mr. Benjamin for the respondent.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The defendant agreed to supply the plaintiff with 100 bottles of milk per day for six months, at 2d. per bottle. The milk was to be fetched by the plaintiff at six o'clock in the morning. The written agreement does not state when the first delivery was to take place, but the evidence clearly shows that it was on October 1; that was the date on which the defendant was to go for the first time to fetch the 100 bottles of milk at six o'clock. There was no desire on the part of the defendant, as far as I can see, to shirk his part of the agreement. On October 1 he had his milk ready, but nobody came for it. On the next, October 2, the defendant had his milk ready, and for the whole of that day nobody appeared to fetch the milk. Considering the perishable nature of the milk, the defendant was justified in my opinion in concluding that the plaintiff was not going to abide by his contract. In a case where a person buys such a large quantity of milk, and fails to fetch it for two days, the presumption would clearly arise that the person did not intend to fulfil his contract. Now, the only point to decide in this case is whether the evidence justified the defendant in coming to the conclusion that there was a repudiation of the contract on the part of the plaintiff. If there was a repudiation, the defendant was not bound by the contract. If the plaintiff's conduct did not amount to a repudiation, the defendant would still be liable. It appears, however, that on October 3 the plaintiff made a contract with another person by which he would make a profit. Thereupon he goes for his milk. But supposing that he had not made that profit, then the defendant would have had to wait for the whole of that period without anyone coming for the milk. Now, in my opinion, having waited for two days without anyone coming, and considering the perishable nature of the milk and all the other circumstances, I think he was justified in coming to the conclusion that the plaintiff no longer stood by his contract. That is the view taken by the Magistrate upon the evidence. The Magistrate has had witnesses before him, and if he believed the defendant's witnesses and disbelieved the evidence for the plaintiff, I think he was justified in finding that there was a repudiation on the part of the plaintiff. The appeal

must therefore be dismissed, with costs.
[Appellant's Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorney: H. Wrensch.]

CORBEAU V. MATTHYS.

This was an appeal from the decision of the Assistant Resident Magistrate, Kenhardt.

It appeared from the records in the Court below that the plaintiff sued the defendant for the sum of £2, for the conveyance of his adopted child from Kenhardt to Victoria West and back, the child being a witness in a criminal case heard before the Magistrate at Victoria West. Matthys took the child on a wagon, in which he conveyed two prisoners and two Crown witnesses, for the conveyance of whom he received payment from the Crown. Matthys stated that he agreed to convey the other persons for the Crown for £48, and that subsequently Corbeau came to see him, and asked him to take the girl, to which he replied that he had no objection. Afterwards the authorities declined to make any payment in respect of the conveyance of the girl, and on Corbeau refusing to pay, plaintiff commenced these proceedings.

After hearing Mr. Benjamin (for the appellant), and without calling on Mr. Gardiner (for the respondent, the Court dismissed the appeal, with costs.

De Villiers, C.J., said that the plaintiff seemed to have contracted to take the child from Kenhardt to Victoria West. The plaintiff was not bound to take any other passengers, and he might have refused to take the defendant's child. He had, however, taken the child at the request of the defendant. It was simply a question whether Matthys' evidence was right, and to him it appeared that Matthys' evidence was decisive. The appeal should be dismissed.

HOHN V. LEACH.

Mr. Buchanan moved for the appointment of a commission in London to take the evidence of Major P. E. F. Hobbs and others.

Mr. Gardiner appeared for the respondent (the plaintiff in this suit), and consented to a joint commission being issued.

Application for a joint commission granted, Mr. McGuinness being appointed as commissioner.

Ex parte RUNCIMAN AND CO

Mr. Sutton moved for an order cancelling the appointment of Wm. Frost as trustee in a certain estate, in which Messrs. W. Runciman and Co., of

Simon's Town, were the largest creditors.

Affidavits were put in showing that at a meeting of the creditors in the insolvent estate in question, Frost, a law agent at Simon's Town, had been appointed sole trustee. Frost had, however, left the Colony for England, and nothing was now known of his whereabouts. No assets in the estate had been lodged with the Master of the Supreme Court.

Application granted, and order issued authorising the calling of a special meeting of the creditors for the appointment of another trustee.

Ex parte STASSEN.

Mr. De Waal made application for leave to sell, for the benefit of the minor heirs in the estate, their shares in a certain farm, situated at Ladismith.

The Master's report was favourable.

Order granted in terms of the Master's report.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and Sir JOHN BUCHANAN.]

ADMISSION.

1904.
Feb. 3rd.

Mr. Searle, K.C., moved for the admission of Douglas Buchanan as an advocate.

Granted, applicant taking the oath.

HILLS V. COLONIAL GOVERNMENT.

1904.
Feb. 3rd.
.. 4th.
.. 29th.

Pénalty - Forfeiture—Liquidated damages—Statutory confirmation of contract.

The plaintiff, under an agreement with the defendant, obtained a concession to construct a line of railway within a prescribed period, and the defendant undertook to pay a subsidy for such construction, but stipulated by clause 17 that in case of non-completion within such prescribed period

certain large sums of money lodged with or retained by him as security should be forfeited as and for liquidated damages, and that thereupon such agreement should cease and determine, and it should be lawful for the defendant to take possession of the incomplete line and pay to the plaintiff the actual cost, less the moneys so lodged or retained. By the following clause the parties agreed that the ordinary rules of law regarding the recovery of penalties for breaches of contract should not apply to certain specified breaches by the plaintiff after completion of the line.

Held, that the ordinary rules relating to the recovery of penalties for breaches of contract should be applied in case of a breach by the plaintiff of any obligations entered into by him under the 17th clause. The 9th clause of Act 19 of 1900 enacted that the agreement, which was set forth in a schedule to the Act, "is hereby confirmed, and shall have the same force and effect as if it were set forth fully in the body hereof."

Held, that this enactment would not justify the Court in applying different rules of construction to the 17th clause from those which would have been applied if the agreement had not been so confirmed.

Held further, that as the large amounts stipulated to be forfeited, exceeding £110,000, are manifestly out of all proportion to the damages suffered or inconvenience undergone by the defendant by reason of the non-completion of the subway line, the penalty of forfeiture should not be enforced notwithstanding that the sums are made payable "as and for liquidated damages."

This was an action brought by Mr. Hills against the Colonial Government, arising out of the con-

tract for the construction of a railway between Mossel Bay and Oudtshoorn. These matters had been before the Court on a previous occasion, but the construction of this particular railway and the rights of the parties arising out of the contract had not been brought by way of action, although a motion in the matter was made in June, and under the Court's decision, the Government took possession of the railway, the Court, however, directing that all matters, such as actual cost, retention money, and so on, should await the result of further proceedings to be taken by action. The declaration was as follows:

1. The plaintiff is Arnold Frank Hills, who sues both personally and in his capacity as receiver, appointed by the High Court of Justice in England, of a certain co-partnership venture called the Grand Junction Railways. The defendant is Arthur Douglass, who is sued in his capacity as Commissioner of Public Works, and as such representing the Colonial Government.

2. On the 4th July, 1900, a contract was entered into between the Thames Ironworks and Shipbuilding Co. and the defendant Government for the construction of a line of railway from Mossel Bay to Oudtshoorn. The terms of the said contract are set forth in schedule 1 to Act 19 of 1900, and the plaintiff prays that this schedule may be considered as inserted herein.

3. The plaintiff has duly acquired by legal cession with the sanction of the defendant all the rights against the Government of the Thames Ironworks and Shipbuilding Co., under the aforesaid contract, and has similarly acquired all such rights of the various parties (other than defendant) to the contract of 13th October, 1896, and to the agreements of 2nd August, 1898, and 18th March, 1899, which are referred to in the preamble to the aforesaid schedule. The plaintiff craves leave to refer to the said contracts and agreements when produced at the trial hereof.

4. Under the said contracts and agreements, the work of constructing the railway line from Mossel Bay to Oudtshoorn was duly proceeded with, save in so far as the due execution of the work was prevented by causes which are hereinafter set forth.

5. In or about the month of June last the defendant wrongfully and unlawfully terminated the contract of the 4th July, 1900, and after application to this Honourable Court on the 15th June, 1903, based upon the non-completion of the line within the two years specified in clause 17 of the contract, the defendant obtained an order of this Honourable Court, whereunder he has entered upon and has since retained possession of the Mossel Bay-Oudtshoorn line.

6. The plaintiff thereupon took the necessary steps to proceed with an appeal to His Majesty the King in his Privy Council against the said order of this Honourable Court, but has now abandoned the said appeal, and instituted the present suit, in consequence of an agreement arrived at between the parties on or about September 4, 1903.

7. The parties hereto under the said agreement agreed that the appeal should be abandoned, that the amount of "actual cost" of the Mossel Bay-Oudtshoorn line should, with the sanction of this Honourable Court, forthwith be ascertained by reference to arbitration, that the referees should be guided by the directions of this Honourable Court, made on the 6th March last, in the reference to arbitration in the matter of the Somerset East-King William's Town and Oudtshoorn-Klipplaat lines, but that the question of whether interest should be included under "actual cost," as well as all other questions and disputes between the parties, should remain open for decision by this Honourable Court.

8. The plaintiff says that, in addition to the amount of "actual cost" to be ascertained as aforesaid, he is entitled as part of the "actual cost" incurred in and about the construction of the Mossel Bay-Oudtshoorn line to such interest as he has lost by reason of expenditure of capital upon the said line, the said capital having produced no interest whilst used in the construction of the said line—and also to such interest as he has paid or become liable to pay in respect of moneys borrowed by him in the ordinary course of business, and used by him in the construction of the said line.

9. The plaintiff was prevented from completing the line within the time specified in clause 17 of the said contract by causes over which he had no control, to wit:

1. The invasion by the King's enemies in February, 1901, of the districts in which the line was being constructed. The construction was for many months stopped or greatly hampered thereby.

(a) Under martial law regulations the local supply of the dynamite absolutely required for construction work was after the said invasion stopped or greatly limited for a considerable period. (b) The supply of labour was materially interfered with. Large numbers of natives engaged on the works left the same in consequence of the said invasion, and it was impossible for a long period in the years 1901 and 1902 to supply their places.

2. The conduct of the Railway Department acting for and under the control of the defendant, in the following matters: (a) In 1901 detailed plans for bridges over the Malagaten and Gwyang Rivers between Mossel Bay and George were submitted to the said department for approval. The department has

never communicated its decision on these plans, though repeatedly requested to give such decision. The plaintiff was unable to proceed with the construction of the bridges without such approval, and this greatly retarded the work of construction of the line. (b)

Shortly after the ratification by Parliament of the contract of 4th July, 1900, the said department expressed strong dissatisfaction with the agreed-on contract route between George and Oudtshoorn as being an impracticable line. Plaintiff was willing and did endeavour to comply with the department's wishes in the matter and in terms of section 3 of the contract, submitted plans for an alternative route, *via* Kaayman's River Valley. The department has never communicated to plaintiff any definite decision on this route.

(c) The department thereafter requested plaintiff to make further surveys and prepare further plans for a "rack line" (not agreed on or contemplated in the contract) over the Montagu Pass, in order that defendant might consider the advisability of adopting the said "rack line" in lieu of the contract route. The surveys were made under great difficulties owing to the invasion aforesaid, and plans were submitted to the Railway Department. The department in this case also has never communicated to plaintiff any decision on this route. (d) Owing to the strong disapproval by defendant of the contract route and pending decision by defendant (which has not been given) on the questions raised by defendant as to route as above, the construction of the line from a point two miles on the Mossel Bay side of George to Oudtshoorn, necessarily and at the wish and to the knowledge of defendant, remained in suspense, and the plaintiff was unable to proceed therewith.

10. By reason of the facts set forth in paragraph 9, the period specified in clause 17 aforesaid has been in law cancelled and superseded, and the defendant is estopped and prevented from taking advantage of the terms of the said clause, and the contract time limit has become null and void.

11. The defendant holds security deposited by plaintiff to the value of £50,000, which was lodged with the Cape Agent-General in connection with the contract of 4th July, 1900, for the completion of the line.

12. The defendant further holds as "retention money" for the completion of the Mossel Bay to Oudtshoorn line under the said contract certain 10 per cent. of the advances of subsidy which the plaintiff became entitled to thereunder. The said "retention money" amounts to the sum of £4,913 2s. 5d.

13. The defendant further holds similarly as "retention money" under certain other contracts of 4th July, 1900 (set forth in schedules G and H to Act 19 of 1900) a sum of £70,689 14s. 5d., the pro-

perty of plaintiff, being moneys retained (for the completion of the Mossel Bay-Oudtshoorn line) by the defendant out of and when paying advances due to plaintiff under the Somerset East to King William's Town railway contract and the Oudtshoorn-Klipplaat railway contract.

14. By reason of the premises the plaintiff is entitled to recover the security and retention money referred to in paragraphs 11 and 13 hereof, the defendant by his failure and neglect to approve of the bridge and route plans as aforesaid and by his entering upon and taking possession of the line having prevented plaintiff from proceeding unto the due completion of the line, the construction whereof had been retarded as above set forth, although plaintiff is and always has been ready and willing to carry out the terms of his contract and to duly complete the said line.

15. By reason of the premises the plaintiff has suffered damages which he assesses at the rate of ten per cent. on the ascertained amount of the actual cost aforesaid.

Wherefore plaintiff claims: (a) An order declaring plaintiff entitled to the "actual cost" incurred in and about the construction of the said line. (b) An order by consent referring the ascertainment (subject to the directions set forth in paragraph 7 hereof) of the amount of "actual cost" to referees to be appointed by this Honourable Court. (c) An order declaring that the plaintiff is entitled as part of the actual cost to "interest" as set forth in paragraph 8 hereof. (d) An order referring the ascertainment of such interest to the said referees. (e) Return of the £50,000 deposited as security with the Cape Agent-General in London. (f) Payment of the sums of £4,913 2s. 5d. and £70,689 14s. 5d. held by defendant as 10 per cent. "retention money" as set forth in paragraphs 12 and 13 hereof. (g) Damages calculated at the rate of 10 per cent. on the "actual cost" to be ascertained as aforesaid. (h) Interest *a tempore morae*. (i) Alternative relief. (j) Costs.

The defendant's plea was as follows:

For a plea to the declaration the defendant says:

1. He admits that Arnold Frank Hills is the plaintiff herein, but he denies that he is entitled to sue in any other than his personal capacity, or to sue as receiver of a co-partnership venture called the Grand Junctions Railways; the remaining allegations in paragraph 1 are admitted.

2. He admits the execution of the contract dated 4th July, 1900, referred to in paragraph 2 of the declaration, and craves leave likewise to refer to the terms of Act No. 19 of 1900 of Schedule 2 hereto, and also of the schedules to the said contract mentioned in the said contract, but not printed in Schedule 2, and

to the plans, sections, and specifications referred to in the said contract. The said contract dated 4th July, 1900, was preceded by the contracts of 13th October, 1896, 2nd August, 1898, and 12th March, 1899, referred to in the preamble to Schedule 2 to Act No. 19 of 1900.

3. He admits that the plaintiff has acquired by cession with the sanction of the Cape Government all the rights of the said Thames Ironworks and Shipbuilding Co., in respect of the contract dated 9th July, 1900, but says that the Government refused to comply with the plaintiff's request to recognise the firm styled the Grand Junction Railways as assignee of the said contract, or interested under the said assignment. He does not admit the remaining allegations in paragraph 3, and puts the plaintiff to the proof thereof. He says further that the aforesaid contract of 1900 attached to and confirmed by the aforesaid Act No. 19, of 1900, which was substituted for the theretofore existing and thereby cancelled contracts, became and was the only contract subsisting between plaintiff and defendant respecting the aforesaid railway from Mossel Bay to Oudtshoorn after the date of such cancellation.

4. He admits that the construction of the said railway was commenced, and certain work done thereon under the said contract and agreements; but he denies the remaining allegations in paragraph 4, and denies that the work of construction was duly proceeded with.

5. As to paragraph 5, he admits that on the 15th June, 1903, on application duly made by him under clause 17 of the said contract, he obtained an order from this Honourable Court declaring that the agreement between the Government and the concessionary (the plaintiff) had ceased and determined, and authorising the Government to enter upon and take possession of such incomplete lines of railway as had been constructed by the said concessionary (the plaintiff), and he says that by such order the said contract became and was determined. He craves leave to refer to the proceedings heard in and order made by this Honourable Court on the said 15th June, for the grounds advanced in support of the application on which the said order was obtained. He also admits that in terms of and as authorised by, and in exercise of the powers given by the said order, he has duly entered upon and retained possession of the said uncomplete line. Save as above he denies the allegations in paragraph 5.

6. Paragraph 6 is denied. Plaintiff obtained leave in this Honourable Court to appeal to His Majesty the King in his Privy Council against the said order, but thereafter failed duly to give the security required by law within the time required by law in that behalf, and thereby the right to prosecute the said appeal lapsed, and was lost to the plaintiff.

7. As to paragraph 7, defendant says (a) that there was no agreement there as between him and the plaintiff other than the arrangement embodied in a letter addressed by defendant's attorneys to plaintiff, dated 10th September, 1903, copy of which is hereunto annexed, marked "A," to the terms of which for greater certainty defendant craves leave to refer. (b) He denies that he entered into any agreement regarding the abandonment of the aforesaid appeal, and save as above in (a) and (b) he denies the allegations in paragraph 7. (c) Defendant is still willing and offers to have the amount of "actual cost" ascertained by a reference and subject to the conditions set out in annexure "A."

8. The allegations in paragraph 8 are denied.

9. The allegations in paragraph 9 are denied, save that defendant admits there was a certain invasion by the King's enemies in the said districts in 1901, and he craves leave to refer to the next paragraph hereof.

10. With further reference to paragraph 9, defendant says: (a) That no detailed working drawings of the bridges over the Malagataar and Gwyany Rivers were submitted to the Government or its engineers. (b) That it was the duty of the plaintiff to construct the said railway in terms of the said contract and of the plans and sections attached thereto or referred to therein and that at no time has there been any approved deviation from the said plans or sections in terms of clause 3 of the said contract, dated 4th July, 1900, nor has the plaintiff, in terms of clause 4, submitted for approval, or at all, any route beyond George towards Oudtshoorn, via Zwart River or Kagma River Valley, either or both, showing a total distance not exceeding 75 miles, nor has the defendant or the Railway Department at any time agreed to any novation or variation of the said contract. (c) That the plaintiff wholly failed and neglected to perform his obligations under the said contract, and that the Railway Department is not responsible for any delay in the construction of the said railway. (d) That such extensions of time were allowed as, in the opinion of the Commissioner, the plaintiff was entitled, under the provisions of his contract, to receive.

11. The allegations and contentions in paragraph 10 are denied. Defendant craves leave to refer to the matters pleaded above in paragraph 10 (d), and to the proceedings and order in the matter heard in this Honourable Court on June 15, as set out above in paragraph 5, and says further that by the said order it was judicially determined that the contract time limit (extended by the Commissioner as aforesaid) had not been observed by the plaintiff, and says accordingly that the plea of *res judicata* is a good answer to any claim founded by

plaintiff in respect of any illegal insufficiency or inapplicability of the said time limit.

12. Paragraphs 11, 12, and 13 are admitted save that as to a sum of £9,455 18s. 3d. being part of the amount of £70,689 14s. 5d. mentioned in paragraph 13, the defendant craves leave to refer this Honourable Court to schedule 17 E. attached to the referees' report of the 11th July, 1903, and to paragraph headed "Retention Money" in the said report.

13. The allegations in paragraphs 14 and 15 are denied.

14. Defendant is ready and willing, and consents that this Honourable Court should make an order referring the ascertainment of the amount of the "actual cost" of the incomplete line now in suit to the referees appointed by the Court on the 6th March last in the matter of the Oudtshoorn-Klipplaat and another line, subject to similar directions as were given to such referees in that matter, and craves leave to refer to annexure "A" hereto. Wherefore, subject to defendant's consent to a reference as set out in paragraph 14, he prays that the plaintiff's claim be dismissed with costs. And for a claim in reconvention defendant, now plaintiff, says:

15. He refers to the several matters and things hereinbefore by him pleaded.

16. (1) In terms of clause 16 of the agreement of July 9, 1900, annexed on schedule 1 to --, and enacted by the aforesaid Act No. 19 of 1900, the plaintiff (now defendant) was bound within 18 months from the approval of the said agreement by Parliament to complete the section of the line of railway referred to in the said agreement from Mossel Bay to George with the exception of platelayers' cottages and station buildings. (2) The said Act was promulgated on 19th October, 1900, and the said period of 18 months expired on the 18th April, 1902. (3) An extension of time of three months was granted by the defendant or his predecessor having regard to the terms of the concluding paragraph of the said clause, but the plaintiff (now defendant) did not complete the said section of the said line within such extended period, or at all, and therefore forfeited to the Government in terms of the said clause the sum of £10,000 sterling, the delay beyond the extended period not having been proved to the satisfaction of the Commissioner to have been caused in the manner set out in the said clause. (4) The plaintiff (now defendant) is accordingly indebted to the Government, as represented by the defendant, in the sum of £10,000, under and in terms of the said clause.

17. (1) In terms of Clause 17 of the aforesaid agreement, the plaintiff (now defendant) was bound within two years of the date of the approval of the said agreement by Parliament to complete

the said line from Mossel Bay to Oudtshoorn. (2) The said Act was promulgated on 19th October, 1900, and the said period of two years expired on the 19th October, 1902. (3) An extension of time of seven months in all was granted by the defendant, having regard to the terms of the first paragraph of the said clause, but the plaintiff (now defendant) did not complete the said line within such extended period or at all, and thereupon forfeited to the Government as and for liquidated damages in terms of the said clause, the security referred to in this agreement and hereinafter set out, the delay beyond the extended period not having been proved to the satisfaction of the Commissioner to have been caused in the manner set out in the said clause. (4) The aforesaid security of (a), the ten per cent (10 per cent.) retention money under the said agreement, (b) the ten per cent. (10 per cent.) retention money under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town lines, dated 4th July, 1900, and (c) the security lodged with the Cape Agent-General, and is the security referred to and set out in paragraphs 12, 13, and 11 respectively of the declaration; and the plaintiff (now defendant) is accordingly indebted to the Government, as represented by the defendant, in the sums of £4,913 2s. 5d., £70,689 14s. 5d. (subject as to £8,455 18s. 3d., to the matter set out above in paragraph 12), and £50,000, under and in terms of the said clause.

Wherefore the defendant (now plaintiff) claims (a) judgment in the sum of £10,000; (b) judgment in the sums set forth in paragraph 17 (4); (c) alternative relief; (d) costs of suit.

In his replication, the plaintiff stated that it was agreed between plaintiff and defendants that, on plaintiff abandoning his appeal against the order of the Court on June 15, the defendants should not avail themselves of the plea of *res judicata*.

Counsel said he did not intend to proceed on paragraph 9, section 2, subsection (a) of the declaration.

The correspondence referred to in the pleadings were the letters put in at the hearing of the motion on the 20th November.

De Villiers, C.J., said there was a judgment of the Court by which it was declared that the agreement between the Government and the concessionary had ceased and determined, and it was ordered that the Government be authorised to enter upon and take possession of such line of railway as had been completed. That judgment stood, and the Court was bound by it.

Mr. Searle: The question now to be considered, I submit, is whether or not the Government cannot enter into an arrangement with us whereby they would be debarred from pleading that.

[De Villiers, C.J.: Is it your contention that this new agreement amounts to a renunciation by the Government of its right under this judgment?]

That is the case. We say that the Government undertook that the question of deciding whether plaintiff was entitled to any damages should be left open on consideration of the plaintiff abandoning his appeal on the motion. Counsel said he proposed to call Mr. Hills to give evidence as to the agreement which was arrived at at an interview between him and the Commissioner.

[De Villiers, C.J.: Are the terms of the new agreement to be derived from the correspondence? Surely the correspondence will speak for itself?]

Mr. Searle replied that it was partly from the correspondence and partly from a verbal agreement made at an interview between the parties. The appeal was abandoned in consequence of this agreement, and the actual cost of construction was to be ascertained. He proposed to call Mr. Hills.

[De Villiers, C.J.: What do you want to call Mr. Hills for?]

To give evidence as to what took place at the interview between the Commissioner and Mr. Hills.

[De Villiers, C.J.: But the defendant admits all that you claim about the agreement. The agreement was not disputed, only the construction of it.]

The plaintiff would never have given up his remedy unless the Government had agreed to allow plaintiff to sue for damages. If it was decided that this was *res judicata*, the question of damages would fall away, but the question of the retention money would still remain.

[De Villiers, C.J.: There is nothing in the agreement by which the Government renounced its rights under the original judgment.]

The correspondence shows that defendant had refused to discuss the question of reference until the appeal to the Privy Council was withdrawn.

[De Villiers, C.J.: How can evidence be given as to what took place at the interview when the letters embodied the arrangement arrived at?]

I admit that there was no specific renunciation by the Government of its rights under the judgment, but this may be gathered from the general tenor of the letters. The appeal was only abandoned in consideration of their being allowed to enter an action *de novo*.

[De Villiers, C.J.: There is not a word in the letters which would bear that construction. The judgment must stand and any evidence inconsistent with it disallowed. If the agreement altered the judgment, why do you not come into Court to have the judgment altered? The fact that this is not done strengthens the judgment.]

If the judgment stood it will be difficult to argue the question of damages. The penalty cannot be enforced without going into the full circumstances of the case. A penalty of £135,000 was asked for. The judgment gave the Government only the beneficial work, and not the entire work at actual cost, and they were therefore not entitled to claim a penalty. *Res judicata* must be specially pleaded.

[De Villiers, C.J.: It is pleaded.]

It is pleaded, but there may be an estoppel or waiver of the plea. The agreement is a sufficient waiver. Mr. Hills would never have given up the appeal if he did not believe that there had been a waiver.

[De Villiers, C.J.: Mr. Hills wants to get the advantage of getting out of completing a losing contract, and at the same time to get the benefit under the contract.]

That is not Mr. Hills' fault. The Moesl Bay—Oudtshoorn line was most economically constructed, and paying well. The Government have not settled the route of the line beyond George, and this prevents plaintiff from going on with the work. About 33 per cent. of the work was done, and it was provided that the retention money should be returned when one-third of the work was done.

[De Villiers, C.J.: The judgment of the Court must stand, and there is nothing in the agreement to show that the Government renounced its rights under the judgment.]

Then I would direct my evidence to the two questions of interest and the retention money.

Buchanan, J., remarked that the question of the retention money was raised by the defendant.

Mr. McGregor said that he would not say anything on the question of damages, as it was perfectly clear they could not be claimed. The question of forfeiture still remained open, as the Court had made no order on the point.

[De Villiers, C.J.: It will be sufficient to say that no evidence can be led which is inconsistent with the actual judgment of the Court.]

Mr. Searle: We do not say the agreement was contained in the letter.

[De Villiers, C.J.: Why didn't you go on with the appeal?]

The time has passed now, because security was not lodged in time.

[De Villiers, C.J.: I daresay the Privy Council would give you leave to appeal.]

I contend that the effect of the agreement between plaintiff and the Commissioner was to prevent the Government setting up the plea of *res judicata*.

[Buchanan, J.: You say you have got an undertaking from the Government, and that, in consideration of that undertaking, you gave up your appeal,

Now you have to prove what that undertaking was.]

Mr. McGregor said the Government denied that there was any such agreement. The Government was quite indifferent as to whether there was an appeal or not.

Mr. Searle said that if the plea of *res judicata* were held to be good this question of damages would have to fall.

[Buchanan, J.: Do you say the new agreement allows you to go into the question of damages.]

Mr. Searle: Yes. Our position is that we said to the Government: "If you want us to abandon this appeal you must enable us to argue the case before the Supreme Court *de novo*."

[Buchanan, J.: Where do you say it was agreed to start *de novo*? In the letters?]

Yes.

[De Villiers, C.J.: There is nothing in the letters in the remotest degree suggestive of any such agreement.]

Mr. Searle contended that it was the intention of the parties that there should be no plea of *res judicata*, and that plaintiff would never have agreed to give up his right to appeal unless he had understood that the Government had waived its right to plead *res judicata*.

[De Villiers, C.J.: The former judgment of the Court stands, and no evidence inconsistent with that judgment can be admitted.]

Benjamin Theodore Tompkin, accountant, in the employ of the Grand Junction Railways, said he had prepared an account showing the interest on this section of railway. The interest was £6,318 9s. 7d. on the London expenditure, and £10,344 3s. 2d. on the Cape expenditure. The witness also produced a statement showing that according to the Government statement of work done, £166,900 odd had been paid, from which had to be deducted £17,000.

Mr. Searle said he wished to put this in to show that a third of the value of the work had been completed, it being agreed that a third of the retention money should be returned upon a third of the work being completed.

Cross-examined by Mr. McGregor, the witness said that the £166,900 included advances made on account of material which had not yet been put into the work. In regard to the interest witness had taken the cost of material, wages, etc., and the amount paid by Government and taken the interest on the difference.

By the Court: The rate of interest was 6 per cent.

Arnold Frank Hills, the plaintiff, said he claimed interest as portion of the actual cost. This was a line the Grand Junction Railways were constructing for themselves as owners, receiving a subsidy from Government. It was necessary to raise considerable capital; he had per-

sonally found over £400,000. He had built railways in England, and abroad.

Mr. Searle asked the witness whether it was the custom of commercial men to regard interest as part of the cost of work.

Mr. McGregor objected, contending that it was not pleaded that this was a custom, and that the Court would not admit evidence going to show that interest was due under a custom.

Mr. Searle contended that a reasonable rate of interest should be included in the cost. He would be able to call evidence to show that commercial men always regarded interest as part of the outlay on a work.

[De Villiers, C.J.: The point is whether interest was part of the actual cost. There must be some reason for the use of the word "actual."]

Mr. Searle said he would put the question to the other witnesses in that form; whether it was the custom to regard interest as part of the actual cost.

Mr. McGregor urged that this could not be done unless it were pleaded that interest was part of the actual cost. He contended further that if interest were to be regarded as part of the actual cost, the same view should apply to the amounts advanced by the Government.

[De Villiers, C.J.: If the objection be insisted upon the Court will have to allow it, but it is a question for counsel for the Government to consider whether he should not allow the evidence to go in for what it is worth.]

Mr. Searle argued that he had a right to show by expert evidence that interest was what was called "prime cost."

[De Villiers, C.J.: The contention is that it was part of the actual cost. Supposing the contractor was to borrow at a high rate of interest, would the employers be bound to pay that rate?]

Mr. Searle said that only a reasonable rate of interest was payable. Interest would be on the same principle as bank exchange, which was allowed by the arbitrators.

[Buchanan, J.: Bank exchange would rather start on the same footing as freights on goods.]

Mr. McGregor said that the question was either one of interpretation, in which case the Court must decide it or it was one of custom, which ought to have been raised on the pleadings, and this had not been done. If interest was reckoned on the expense, it ought to be on the subsidies.

Mr. Searle said that the Government had specially reserved the question of interest in the agreement.

[De Villiers, C.J.: If the question of interest being considered as actual cost is objected to, the objection must be allowed.]

Mr. McGregor said that he would not press the objection.

[De Villiers, C.J.: Then the question may be asked by consent, and Mr.

Searle must show that interest was part of the actual cost.]

Mr. Searle (to witness): Did you consider interest as actual cost?

Witness: The only case in which I came across the expression actual cost was in the contract. I carefully considered the meaning of it, and I for one certainly thought that interest was included in the words "actual cost."

The deductions made by the referees over all the contracts amounted to over £155,000. He had been appointed receiver of the Grand Junction Railways, Limited, by the English Courts. The Mosel Bay-George line was an economically constructed and a well-constructed line.

[De Villiers, C.J.: Quite irrelevant.]

Witness cross-examined by Mr. McGregor: The most difficult part of the line still remains to be constructed, for the reason that we cannot go on with the work.

Sir Lewis Lloyd Michell said that for many years he was general manager of the Standard Bank, and had been engaged in financial work for forty years. He considered that "actual cost" certainly included a reasonable interest. What a reasonable rate of interest would be depended on various circumstances. Under ordinary circumstances, he would consider 5 or 6 per cent. a reasonable rate.

Cross-examined by Mr. McGregor: Witness believed the term "actual cost" was a recognised term in commercial circles. He thought it was a phrase which had a recognised meaning. He certainly attached to the words the meaning that the actual cost should include a reasonable interest.

In reply to a question by the Court as to whether a corresponding interest on the amounts advanced by the Government should be allowed, witness said he thought an interest account should be made out.

Harry Gibson, incorporated accountant, stated that in his opinion actual cost included interest. He had taken this view in a case some years ago, in which he had to deal with the words "actual cost."

John Edwin Paul Close, incorporated accountant, gave similar evidence. He had charged interest as part of the actual cost when he submitted the cost of the Cape Flats Railway, and this was placed before the Select Committee, and dealt with on this basis. Witness would take actual cost to mean the cost to a man.

[De Villiers, C.J.: He did not think that "actual cost" was used as a technical term indicating a definite meaning.]

Mr. Searle said that he wished to call Mr. Pauling, but unfortunately he was not present just then. The only other evidence which he proposed to lead was evidence as to the fact that the Govern-

ment had sustained no damages owing to the non-completion of the line. This might perhaps be better given after the defendant had made his case. Subject to the right to call this evidence, he closed the case for the plaintiff, after having put in the correspondence.

Mr. McGregor said that he did not know if it was necessary for him to call any witnesses, except as to whether the sum claimed by the Government was as penalty or by way of liquidated damages. In view of the wording of the Act, he contended that it must be regarded as liquidated damages.

[De Villiers, C.J.: Have you no evidence of what "actual cost" means?]

I am quite content to accept the interpretation of the Court.

Mr. Searle said that if the Government produced no evidence as to damages, it was not necessary for him to call rebutting evidence. The two points then in dispute were the question of interest and the matter of the retention money, of which the latter was by far the more important. Interest would be included by the contractor on the actual cost and not in the profit. Interest was allowed by the Durbanville Railway Act (section 21, Act 7, 1903), and in the last Cape Central Railway Act (section 20, Act 2, 1903). The most recent Canadian Act for the trunk line across Canada assented to last year also allowed interest which was quoted by way of illustration. Actual cost was the expression used in the Act, but the word generally used was "cost" (*Encyclopaedia of Accounting*, p. 263), which included all the indirect and incidental expenses in addition to "prime cost." With regard to the question of the retention money, the Government was not entitled to that money. Section 16 of the contract of the Mossel Bay-George line embodied in Schedule 1, Act 19, 1900, provided for a forfeiture, and not for anything in the nature of liquidated damages. The matter of penalty was discussed in the *Capetown Town Council v. Minder* (6 Juta, p. 410), where the Court held that the penalty could only be imposed when damages were proved. Counsel also quoted *Fort* (45, 1, 13). The fact that the penalty was stated to be so and for liquidated damages did not prevent the Court from going into the question of the extent of damages as was held in *Hansen and Schrader v. Deane* (3 E.D.C. Report, p. 36), and in *Hendrick and Soeker v. Atkins* (13 C.T.R., 517). Counsel also quoted a large number of English decisions going on the same principle. In the present case no evidence whatever of damages had been given. And in the contract, the retention money was always referred to as a security or guarantee fund. Taking the Government's own figures, work to the value of £168,000 was done and the whole work was £500,000, and the retention money

was to be paid when one-third of the work was done.

[De Villiers, C.J.: This money is only security. If the Government take the line, the security falls to the ground.]

Mr. Searle said that that was his contention.

Mr. McGregor said that Section 9 of Act 19 of 1900 provided that the schedule attached should be taken as if embodied in the Act, and should therefore be subject to the same canons therefore be subject to the same canons of interpretation. As to the interest, there was the decision given in the previous case on March 6, where the same question of actual cost arose and the Court then distinctly held that interest formed no part of the actual cost. None of the witnesses produced for the plaintiff had been able to say that any technical meaning was attached to the words "actual costs," or what they definitely meant.

The plaintiff had entirely failed to prove that he had suffered damage by the plaintiff in the taking over of the railway line from Mossel Bay to Oudtshoorn, or that the expression "actual cost" included the interest paid on money borrowed by the contractor for the building of the line. Not a single case was adduced to show that the expression "actual cost" had been judicially considered, which one would have expected if the term were an ordinary and recognised business term. Counsel contended that the provision made for the payment of the interest in Section 21, Act 7 of 1893 (the Durbanville Act), rather strengthened his case than made against it. The point had already been before the Court under exactly the same circumstances, and the Court had held with the defendant and not the plaintiff. As to retention moneys—

[De Villiers, C.J.: Before you enter on that point, I wish to point out that when the work was completed to the value of one-third, the retention money ought to have been repaid, and no evidence has been led to show that one-third of the work has not been completed.]

Mr. McGregor said that the Government Engineer must certify as to the value of the work. He proposed to call Mr. Tippet, the chief resident engineer on the work.

Mr. Searle said that he was going on Mr. Dalton's letter, and Mr. Dalton was the Government Engineer according to the interpretation clause of the Act, which specified that the Government Engineer should be the engineer-in-chief.

Mr. McGregor then called

Allen Grant Dalton, who stated that he was the Assistant Engineer-in-Chief. He was acquainted with the Mossel Bay-Oudtshoorn line, of which Mr. Tippet was the chief resident engineer. In his

opinion one-third of the total value of the work was not even yet done.

Mr. Searle said that the procedure adopted was most extraordinary. He had put Mr. Dalton's figures to his own witnesses, and not a single word of cross-examination had been directed to this point by counsel for the defence.

Witness, cross-examined by Mr. Searle, said that the figure £169,000 included nails, sleepers, and other material. His report of the whole cost in April was about £500,000, and that then £134,000 worth of work was done, and since then, on the same basis, the extra amount of £33,000 had been done.

[De Villiers, C.J.: Really the only question now is whether the rolling-stock should be included in the valuation.]

Witness, re-examined by Mr. McGregor, said that he could only give the certificate for the purpose of the return of the retention money, which could only be given on the basis of what was actually worked into the construction of the line. The value of the rolling-stock was about £42,000.

Mr. McGregor (resuming his argument) said that the question of retention money was decided in the case of *Jones v. St. John's College* (41, Law Journal, 6 Q.B., p. 115), which was very similar to the present case. Time in both cases was of the essence of the contract. The £10,000 deposited with the Agent-General was claimed by the Government under the direct provisions of the contract. Only £4,900 of the retention money arose out of the Mossel Bay—Oudtshoorn line; the larger sum of £70,000 arose out of the other two lines, which had been taken over by the Government. The Legislature had dealt with these three lines as one system, and doubtless for sound reasons had bound up the retention money of the other two lines with the completion of the Mossel Bay—Oudtshoorn branch, so that although the amount seemed large under the circumstances, the Legislature had made it so on account of the importance of the line to the system. One-third of the retention money might be paid over on the completion of one-third of the work, and one-third of the work had not been completed. Consequently the time for payment not having arrived, and as it was now impossible that it could arrive owing to the Government having taken possession of the line under the judgment of Court, the retention money could not possibly be paid over.

[De Villiers, C.J.: What authority is there for saying that a contract embodied in a statute ought to be construed differently from any ordinary contract.]

Mr. McGregor quoted the case of *The Manchester Ship and Canal Co. v. The Manchester Race Co.* (Chan-

cery Division, 1901, vol. 2, p. 39), and the decision on appeal to the House of Lords, in which the principle was definitely laid down. In *Ranger v. The Great Western Railway Co.* (5 H.L., 22) it was held that where the quantum of damages could not be exactly determined a sum agreed upon for security for the non-performance of a contract was to be regarded not as a penalty, but as liquidated damages. Counsel distinguished between the cases quoted on the other side, viz.: *Cape Town Town Council v. Linden*, and *Hanson and Schrader v. Deare*, and the present case. It would be impossible from the very nature of this case to give specific evidence of damage, and therefore the liquidated damages specified by the statute should be enforced. It had been said that the Government had never approved of the Oudtshoorn-George route. There might have been some shadow of an argument in this if the Mossel Bay-Oudtshoorn line had been completed. But that section was never completed, and consequently the work had not been hindered by the failure to approve.

[De Villiers, C.J.: Before you finish your argument, I ought to direct your attention to the question of the retention money being deducted from the Mossel Bay-Oudtshoorn line.]

Mr. McGregor said that the larger sum of retention money was held back from the amount of the other contracts.

[De Villiers, C.J.: How then can the sums on the other lines be claimed for in reconvention?]

Mr. McGregor said that they only claimed to be entitled to the moneys already in their hands.

Mr. Searle, replying on behalf of the plaintiff, said Section 7 of the Act referred to cost of material as being part of the value of the work done. He wished to refer specially to the sum of £116,000. The point had been raised that Section 9 of the Act placed this contract on a different footing, from other contracts, and he did not think that the case of *The Manchester Ship Canal Co.* helped the other side. In the case of *The Sevenoaks and Maidstone Railway v. The London Chatham and Dover* (11 Chancery Division, p. 625), it had been laid down that an Act of Parliament only validated a contract to the extent that if any reasonable construction could be placed upon it, it could not be held void for uncertainty. But how did that help the Government in this case, in which there was no doubt as to the construction to be placed on the language of the contract. The contract must be construed as a contract. Parliament approved of it as a contract and because Parliamentary notification was stipulated for, it could not be argued that Parliament did anything more than validate the contract.

[De Villiers, C.J.: The language of the Act was that the schedules were to have the same force and effect as if embodied in the Act.]

If they had been inserted in the body of the Act, they would still have remained contracts. The English authorities might be useful as to the question of penalty or liquidated damages, but the whole question must be decided by the Roman-Dutch Law. The case of *Flazmore and Co. v. The Langlaagte Mining Co.* (16 Cape Law Journal, 57), laid down the principle that damages must be proved, and the defendant has admitted that no damages could be proved except the salaries of the inspecting engineers. The decisions in *Steyler v. Smuts* (1 Menzies), and *Otto v. Latagan* (9 Juta, 250) were on the same principle. As to the argument that damages were recoverable on the ground of public utility, Section 18 provided that if the line was not being properly worked, Government might take over the line and be awarded damages not exceeding £25,000. How could any larger sum be claimed in face of this provision?

(Cur. Adv. Fult.)

Postea (February 29):

De Villiers, C.J.: The plaintiff by this action claims (1) an order that he is entitled to recover from the defendant, as Commissioner of Public Works, the amount of actual cost incurred in the construction of the railway line from Mossel Bay to Oudtshoorn; (2) an order referring the ascertainment of such actual cost to referees; (3) an order that the plaintiff is entitled as part of the actual cost to interest which he has lost by reason of expenditure of capital on the said line, and also to interest which he has paid or become liable to pay for moneys borrowed by him for the construction of the line; (4) return of the sum of £50,000 lodged by the plaintiff with the Cape Agent-General as security for the completion of the line; (5) payment of the sums of £4,913 2s. 5d., and £70,689 14s. 5d., held by the defendant as retention money for the completion of the said railway line, as well as two other railway lines; and (6) damages alleged to have been sustained by the plaintiff by reason of the defendant having entered upon and taken possession of the Mossel Bay-George line, and thus prevented the plaintiff from completing the line. The agreement for the construction of the line was entered into on the 4th of July, 1900, between the then Commissioner of Public Works and the Thames Ironworks and Shipbuilding Company, and the defendant admits that the plaintiff has acquired by cession, with the sanction of the Cape Government, all the rights of the company in respect of the said agreement. The defendant admits also that he did enter upon and take possession of the incomplete line, which he justifies on the

ground that, as the plaintiff had failed to complete the line within the time required by the 17th clause of the agreement, this Court by its order of 15th June, 1903, gave him the requisite authority to enter upon and take possession of such incomplete line. The defendant raises no objection to the first claim, and as to the second claim an order was made by this Court on the 20th of November referring the ascertainment of the "actual cost" of the work done to certain referees, whose report has been submitted to the Court. The defendant denies that "actual cost" includes interest, or that he is bound to return the deposit of £50,000 or pay any portion of the retention money, and, by his claim in re-convention, he asks for judgment not only for the amounts of the retention money and of the deposit, but also for the sum of £10,000 to be forfeited under the 16th clause of the agreement. The question whether interest should be included in the amount of "actual cost," was considered in the case between the same parties relating to the two other lines of railway, and I see no reason for departing from the view there taken. That was the case of a contract with an ordinary contractor, whereas the agreement now in question was with a concessionary undertaking to construct a railway in consideration of a subsidy to be paid to him, but that is no reason for giving a different interpretation to the words in question. Evidence was tendered, and not objected to that the term "actual cost" would in commercial dealings be regarded as including interest, but no definite instance was mentioned in which this interpretation was accepted. The witnesses did not appear to me to give sufficient effect to the limitation introduced by the word "actual." Moreover, the meaning of the phrase must be collected from the terms of the agreement, and not from the opinion of expert witnesses. Under the 7th clause, "the amount of actual cost incurred in respect of the construction of any section of the line shall be ascertained either by the certificate of the Government Engineer or in such other manner as the Governor shall approve, and the total amount of the subsidy shall be computed upon the actual cost of the construction of the entire line, including the cost of such bridges, culverts, tunnels, stations, or other fixed appurtenances of the line, as the Governor may approve. All books, vouchers, drawings, and other documents relating to the construction of the line, whether in the possession of the concessionary or of their contractor, for the purpose of checking the cost of materials or work done, shall be available at all times for inspection by the Government Engineer, or by any other duly-authorised officer." In thus specifying the particular manner in which the actual cost should be ascer-

tained, it is significant that the agreement does not say a word as to interest on the cost of construction, and the whole tenour of this and other clauses relating to the actual cost satisfies me that the parties intended to include no more than payments actually made for materials used and work done by the concessionary. Before considering the question whether the plaintiff has forfeited his right to claim the retention and deposit moneys, it will be convenient to consider the last of the plaintiff's claims, namely, for damages. The plaintiff alleges that the defendant illegally took possession of the line, but he does not claim to be reinstated in the possession, so as to enable him to complete the contract. The defendant did not take possession of the line until he had been thereto authorised by the Court, and that authority was given upon evidence which satisfied the Court that the plaintiff was wholly unable or unwilling to complete the work which he had undertaken to construct. By the 17th clause of the contract, the concessionary undertook "to push forward the construction of the line with all convenient speed, and to complete the same within two years of the date of the approval of this agreement by Parliament." The clause then proceeds thus: "In the event of the non-completion of the line within the time hereinbefore mentioned, unless the delay is proved to the satisfaction of the Commissioner of Public Works to have been caused by the act of God, war, insurrection, rebellion, strikes, lock-outs, or combinations of workmen, or other extraordinary or unforeseen circumstances, beyond the control of the concessionary, or from or on the part of the Railway Department, the security referred to in this agreement, to wit, the 10 per cent. retention money under the agreement, together with the 10 per cent. retention money under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town lines, and the security lodged with the Cape Agent-General shall be forfeited to the Colonial Government as and for liquidated damages sustained by the said Government for the non-completion of the said line, and thereupon the agreement between the Government and the said concessionary shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of such incomplete line of railway as has been constructed by the said concessionary, and the Government shall thereafter, as soon as the amount of the actual cost of such incomplete line shall have been ascertained, pay to the concessionary the amount so ascertained less such amount as shall have been paid on account of subsidy, and less the amount of retention money and security hereinbefore referred to." According to the evidence given on the previous

application, the line was not completed within the time agreed upon, but owing to the disturbed state of the country an extension of time was offered to him, which, under the circumstances, seems to have been perfectly reasonable. He refused to avail himself of the offer, and the defendant, in the performance of the duties which he owed to the public, obtained from the Court authority to enter upon the incomplete line. The plaintiff gave notice of appeal against the order, but subsequently withdrew the appeal in consequence, as he states, of a fresh agreement entered into between him and the defendant. The fresh agreement is said to be embodied in a letter written by the defendant to his attorneys, and by them communicated to the plaintiff. In that letter the defendant expressed his willingness to submit the matter of the actual cost of the work done by the plaintiff to the same referees who had decided the previous dispute between the parties, it being understood that the questions of forfeiture, interest, retention, deposits, and other differences were not to be affected by the fresh agreement. The offer appears to have been accepted, and the reference was made to the referees by consent of the Court. The plaintiff now, whilst taking the benefit of the agreement so far as it allows him to obtain payment of the actual cost to be ascertained by the referees, claims the right to damages on the ground that the defendant illegally took possession of the line. The claim is wholly inconsistent with his previous conduct, and at variance with the express order of Court, placing the defendant in possession of the line. The appeal against that order has been withdrawn, and the claim for damages being inconsistent with the order of Court, cannot be allowed. The claim for payment of the retention moneys and for a refund of the security lodged with the Agent-General stands on an entirely different footing. In the contracts relating to the two other lines already referred to, the following clause appears: "The Government shall be at liberty to retain 10 per cent. on all the above payments to the contractors as a guarantee fund, such retention to be credited to the contractors and taken into account on final settlement, but subject to the terms as regards retention moneys set forth in the contract for the construction of the Mossel Bay-Oudtshoorn line." Under the heading "General Conditions," the following clause appears: "As security for the due performance of this contract, a sum equal to 10 per cent. of the amount of every certificate will, subject to the provisions of the contract, be deducted therefrom. Such deductions will remain in the hands of the Government as a guarantee fund, to be applied in terms of the agreement for the construction of the Mossel Bay-Oudtshoorn line." Coming next to the last-men-

tioned agreement, we find that by the 6th and 14th clauses the Government is allowed to retain 10 per cent. of the authorised subsidy as part security for the due construction and completion of the Mossel Bay-Oudtshoorn line, to be paid to the concessionary upon the completion of the line to the satisfaction of the Government Engineer. As to the retention moneys of the two other lines, they are placed on exactly the same footing as a certain sum of £50,000 which had been lodged as security with the Agent-General in London. The 15th clause provides that such security, together with the retention moneys of the two other lines, shall be dealt with as follows: Upon the completion of one-third of the actual value of the total work of the Mossel Bay-Oudtshoorn line, one-third is to be paid; upon the completion of two-thirds of the line, a further third is to be paid; and on the completion of line throughout, the remaining one-third is to be paid. In fact, not even one-third of the line has been completed, and the important question arises: what is to be done with the large sums of money in the hands of the Government by way of security? The answer given by the defendant is that the moneys, having been forfeited to the Government under the 17th clause which I have already read, may be retained by him. The answer given by the plaintiff is that the defendant, having taken over the line at actual cost, should pay such actual cost, and that, although taken in its literal sense, the 17th clause would appear to create a forfeiture, yet, when read with the remaining clauses of the contract, and by the light of the ordinary rules of our law relating to the recovery of penalties for breaches of contract, the penal portion of the clause is inoperative, except in so far as it allows the Government to take possession of the incomplete line on payment of actual cost. It is singular that in the contracts relating to the construction of the two other lines no penalty is provided in case the Government should have to take over the lines at actual cost price, although these lines were to be constructed for the Government by the contractors. The retention money was left to be dealt with in connection with the Mossel Bay-Oudtshoorn line, which is a subsidy line, that is to say, the contractors were really concessionaires, who for constructing a line for themselves were to receive a subsidy from the Government. No question arises in the present case as to damages sustained by the Government by reason of the plaintiffs failing to complete the two other lines. In the previous action between the same parties the plaintiff obtained judgment for the amount of actual cost of those lines, but from the amount of such actual cost as ascertained by the referees was deducted the amount of retention

money of those lines to be dealt with in connection with the line now in question. In support of the claim for a forfeiture the defendant's counsel mainly relied upon the 9th section of Act 19. of 1900, which not only confirmed the contracts, but enacted that they should have the same force and effect as if they had been set forth fully in the body of the Act. Among the contracts thus confirmed was the agreement now in question. That agreement contained clauses which had not been authorised by the two previous Acts relating to the construction of the railway, namely, 28 of 1895 and 40 of 1898, and it therefore became necessary for the legislature to confirm the agreement in order to render its clauses operative. The object of the legislature in confirming the agreement in such comprehensive terms appears to be to have been to make it perfectly clear that the agreement must be carried out in all its details. The object of the legislature could certainly not have been to defeat the intentions of the parties as embodied in the whole agreement, and, therefore, in construing the 17th clause of the agreement, the important question to be determined is what rights the parties themselves intended to be conferred on the Government. The English case of the *Manchester Ship Canal Company* (2, Ch. Div., 1900, p. 352), which was relied upon by the defendant's counsel, is really not in point, for there the question to be decided was whether an important clause of the statutory agreement was wholly void for perpetuity as well as uncertainty. A case which is more in point is that of *Queen v. Midland Railway Company* (19, L.R., Q.B.D., 540), where the question arose as to the effect of a provision in an Act of Parliament whereby an agreement set out as a schedule to the Act was "confirmed and made binding" on the parties thereto. The Court of Queen's Bench held that a clause of the agreement which provided that all questions of difference should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, did not confer jurisdiction on the Railway Commissioners to undertake an arbitration upon differences arising between the parties. The ground of the decision was that the object of the confirmation of the Act of Parliament was merely to give statutory validity to an agreement which without such confirmation would not have been valid. In both these cases the previous case of the *Caledonian Railway* (L.R., 2, "Scotch Appeal Cases," 347) in the House of Lords, was referred to. The question there was whether the jurisdiction of the Courts had been excluded by a clause in an agreement, confirmed by the legislature, that all disputes arising under it must be settled by arbitration. But the terms in which the agreement was confirmed by the legislature in that case were different from the language of our own Act, "The said agreement shall be,

and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company respectively, as if those companies had been authorised by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this Act." The Lord Chancellor (Lord Cairns), after reading these words, said: "Up to this point the enactment does no more than give statutory validity to the agreement, but the clause proceeds in these words: 'And it shall be lawful for the company and the Caledonian Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained.' Now, my lords, I apprehend it to be clear beyond the possibility of argument, that when an agreement between two companies, who are coming for an Act of Parliament is scheduled to the Act of Parliament, and when an enactment is found in the body of the Act, that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections." In the present case the obligatory nature of the stipulations is not denied, but the question is raised whether the parties intended the ordinary rules of construction to be applied to the 17th clause of their agreement. The presumption is that the parties did so intend, and the clause itself contains no indication of a contrary intention. The subsequent clause, however, shows that the parties bore in mind the ordinary rules of our law regarding the recovery of penalties for breaches of contract. Under the eighteenth clause, the concessionary was to be liable to a considerable payment in case of his failing to maintain the line when completed, in a proper and efficient manner, to the satisfaction of the Government, and the clause then proceeds thus: "It is hereby expressly stipulated and agreed that the payment hereinbefore provided for shall be as and for liquidated damages sustained by the Government, and shall not be considered to be in the nature of a penalty, or subject to the ordinary rules regarding the recovery of penalties for breaches of contract." If a stipulation similar to this had been added to the seventeenth clause, it would have been clear that the parties intended to exclude the operation of the ordinary law, and the Court would have been bound, after the ample confirmation of every detail of the agreement by the Legislature to give effect to their intention. The absence, however, of such a stipulation from the seventeenth clause goes far to support the view that the parties intended the ordinary law to apply to the construction of that

clause, as well as to the enforcement of the penal stipulations therein contained. If then such was the intention of the parties at the time of the agreement, can it be successfully contended that their intention was defeated by the subsequent statutory confirmation of the agreement? The terms of the ninth section of the Act, comprehensive though they be, would not justify the Court in applying different rules from those which would have been applied if the agreement had not been confirmed. The confirmation was necessary, for, as I have already observed, the Government had no authority under the previous Acts of Parliament authorising the construction of the lines in question, to enter into the agreement as finally adopted. The Legislature accordingly confirmed the agreement, and enacted that it should have the same force and effect as if it had been fully set forth in the body of the Act; but the ordinary rules for the construction of contracts, and for the enforcement of penalties for breaches of contract, upon the basis of which the parties contracted, are not on that account excluded. That the provisions of the seventeenth clause of the agreement are of a highly penal nature does not admit of any doubt. Under the 52nd Clause of the contracts relating to the two other lines, the retention moneys have been deducted from the amount of the actual cost awarded to the plaintiff. Under the seventeenth clause of the agreement now in question, not only the retention moneys, but the security of £50,000 lodged with the Agent-General are forfeited as liquidated damages, and, if the concluding portion of the clause is taken in its literal sense, the retention moneys must be again deducted from the actual cost of the line now in question, and the £50,000 must be also so deducted. The result would be that whilst the plaintiff would receive nothing for actual cost, he would forfeit the whole amount of the retention moneys and security, amounting in all to more than £110,000. The question then arises whether these penal stipulations should be construed in their literal sense or confined in their operation to the damages actually sustained by the Government. The practice of securing the performance of obligations by means of penal stipulations was well established and recognised in the Roman law. The practice led in many cases to great hardship, and to contradictory decisions as to the extent to which such stipulations should be enforced. To remove all doubts as to the principles which should be followed in the enforcement of penalties, Justinian issued a law, the essential portion of which reads as follows: *Sanctum in omnibus casibus qui certam habent quantitatem rei naturam, veluti in renditionibus et locationibus et omnibus contractibus, hoc, quod interest dupli quantitatem minime excedere; in*

alteris autem casibus, qui incerti esse videntur, iudices, qui causas dirimendas suscipiunt, per suam subtilitatem requirere, ut quod reus inducitur damnum, hoc redatur (Cod., 7-47-1). Groenewegen in his commentary on this law remarks that it opens up a wide sea upon which few writers have embarked without peril, and that twenty-five different explanations of the law have been given by as many different commentators. His own view is that a penal stipulation is not subject to the rule limiting the amount of damages to double the value of the thing which was the object of the primary obligation. On the other hand, he is equally clear that the amount which can be claimed under a penal stipulation is not unlimited, and that such amount is subject to reduction by the judge in the exercise of his judicial discretion. He cites Dumoulin as his chief authority in support of this view. Pothier also (oblig., n. 345) accepts the opinions of Dumoulin as correct, and adds that it would be contrary to equity "that the creditor should enrich himself at the expense of the debtor by acquiring from him a penalty too excessive and manifestly beyond the damage which he has suffered from the non-performance of the primary obligation." Bynkerhook (Qu. Jurs. Priv., 2, 14), on the other hand, considers that Dumoulin's treatise increased the obscurity of the law, and that if his lessons were followed the work of the Law Courts would be still further increased. In the end, however, his conclusions do not greatly differ from those of Dumoulin, and he shows from decided cases in Holland that where a penalty is stipulated for which greatly exceeds the damages sustained by the stipulating party, the penalty would not be enforced. In the case of *Cape Town Town Council v. Linder* (6, Juris, 410), the remark was made by myself that there is a strong disinclination in our law to allow one person to be enriched at the expense of another, and that where a stipulation of this nature is inserted in a contract, the Court will carefully inquire whether it has been inserted as a penal stipulation or as compensation for damages. In that case the amount of £500 claimed was clearly intended as a penalty, but nothing that fell from the Court would justify the view that if the same amount had been made claimable by way of compensation, or as liquidated damages, the Court would have been bound to award it. The objection of our law to the inequitable enrichment of one person at the expense of another exists whether the means through which this is sought to be done be called a penalty or forfeiture, or compensation. Where the payment is stipulated to be made by way of compensation, the presumption is that it was intended as the measure of damages agreed upon for breach of the obligation, and the payment would be enforced unless the amount were manifestly out of all proportion to the damages really suffered, or the inconvenience actually undergone. Where the amount is fixed by way of penalty or forfeiture, no such presumption exists, and the payment would not be enforced unless the amount manifestly represented the measure of the damages actually sustained. I have not referred to the law of England, because the cases there decided are not so consistent with each other, or with the principles of our law as to afford clear guidance for the decision of a case like the present. According to Story (Eq. Jurisprudence, 1,317), "it is not improbable that Courts of Equity adopted the doctrine of relief in cases of penalties and forfeitures from the Roman laws," and he adds that, "penalties were in that hard treated altogether, as in reason and justice they ought to be, as a mere security for the performance of the principal obligation." The Courts of Common Law also in course of time followed the practice of the Courts of Equity. In the case of *Hetta v. Bunlo* (4 H., and N. 511), heard in the Court of Exchequer, Bramwell, B., said: "It seems as if, by some singular instinct, the Courts have been right, though without referring to the Statute by which they ought to have been governed. I believe that the reason is that the judges have considered when equity would have relieved. I agree with most of the cases. The words, 'liquidated damages,' or 'penalty,' are not conclusive, as to the character of the sum stipulated to be paid, for if the whole agreement is such that the Court can see that the sum is a penal sum, it must so be treated. On the other hand, if it is not a penal sum, it would be incorrect to treat it as a penalty merely because it is so-called in the agreement." In the case of *Dimech v. Corlett* (12, Moore, P.C.C., 199), Coleridge, J., in delivering the judgment of the Judicial Committee, said: "The law of this country on the question of penalty, or liquidated damages, may now be considered, after a great number of decisions, not perhaps all of them strictly reconcilable with each other, to be at length satisfactorily settled, and the hinge on which the decision in every particular case turns is the intention of the parties, to be collected from the language they have used. The mere use of the term 'penalty,' or the term 'liquidated damages,' does not determine that intention, but, like any other question of construction, it is to be determined by the nature of the provisions, and the language of the whole instrument."

In the present case the sum of £50,000 lodged with the Agent-General, as well as the retention money, is expressly stated to be held as "security" for the performance of the principal obligation, namely, the completion of the line. The defendant, taking advantage of the plaintiff's failure to complete the line within the proper time, took possession

of the incomplete line, and thus prevented him from completing it. In so doing the defendant acted well within the rights conferred on him by the agreement, but it does not follow that, without proof of damages, he is entitled to a forfeiture of moneys held by him as "security" or as a "guarantee fund" for the completion of the line. He claims the right to retain the moneys on the ground that they have been "forfeited to the Colonial Government, as and for liquidated damages sustained by the said Government for the non-completion of the line." It is difficult, however, to see what damages the Government could possibly have sustained by reason of the non-completion of the line. The plaintiff was not a contractor for the construction of the line on behalf of the Government, but he was a concessionary who obtained the right to construct the line on his own behalf, and, in consideration of the benefit expected to accrue to the public from the line, was to receive a subsidy from the Government. The non-completion of the line caused no pecuniary or other loss or damage to the Government. The only loss suggested from the bar to have been sustained by the Government was the payment made to its Engineer for the supervision of the construction, but that can hardly be regarded in the light of damages by reason of the non-completion of the line. Even if some damages were sustained by the Government, the amount of the forfeiture appears to me to be wholly in excess of any such possible damages. If this case had arisen between two parties in their individual capacity the Court would have been bound to reduce the amount of the penal stipulation to its proper limits, and the fact that one of the parties to the suit represents the Colonial Government does not alter the duty of the Court. There is really no proof whatever of any damages having been sustained by the Government. The defendant has obtained possession of the different lines constructed by the plaintiff without including in such cost any wasted expenditure or interest lost or paid by the plaintiff. From the amount awarded to the plaintiff in respect of the actual cost of the Klipplaat and Somerset East line has been deducted the amount of the retention money of both these lines. To allow the plaintiff now to retain the security of £50,000 and the retention moneys, amounting to over £66,000, would be contrary to the rule that a penal stipulation should not be enforced for an amount which is manifestly in excess of the damages actually sustained. The plaintiff must therefore succeed in his claim for the amount of actual cost as found by the referees, namely, £73,500 12s. 7d., for the return of the £50,000 lodged with the Agent-General, and for the payment of the retention moneys, namely, £66,146 18s. 7d., with interest from the date of summons and with costs, such costs not

to include costs in connection with the plaintiff's claim for damages, which must be paid by the plaintiff. It follows that the defendant must fail in his claim in reconvention for the amount of the security and retention moneys. As to the defendant's claim of £10,000, under the 16th clause of the agreement the forfeiture was, in the face of it, intended as a penalty for non-completion of certain sections of the line, and in the absence of any proof of damage, he is not entitled to succeed. In this view of the case it becomes unnecessary to consider the further question whether the defendant has waived his rights, if he had any, to claim the amount of the penalty. The result is that the plaintiff will obtain payment only for such amounts as have been actually and beneficially expended on the different lines, without any allowance for interest, loss of profits, or damages. He undertook the construction of works which were beyond his resources, but the penalties sought to be enforced against him would have been quite out of proportion to the loss or inconvenience sustained by the Government. For his failure to complete the lines within the times agreed upon, he has been deprived of the opportunity of making any profits out of his contracts; but it appears to me that the law would not have been in accordance with justice if it had further condemned him to the loss of the large sums retained by or lodged with the Government as a security for the completion of the lines which the Government has elected to take over in their incomplete condition.

Buchanan, J., concurred.

Mr. Upington said that he appeared for the London and Westminster Bank receivers of the partnership, the Grand Junction Railways, to ask that the amount for which their lordships had just given judgment should be paid to them. He noticed that a motion stood in the list on the part of the London and Westminster Bank, who claimed a preference over these moneys. He presumed that any payment made to the receivers would not in any way affect the rights of the London and Westminster Bank.

De Villiers, C.J.: The Court will not make any order as to the payment of the money until it has heard the application of the London and Westminster Bank.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bissett; Defendant's Attorneys: Reid and Nephew.]

[Before the Hon. Mr. Justice HOPLEY.]

GRAHAM V. GRAHAM. { 1904.
Feb. 3rd.

This was an action brought by Annie Elizabeth Graham (born Lloyd) against her husband, Robert Graham, for restitution of conjugal rights, failing that, a decree of divorce.

Mr. Benjamin was for the plaintiff and the defendant was in default.

The plaintiff's declaration set out that the plaintiff resided at Knysna, and the defendant's whereabouts at present was unknown. The parties were married in community of property in Knysna on the 14th September, 1896. There were four children of the marriage, who were still minors. The defendant deserted her about March, 1902, and she did not know of his whereabouts. Failing compliance with the order, plaintiff prayed for a decree of divorce, custody of the children, and forfeiture of the benefits accruing from the community of property.

Charles W. H. Smith, clerk in charge of the marriage record of the Colonial Office, produced a copy of the certificate of marriage between Robert Graham and Annie Elizabeth Lloyd.

Annie Elizabeth Graham (plaintiff) said that until the last year she had lived happily with her husband. The cause of the unhappiness was the intemperate habits of the defendant, who ill-treated her when he was intoxicated. He joined an irregular force in Cape Town during the war, and when he returned to Cape Town, she never heard of him again. The letters she received from him while he was in Cape Town were in affectionate terms.

[Hopley, J.: For all you know, he may be dead?]

Witness: I don't think he is dead, my lord.

The defendant was ordered to restore conjugal rights to the plaintiff by the 5th March, failing which, to show cause by the 12th March why a decree of divorce should not be granted, why the plaintiff should not have custody of the children, and why he should not forfeit his benefits arising out of the marriage in community, the order to be published similar to the previous one. A further order was granted, authorising the Master to pay to the plaintiff £50 out of the moneys at present belonging to the joint estate.

ALLIE AND OTHERS V. { 1901.
PORTER AND BARSDFORF. { Feb. 3rd.
" 4th.
" 11th.

Building loan—Mortgage.

This was an action brought by the plaintiffs to recover from the defendants

the sum of £421 18s. 1d., or to reduce a bond on a certain building of the amount of £1,000 to £579 1s. 11d., and to recover £100 damages incurred by reason of breach of agreement by the defendants.

The declaration set out that the plaintiffs resided at Cape Town, and the defendants at Claremont. About June, 1903, the defendants agreed to give plaintiffs a loan of £1,000 to enable the plaintiffs to complete certain buildings situated at Claremont, for which loan plaintiffs undertook to pay interest at the rate of 6 per cent. per annum, and which was secured by a mortgage bond on the said land and property of the plaintiff. On 6th June, 1903, plaintiff executed a bond in favour of the defendant for £1,000, which bond was thereafter reduced without the knowledge of the plaintiff to £800. Defendants advanced moneys, performed services, and supplied goods to the value of £579 1s. 11d., and they now refused to advance the balance of the bond. Plaintiffs claimed the sum of £421 18s. 1d., being the balance of the bond or for a reduction of it to £579 1s. 11d., and £100 damages by reason of certain accounts for bricks and cement, which plaintiffs challenged, and for accounts incurred through the failure of the defendants to keep the agreement.

The plea set out that the money was not to exceed £1,000, but it was merely a covering bond. The defendants had advanced moneys, supplied goods, and performed services to the amount of £747 6s. 11d. The defendants before trial tendered the balance of £52 13s. 1d., and denied that the plaintiffs had sustained any damages by reason of any act of theirs.

Mr. Benjamin (with him Mr. Buchanan) for plaintiffs; Mr. Alexander for defendant.

Ahmed Allie, one of the plaintiffs in the case, said that with the other two plaintiffs, he bought a piece of land at Claremont in 1902. It was decided to put up two houses, which with the ground would cost £1,400. The three plaintiffs had about £400 between them, and the building was commenced before the bond was executed. Bricks were supplied by the defendant Barsdorf before any loan was secured, and the rate charged then was 73s. 6d. per thousand. Later, accounts were put in for 76s. and 80s. per thousand. Barsdorf said he would lend witness £1,000, and there was nothing mentioned of "if you want it." The total number of bricks put in for the construction was something like 78,000. He was to receive as much of the £1,000 as he required, and the balance when the house was complete. Barsdorf paid the money to the foreman, and not to witness, who had to pay several accounts, and was subsequently threatened with civil imprisonment. He never promised 5 per cent. to the defendants for

buying goods for him. He knew nothing of the bond being reduced from £1,000 to £800.

Cross-examined by Mr. Alexander: He did not know that it was difficult to get money at the time. The two defendants were present when the arrangement about the bond was made. The house cost in all about £1,400. Walker was within hearing of the terms of the agreement. A wall fell down, but the kitchen did not collapse. He used the same bricks to rebuild the wall. He had cashed cheques to pay the workmen from Mr. Barsdorf. Porter was asked through his attorney to settle several accounts in connection with the building, and witness had actually disbursed £558 (which included the purchase price of the ground) on the property. He never agreed to pay 5 per cent. on the amount expended by the defendants, but he could not explain why the amount claimed in the summons, £615 1s. 8d., had been reduced in the pleadings to £579 1s. 11d.

Purdon Smailes, Claremont, said that Porter took twenty casks of cement from him last July at the rate of 14s. 9d. per cask.

Cross-examined by Mr. Alexander: He had paid 19s. for a cask of cement some time previously.

Francis Scott, partner in the firm of W. and G. Scott, said that his firm were fairly large dealers in cement. About 17s. 6d. less 5 per cent. would have been a fair price for English cement in July last, and a shilling less next month.

Cross-examined by Mr. Alexander: A reduction would be made on a purchase of anything over eight casks.

Harry Clifton, builder, Rosebank, said that the bricks of the quality produced would cost 65s. and 60s. respectively, delivered at Claremont.

He considered the market price for cement last July would be about 15s. 6d. per cask, taking 50 casks. The bricks produced were inferior bricks.

John Tully, member of the firm of Tully and Waters, architects, said that he inspected the buildings at Claremont, and estimated the number of bricks in the building, including wastage, to be 63,895.

Cross-examined by Mr. Alexander: He had not allowed for the washaway of the wall. The buildings would have cost about £500 each.

Abdul Solyman, foreman mason, at the works at Claremont, said that he remembered when the foundation was finished. Barsdorf asking him where Allie would get his bricks from, and the former offered to supply the bricks delivered on the spot at 73s. 6d. a thousand. Allie told him to give Barsdorf the order for the bricks. Barsdorf said that he ceased sending bricks because Allie had not paid him and then offered through witness a bond to Allie. Subsequently Allie said he would require £1,050, and

witness brought the plans to Barsdorf. Part of the building fell through excessive rains, but there were very few bricks wasted in taking down a wall.

Cross-examined by Mr. Alexander: His conversation with Mr. Barsdorf took place six weeks before the bond was executed. About 500 bricks were wasted on one wall. When the building was nearly completed, he got ten casks of cement from Mr. Reynolds, and he also received three loads of stone. He had given Allie back £10 out of a wages cheque to pay the carpenters.

Christopher Brady, attorney for the plaintiff, stated that on the 9th September, he wrote to Mr. Porter, claiming £1,000 on a bond. Mr. Barsdorf never denied having received 1,200 bricks, 31 bags of lime, and three casks of cement from the building, and witness understood that they would allow for the articles in the accounts. The tender of £52, which the defendants alleged in their pleadings, was tendered, was never offered to witness.

Cross-examined by Mr. Alexander: His client was an ignorant man, and that would explain why he had not disclosed a certain book in the pleadings.

This closed the evidence for the plaintiff.

Edmund George Barsdorf, one of the defendants, said that when he found the plaintiffs were unable to pay for the bricks the bond was entered into. Allie first wanted a building loan, but defendants agreed on the passing of a bond to supply him with stones, bricks, lime, cement, sand, and pay wages. No prices were agreed upon. The money they advanced to Allie was obtained by overdraft, for which they had to pay 8 per cent. It was agreed that defendants were to receive 5 per cent. for paying wages, and looking after the work. The whole of the arrangement was gone over in Mr. Walker's presence. Witness complained to Allie when the walls fell three times, and the plaintiff replied, "What am I paying you 5 per cent. for? Get it covered up yourself." When Allie had drawn nearly £800, witness told him that the bond would be reduced. Mr. Porter and Mr. Hardy heard the conversation about reducing the bond. The prices plaintiffs were charged for bricks and material were the prices ruling at Claremont at the time.

Cross-examined by Mr. Benjamin: The five per cent. was charged to Allie for keeping the defendants' own accounts. He believed Mr. Porter could produce the invoices of the bricks. He had to draw the foreman's attention to soft bricks in the wall. He was neither an architect nor a builder, but as a "general agent" he inspected the building. The defendants were to supply the material, and pay wages up to £1,000, and when the building was complete the balance

of £1,000 was to be given to the plaintiffs if the bond could be ceded.

Phillip J. Porter, the other defendant, stated that he remembered the interview in May, when an arrangement was made that Allie and the others were to give defendant a covering bond for £1,000, and defendants in return were to supply money for wages, and also bricks, cement, stones, and lime. The 6,500 bricks objected to arrived after April, and were not included in that month's account. In August Allie was told by witness that the bond would be reduced to £800, and at Allie's request to make it £900, the plaintiff said "All right."

Cross-examined by Mr. Benjamin: He only produced vouchers for the items disputed, but he did not think the others were necessary. He had taken a number of tasks off an agent's hands, and retailed them to the plaintiffs at the current rate. The valuation was made with a view to ceding the bond.

John H. Walker, attorney for the defendants, said that he remembered Mr. Barsdorf saying that Porter and himself had agreed to lend the plaintiffs moneys up to £1,000 for the building, and when finished, the intention was to raise a loan, and cede the bond to save expense. The defendants mentioned that the building would roughly cost £1,400, and the plaintiffs were to put in about £400. The material was to be supplied at current local rates. Afterwards, on instructions, he had the bond reduced to £800.

Cross-examined by Mr. Benjamin: He did not put any of these arrangements into the bond.

R. B. Hardy, accountant, said that he remembered Mr. Porter stating that the bond would be reduced to £800, and Allie appeared to agree.

Thos. F. Penfold said that the firm of Ward and Thorpe sold cement in June, July, and August last year, at 18s. 6d. a cask.

Cross-examined by Mr. Benjamin: He would bring the delivery notes from the stores.

Martin H. Greve, Claremont, said the two buildings could be put up for £825. The ruling price for Stellenbosch bricks during that time, delivered at Claremont, would have been about £4 per thousand.

Chas. Weidner, architect, Claremont, estimated the bricks in the buildings to be 63,000, and he would allow for a wastage of 9 per cent. on the red bricks, and 50 on the white. If the whole two stoeps were filled up with bricks, it would take another 6,000 bricks.

Abraham Levitan, Wynberg, said that in July and August last year, bricks from Stellenbosch cost 82s. 6d. per 1,000.

Cross-examined by Mr. Benjamin: About 30 or 40 per cent. of the bricks he purchased were similar to the one produced, and the remainder were of a better quality.

Counsel were then heard in argument on the facts.

Cur. Adv. Vult.

Postea (February 11):

Hopley, J.: This case has presented considerable difficulty, not only by reason of the many contradictions between the witnesses on matters of fact, but also of the way in which the pleadings have dealt with the matters at issue between the parties. The contradictions have been rendered to a great extent possible by the very irregular and unbusinesslike mode of procedure adopted, by men accustomed to transact business, in a matter which should have been conducted on ordinary lines of sense and precedence, and which in that case would probably have ended without dispute or litigation. The state of confusion consequent upon the course pursued is also probably responsible for the state of the pleadings, which do not comprehend to the full the points in dispute between the parties; but I do not think that they are so defective in this respect as to render it impossible to deal effectively with the whole matter. The plaintiffs are three Indian tradesmen, who reside and carry on business in Cape Town, and who seem to have combined about April last to purchase a building lot on the Sans Souci Estate, at Claremont, on which they proceeded to erect a house. After they had paid for the ground, their available capital consisted of £400, or, at all events, they represented that they had that sum in hand, and would spend it in the building, which, however, was designed to cost a considerably larger amount. They procured stone and laid the foundations, and then obtained on credit bricks from the defendant Barsdorf, who is a general agent at Claremont, and who was at that time, in conjunction with the defendant Porter, carrying on a business in building materials, other than woodwork and iron. Barsdorf agreed to supply bricks at 73s. 6d. per 1,000, and during April he did deliver 22,500 bricks, with which the walls were begun. The plaintiffs did not pay for all these bricks, but about the beginning of May they approached Barsdorf with a proposition that he should raise a building loan for them, and after some negotiation, an agreement was come to between the plaintiffs of the one part and the two defendants acting together of the other part, that the latter should aid them financially, to enable them to complete the building. Unfortunately, and most unwisely, the agreement was not reduced to writing, as it should have been. I am, however, satisfied as to the general terms of the understanding arrived at. It was agreed that the defendants should receive a covering bond, secured by mortgage of the property in the amount of £1,000, and that they should supply at their

current prices such building materials as they were in the habit of dealing in, and, furthermore, advance the wages of the workmen to the amount of the above sum, if necessary. The plaintiffs agreed to spend also the £400 they had in hand on the wood, iron, and carpentry work. The result of this arrangement would be that if the £1,000 to be supplied by the defendants was all expended, as well as the sum of £400, there would be a building which, together with the value of the ground, would give a security worth about £1,500 for the amount due under the bond. The plaintiffs were constructing the building without the aid of a supervising architect or clerk of the works, and I am satisfied that it was agreed between the parties that the defendants, through Barsdorf, who was on the spot, should supervise the building, and that they should have as remuneration for this service and for the general agency in supplying the goods and advancing the money a commission of 5 per cent. on the amount expended through them, including the goods supplied by them. It was a rough-and-ready way of fixing some remuneration for their supervision and trouble, and would work out at the most at £50 in the five or six months to be occupied by the work. The agreement as to Barsdorf's supervision and the remuneration of 5 per cent. is denied by the plaintiff Allie, but I am satisfied that it was entered into, and the significant fact that Barsdorf on one occasion purchased iron to protect the walls from rain, and that his action in this matter and the charge for the iron are not disputed, confirm my belief that his version on this point is correct and that Allie's is untrue. The season was a very wet one, and it is likely that there was a considerable waste of bricks, especially as there is evidence of more than one collapse of walls; but eventually, towards the end of August, the building was near completion, by which time the expenditure through the defendants, according to their books, was something between £700 and £800. The defendants had never intended, as I am satisfied, that they informed the plaintiffs, to retain the bond for their own benefit, but they had all along intended to cede the bond, on completion of the building, to some money-lender; and they had meanwhile found the necessary funds by overdrawing their own account at their bank. When the building was completed, or nearly so, they computed that its value was considerably less than £1,500, with the ground, and they saw that they would not be able to find a capitalist who would advance £1,000 on the security. They therefore told Allie, who acted throughout for the plaintiffs, that they proposed to reduce the bond by £200. He asked whether they could

not let it remain at £800, being no doubt anxious to secure the unexpended balance, but the defendants refused, and Allie consented to the reduction to £800. This is denied by Allie, but I am quite satisfied that he did agree to this, and it is again unfortunate that this was not put into writing. This took place on August 22, and on the 9th of September the bond was reduced by the defendants to £800, at which amount it now stands registered. About this date Allie consulted an attorney, with the result that he claimed the unexpended portion of £1,000 and disputed the amount alleged by the defendants to be due to them. With regard to the bond, it is true that in its terms it is an absolute acknowledgment of debt by the plaintiffs for the full sum of £1,000, and they allege that it was reduced without their knowledge or consent to £800. The plea does not specifically set up the consent to the reduction, but there is a general denial of the paragraph of the declaration in which the absence of knowledge and consent on the part of the plaintiffs is alleged; and it seems to me that the onus is on the plaintiffs of proving that a reduction of their indebtedness, *prima facie* a matter entirely in their interests, was detrimental to them, and that it was done without their consent and in breach of the contract which they had entered into with the defendants. The case they set up is that they wanted the balance of the £1,000 to pay their other tradesmen for wood, iron, carpentering, etc., and that they are entitled to have such balance paid over to them; but I am satisfied that the bond was to cover the defendants for the advances of cash and for goods supplied by themselves only, and I am also satisfied that Allie knew of and consented to the reduction he now complains of. The sole question that remains therefore is the amount which was actually expended by the defendants for the plaintiffs and the amount due to them for materials supplied. They have furnished an account showing the amount to be £747 6s. 11d., and they say that they have tendered and are ready to pay over the balance of the £800—to wit, £52 13s. 1d. Both the amount expended by defendants and the tender are denied by the plaintiffs. They dispute the number of bricks alleged to have been supplied to them, the prices charged for bricks and cement, and the item of £32 3s. 6d. charged for commission on expenditure on the 5 per cent. basis. They also dispute an item of £2 2s., being a fee paid to a competent valuator in September, and his train fare, 1s. 6d. There are, moreover, three items in defendants' account which stand in a peculiar position, namely, under the date of September 25, 1,200 bricks, 31 bags of lime and three casks of cement, which were taken from the building where they had been delivered by the de-

fendants to some premises where the defendant Barsdorf was in his individual capacity constructing some building. These were taken by Barsdorf with the consent of Allie, Barsdorf having promised Allie to pay him for them, and he says that he is quite ready and willing to do so at any time, but that that is a private matter between himself and the plaintiffs. This contention I believe to be the correct state of affairs. It was a private matter between the plaintiffs and Barsdorf, for which Barsdorf is ready to pay them, and it is a pity that such payment was not made and the items struck out of the account. They must, however, be left for adjustment between the plaintiffs and Barsdorf outside of the present action. Now with regard to the prices charged by the defendants for bricks and cement, I am satisfied that in April they were supplying bricks by arrangement with Allie at 73s. 6d. per 1,000, and that price is charged in their account for the bricks supplied by them at that time. After the arrangement, however, that the defendants should finance the operations, I am satisfied that the arrangement was that they should supply all the materials in which they dealt at their current prices, which of course varied with the market, and I am satisfied that the prices charged by them are the prices at which they were, at the several times specified, supplying similar materials to their various customers. To determine the number of bricks actually supplied under the contract is the most difficult matter in the whole of this case. The defendants in their account charge for 79,450, and the onus of proving that such number was delivered at the works and received under the contract rests on them. One might go further and say that, as they were charging a 5 per cent. commission for supervision of the work, it was their duty to see that whatever bricks were delivered were actually usefully expended in the building. It is in this portion of the matter that both sides displayed an astonishing lack of ordinary business methods and precautions, and for this the defendants seem to me more to blame than the plaintiffs. The bricks were delivered by their cart—a man called Southam—and the only guide anyone had as to the number was the reports made verbally by this man to Mr. Porter. No delivery notes seem to have been used, and no receipts were even given, nor was any tally of any kind kept. If Southam had been called at the trial it might have been possible to judge from his evidence whether he had made false reports on the matter to his employers, but unfortunately he had disappeared, and though the defendants have made all possible attempts to find him and produce him at the trial, he has not been discovered. They, however, knew as early as last Septem-

ber that the quantity of bricks was a matter in dispute, and they seem to have made no effort at that time to keep Southam under observation in order that they might not lose the benefit of his evidence. From what was said by defendants' counsel at the trial, there is reason to suspect that Southam has disappeared for reasons best known to himself, but apparently not creditable, as it was remarked that several people, presumably creditors, were anxious to ascertain his present whereabouts. It is obvious that if he were not an honest man he had every opportunity of disposing of the defendants' bricks for his own benefit, and accounting for them by false statements to Mr. Porter. In these circumstances the only remaining way of finding out what was actually supplied is to ascertain by measurement and calculation the number of bricks in the building, and to make an allowance for waste, having due regard to the inclement season which prevailed during the building operations. The best evidence on this point that has been called is that of the architect, Mr. Tully, who estimates the bricks which would have been used at about 64,000, including about 8,600 for waste. His estimate, however, though making a somewhat liberal allowance for waste, is probably something under the mark, as there seem to have been more bricks used in the stoep than he allowed for, and as he probably did not estimate for the collapses and carelessness of the plaintiffs' foreman. Another architect, Mr. Weidner, estimates that there are 63,000 bricks actually in the building, and that at least another 9,000 should be allowed for waste. On the whole, I am of opinion that it would be fair to allow about 70,000 bricks as having been supplied under the contract, and to deduct 8,000 from the number claimed by the defendants as having been delivered. These would not be of those delivered during April, but later, when the prices ruled at 80s. per 1,000—and accordingly £32 must be deducted from the defendants' account on that item. The items of £2 3s. 6d. for the valuator's charges should, I think, be allowed against the plaintiffs, for the reasons that they were usefully and necessarily incurred for the plaintiffs, and, I believe, with their consent and at their request; and it is also significant that in the account furnished by them those items were not objected to. The other items objected to by them were either admitted at the trial or are covered by my finding as to the prices the plaintiffs agreed to pay under the contract. The result is that the total set up by the defendants of £747 6s. 11d. should first of all be reduced by £52 3s. 6d., the amounts charged as commission, which would bring it down to £695 3s. 6d. (for I do not think commission should be

charged on the commission of £20 for raising the loan). From the £695 3s. 5d., a further deduction of £32 must be made for the 8,000 bricks not delivered—or at least not proved to have been delivered—which would bring the amount to £663 3s. 5d. On this amount 5 per cent. commission should be allowed to the defendants an amount of, say, £33 3s. 1d., which would raise their account to £695 6s. 6d. And to this amount must be added their commission of £20 for raising the loan of £800—an amount disputed by the plaintiffs, but at the trial admitted to be due. When that is added, the amounts claimable by the defendants against the plaintiffs come to £716 6s. 6d., and the balance of the £800, viz., £83 13s. 6d., is due to the plaintiffs from the defendants. The defendants plead that they tendered, and again tender by their plea, the sum of £52 13s. 1d. as the full balance due to the plaintiff. As I find this was less than the amount really due under the contract, it is not necessary for me to decide the point raised as to whether the tender being made "in full settlement of the matter" was or was not an unconditional tender. I believe that in our practice such a tender has always been looked upon as unconditional in its nature and terms, but there seem to be English decisions in which a contrary view has been expressed. The plaintiffs also claimed damages on the ground that they were obliged to raise funds for payment of other people who had supplied them with materials (not of the kind supplied by the defendants), which course they would not have had to adopt if the balance of the £1,000 had been paid over to them, and for inconvenience and loss sustained by them by reason of withholding such balance; but there was nothing in the contract making it obligatory on the defendants to pay other tradespeople, and the claim must fail. There must, therefore, be judgment for the plaintiffs for the sum of £83 13s. 6d., with interest from the date of the summons. With regard to costs, I feel that both parties are to blame. The plaintiffs have insisted on an untenable claim, that they should have the balance of £1,000; they have made a claim for damages which has failed, and they have disputed charges and items for which they were justly liable. The defendants, on the other hand, have largely contributed to the state of confusion and consequent litigation by their unbusiness-like manner of proceeding; and, finally, from the same cause, have made an insufficient tender. There will, therefore, be no order as to costs.

[Plaintiffs' Attorney: C. Brady; Defendants' Attorney: D. Tennant, jun.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

CAVANAGH V. HANSEN. 1904.
{ Feb. 4th.

This was an application for the compulsory sequestration of the defendant's estate, the defendant having failed to satisfy a judgment. The sequestration would, it was stated, be for the benefit of the creditors.

The affidavit of Martin Christian Hansen, of Newlands, stated that he was not indebted to the plaintiff in any sum whatever, and had never had any dealings with the plaintiff. Deponent's father appeared to have signed the bond in respect of which judgment had been given. The father's name was Martin Christian Hansen, and he was at present detained in the Valkenberg Asylum on an order of a judge of the Supreme Court, though he had not yet been declared to be of unsound mind.

It was admitted that the real defendant was the father, who, plaintiff stated, had passed bonds under the name in which the summons had been issued. Plaintiff further stated that the summons had been left at the son's house as service on the father, this being the father's last known place of residence.

Mr. J. E. R. de Villiers for Martin Christian Hansen; Mr. Gardiner for plaintiff.

De Villiers, C.J.: The matter had better stand over until steps are taken to place the estate of the father under curatorship. The question of costs will also stand over.

MARTIN V. DE JONGH.

Mr. Nightingale moved for provisional sentence on a judgment of the R.M. of Queen's Town for £17 and costs, and for certain landed property to be declared executable.

Granted.

JONES V. STEPHAN.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £3,500, and for certain specially hypothecated property to be declared executable.

Granted.

ROSENBLATT V. WILL.

Mr. Gardiner asked for provisional sentence on a mortgage bond for £800, for interest on certain promissory notes, and for specially hypothecated property to be declared executable.

Granted.

ROSENBLATT AND WESSELS V. WILL.

Mr. Gardiner applied for provisional sentence for £985 19s. 11d. on a mortgage bond, and interest on promissory notes, and for certain specially hypothecated property to be declared executable.

Granted.

LIPSCHITZ V. BOTHA.

Mr. Rainsford moved for provisional sentence on a promissory note for £313 16s. 6d.

Granted.

GOLDMAN V. BOTHA.

Mr. Rainsford moved for provisional sentence on a promissory note for £68.

Granted.

MCGREGOR V. PENKIN.

Mr. D. Buchanan asked for provisional sentence on a mortgage bond for £5,250, and for specially hypothecated property to be declared executable.

Granted.

SYFERT V. ROWTOWSKI AND OTHERS.

Mr. Struben moved for provisional sentence on a mortgage bond for £3,750.

Granted, specially hypothecated property being declared executable.

LIND V. NATHAN.

Mr. Nightingale moved for provisional sentence on a mortgage bond for £850, and for properties hypothecated to be declared executable.

Granted.

JACOBSON V. PRETORIUS.

Service, short—Costs.

Mr. Nightingale moved for a final order of sequestration of the defendant's estate.

De Villiers, C.J., said there had been short service. The summons must be served afresh, and the return day would be extended until the 18th inst. The costs of the short service could not be allowed.

MEYER V. BOAAF AND ANOTHER.

Mr. Russell moved for provisional sentence for £73 6s. 8d., on certain conditions of sale.

Granted.

VAN HEERDEN V. WERTH.

Mr. D. Buchanan applied for provisional sentence on a mortgage bond for £400, and for certain specially hypothecated property, to be declared executable.

Granted.

HULIN V. JAMES.

Mr. Close moved for provisional sentence on certain four promissory notes, or I.O.U.'s, for the sum of £5, £10, £13 5s. 3d., and £1. Counsel said that defendant had also been summoned, under Rule 329d, for a sum for board and lodging, but the time in which appearance had to be entered in that case had not expired.

The defendant appeared, and said he was in the railway service, and had come from De Aar to defend this case. In regard to the claim for board and lodging, he denied that he was indebted to the plaintiff therefor, and put in a letter written by Hulin to him, inviting him to stay at his (Hulin's) house as a guest. As to I.O.U.'s, he admitted that the signatures thereon were his, but said that he had a counter-claim for services rendered. Payment had never been demanded from him on account of these I.O.U.'s, and the first intimation he had was on receipt of the summons.

De Villiers, C.J., said that if the defendant had a claim for services rendered, that was quite a separate matter. Judgment must be given on these notes.

Mr. Close said that if defendant paid the amount of the notes, the other part would be abandoned.

On the question of costs, defendant said Mr. Hulin knew where he was, and could have applied to him for payment before putting him into court.

[De Villiers, C.J.: You should have tendered the amount.]

Defendant said he was ignorant of the legal procedure. He could not pay the amount for three months.

Provisional sentence was granted, with costs, execution being stayed for three months.

ATTWELL AND CO. V. CHANCE.

Mr. Close moved, under Rule 329d, for judgment for £146 10s. 8d., balance of account for goods sold and delivered, and for £27 10s. 10d., moneys disbursed by plaintiff on behalf of the defendant.

Granted.

SMITH V. SMITH.

This was an application made upon summons issued by John Jacob Smith, calling upon Anna Johanna Smith to show cause why she should not be adjudged of unsound mind, and why a curator should not be appointed for the care of her person and property.

Mr. Russell for applicant; Mr. Struben for respondent's curator.

Plaintiff, John Jacob Smith, said defendant was his wife. He saw her about 14 days ago. She was then in Valkenberg Asylum, where she had been confined since March. When he last saw her, she was in a very bad state, and had nothing to say. She owned a farm at Constantia. Under a deed of sale, signed by her, transfer of certain property had to be made to a Mr. Nel, and witness now applied that the curator should pass transfer of this. He also wished to sell certain goats for the benefit of his wife. He wanted to have appointed as curator of the property Mr. Pritchard, of Beaufort West, who had acted as temporary *curator bonis*. Witness asked that he (plaintiff) should be appointed curator of the person.

Cross-examined by Mr. Struben: His wife had not shown signs of insanity before this deed of sale was signed in January last year.

Dr. Dodds, superintendent at Valkenberg Asylum, gave evidence showing the woman to be insane. There were only faint hopes of her recovery.

Mr. Struben said he had seen the woman, and was satisfied that she was of unsound mind. He was also satisfied that she was sane when she entered into the contract of sale.

The Court declared the respondent to be of unsound mind, and appointed applicant a curator as to the person, and Mr. Benjamin Pritchard curator as to the property, with power as prayed for in the summons, costs to come out of the estate.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte PARKER. { 1904.
Feb. 5th.

On the motion of Mr. Nightingale, a rule *nisi* granted under the Derelict Lands Act was made absolute.

CLOETE V. TAYLOR.

This was an application for an order for ejectment.

Mr. Russell, who appeared for the plaintiff, said the defendant had left the premises, and he asked now for costs.

Order for costs granted.

BENNER V. BENNER.

Mr. Russell moved for leave to sue by edictal citation.

Granted; order being returnable on the 15th April, personal service to be effected if possible, failing which, publication in the "Gazette" and "Cape Times." Leave granted to serve *intendit* with notice of trial.

STAUDE V. STAUDE.

Mr. Russell moved for extension of the return day of citation, and for leave to make substituted service. The acting deputy sheriff of Pretoria certified that diligent search had been made for defendant, who could not, however, be found.

Application granted, and return day extended until 15th April, service by publication in a King William's Town and a Natal paper, and in the "Gazette."

Ex parte SLABBERT AND { 1904.
OTHERS. { Feb. 5th.

Will — Prohibition against alienation—Mortgage.

This was an application for an order authorising the registration of a certain mortgage bond. The petitioners were Cornelia Elizabeth Margaritha Slabbert and others, all legatees under the joint will of their parents, Johannes Slabbert and Francina Christina Slabbert (born Strydom).

The facts sufficiently appear from the report of the Acting Registrar of Deeds, which reads as follows: "By the will of the late Johannes Slabbert and his deceased spouse, Francina C. Slabbert, all immoveable property found in the joint estate at the death of the first-dying was bequeathed to five of their sons, viz.: (1) Johannes Floris, (2) Matthys Johannes, (3) Francois Johannes, (4) Martin Christoffel, and (5) Jurgen Johannes, in equal shares, but vesting was deferred until the death of the longest living of the testators, who was left in the full, free, and undisturbed possession and use of the land. The will then went on to recite that neither the longest living nor one of the above-named heirs, during their lives, shall sell, pledge, ex-

change and lease, or alienate, or in any other manner dispose of the said landed property, or any portion thereof, save to one or more of the above-named heirs, and then alone for a sum not exceeding £50, which said sum shall be reckoned as each child's or heir's share in the said legacy of the landed property.

The further provisions were that each heir might dispose of his share by will and that the restrictions above imposed only applied to the children of testators, and not to the children or future owners.

It seems clear that there is a distinct prohibition against alienation or pledge (and in the term "pledge" used in conjunction with the succeeding words, I take it "mortgage" is included) save to one or more of the above-named heirs, and then for a sum not exceeding £50, which said sum shall be reckoned as the seller's or pledgor's share in the legacy of the land. The intention of the testators was evidently to create a *fidei commissum* in favour of their grandchildren, the restrictions imposed making it almost impossible for the land to go into the hands of strangers prior to the succession of the grandchildren, although, curiously enough, the heir might bequeath his share to anyone he pleased. The purchaser of some of the shares is a brother and one of the *residuary legatees*, while not an heir to the property in question, and it might therefore be that the wishes of the testators would be carried out by permitting transfer to Renier Johannes Slabbert; but in view of the fact that he is not a co-heir, the Registrar did not feel justified in passing transfer contrary to the direct provisions of the will; and as pledge to a stranger was equally prohibited, he declined to register the bond by Francois Johannes Slabbert to G. S. L. Jones.

On the motion of Mr. Russell, the Court granted an order as prayed.

[Applicants' Attorneys: Van Zyl and Buissinné.]

Ex parte VAN DER WALT.

This was an application by Johanna Alida van der Walt, in her capacity as executrix testamentary of the estate of her late husband, and in her capacity as mother and natural guardian of her minor children, and in her personal capacity, for leave to sell certain immoveable property bequeathed to her said minor son, and after paying the debts of the testator (petitioner's late husband) out of the proceeds to invest the balance of such proceeds in house or landed property in Middelburg, in the name of the said minor son.

The Master recommended that the prayer of the petition be granted.

On the motion of Mr. Schreiner, K.C., the Court granted an order as prayed.

Ex parte DE BRUYN.

This was an application on behalf of Olivia Mason de Bruyn, in her capacity as executrix testamentary, in the estate of her late husband, Daniel P. B. de Bruyn, for an order authorising her to invest certain money due to her minor children from the estate of her late husband in a first mortgage on certain property. The petitioner contemplated entering into a second marriage.

The Master's report was favourable.

On the motion of Mr. M. de Villiers, the Court granted an order as prayed.

JACOBS V. JACOBS.

Mr. Alexander moved to extend the return day of citation, and for leave to make substituted service. Defendant was last heard of in England.

The return day was extended until 14th May, substituted service being ordered to be effected by publication in the "Government Gazette" and the London "Daily Telegraph."

SPANGENBERG V. SPANGENBERG.

Mr. J. E. R. de Villiers moved for leave to sue in *forma pauperis* for divorce. The plaintiff was the wife, Johanna Maria Spangenberg, and counsel was prepared to certify in the matter.

The plaintiff appeared, and stated that she was not possessed of any property.

It was stated that defendant lived at Maitland.

A rule *nisi* was granted, returnable on Thursday next, calling on the respondent to show cause why leave should not be granted to sue in *forma pauperis*.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

THOMPSON V. THOMPSON.

This was an action brought by Edith Constance Thompson (born Aitchison) against her husband, John Reginald Thompson, for a decree of nullity of marriage, on the ground that the defendant had committed bigamy, having previously married one Emma E. Voss in London.

Mr. Gardiner was for the plaintiff, and the defendant was in default.

The affidavit of the petitioner set out that the parties were married at Claremont on the 10th April, 1901, the defendant stating that he was a bachelor. Three days later the defendant was arrested on a charge of theft, and acquitted. In September or October, 1901, the defendant wrote saying that

he was leaving South Africa, and that the petitioner would never see him again, and since that she had never heard of him. Petitioner was informed that in November, 1882, the defendant was married to one Emma Eugenie Voss at East Ham Parish Church, London, and that his first wife was still alive.

Mr. Smith, clerk in charge of the marriage register, produced the register showing the marriage of the plaintiff and defendant at Claremont, and a witness of the second marriage, Mr. Simpkins, also gave evidence.

Decree granted.

VAN BLONMESTEIN V. { 1904.
HOLLIDAY. { Feb. 5th.
 " 9th.

Negotiable instruments — Share certificates indorsed in blank — Agency — Estoppel.

The plaintiff having purchased 100 shares in a Transvaal gold mining company, and accepted as sufficient delivery a certificate indorsed in blank by the registered holder, deposited the certificate with his broker for safe custody. The broker delivered the certificate for valuable consideration to the defendant who had no notice of the plaintiff's interest in the shares, and he having purchased them under stock exchange rules, had them registered in his name. In an action for a return of the shares,

Held, that as the further act of having the shares registered in the transferee's name was necessary to perfect his right the certificate indorsed in blank by the registered owner was not a negotiable instrument.

Held further, that although the instrument was not negotiable, the universal custom in South Africa being to accept certificates so indorsed as being "in order," the plaintiff was estopped by his conduct in leaving the instrument in that form in the hands of a share broker from asserting his right to the shares.

This was an action brought by Onderdewyngaard van Blommiestein against

John Holliday, to recover scrip for 100 New Florida Gold Mines, or their value, with costs of suit.

The plaintiff's declaration set out that he was a newspaper vendor, residing in Cape Town, and the defendant, a stockbroker, also residing in Cape Town. On or about February, 1902, plaintiff bought 100 New Floridas from one W. T. Bacon, at 21s. per share. Plaintiff received the scrip, the numbers being 112.101 to 112.200. In September, 1902, plaintiff deposited for safe keeping with J. H. A. Langton, stockbroker, of Cape Town, this scrip, together with other scrip, and received a receipt for the certificates. About September, 1903, Langton disappeared from Cape Town, and his present whereabouts was unknown. He succeeded in obtaining possession of some of the scrip, but he failed to get the 100 New Floridas. About October, 1903, plaintiff discovered defendant had on the 2nd of that month obtained transfer of the New Floridas in the books of the company, and he had since learned that the defendant had the scrip in his possession. Plaintiff did not at any time authorise Langton to deal in the scrip, and he was now entitled to recover the scrip from the defendant, the scrip having been stolen or fraudulently dealt with by Langton, or by some other person, who obtained the same from Langton; but the defendant refused to deliver the scrip. Plaintiff claimed (a) delivery of the shares, represented by the scrip, or their value with interest *a tempore morae*; (b) alternative relief; and (c) costs of suit.

The defendant's plea set out that the plaintiff was well acquainted with the customs of the share market, and that the defendant had no knowledge that the plaintiff deposited the New Florida scrip with Langton for safe-keeping. Prior to September, 1903, Langton borrowed sums of money from the defendant, who was a member of the Stock Exchange, and in accordance with the custom and practice prevailing, the said Langton sold certain scrip, including that of 100 New Floridas, for advance, which scrip was resold by the defendant to Langton, redeemable on the 15th September, 1903. The scrip was not redeemed on the said date, and along with the other scrip, was, in accordance with the rules of the Cape Town Stock Exchange, publicly sold by the secretary of the said Exchange, and the defendant bought the New Floridas. The scrip was registered in the name of E. J. Earp and bore an endorsement in blank, signed by him. The scrip was, by the custom of the share market in the Transvaal and Cape Colony, delivered from hand to hand, and the defendant became the legal holder thereof, *bona fide*, and for valuable consideration. The plaintiff,

if he deposited the said scrip with Langton, did so representing and intending to represent, or allowing and intending to allow, the said Langton to represent that the said Langton was entitled to transfer the scrip. The defendant denied that the plaintiff did not authorise Langton to sell or deal in the scrip, and further said that if Langton stole or fraudulently dealt with the scrip, which he denied, the plaintiff by his carelessness and negligence allowed and enabled Langton to do and commit a fraud upon the defendant, who refused to hand over the scrip to plaintiff.

Mr. Searle, K.C. (with him Mr. Bissett) for the plaintiff; Mr. Benjamin (with him Mr. Gardiner) for defendant.

Mr. M. Bissett then called the plaintiff, Mr. Van Blommestein, formerly of Johannesburg, who said that he was a newspaper vendor. He purchased 100 New Florida shares on 13th February, 1902, and received the scrip. In August, 1902, his box was broken into, and on 16th September he deposited these and other shares with Mr. Langton. The receipt produced did not specifically state "for safe keeping," but that was understood. Mr. Langton had never been instructed to deal in any way with the scrip. In September, 1903, he noticed in the "Argus" that these shares were being sold along with Mr. Langton's other shares. Mr. Barnett, Mr. Langton's clerk, subsequently gave him the other shares at his private house. Witness gave notice when he heard Mr. Langton had "done a bunk," that these shares were stolen. He found out on 2nd October, 1903, that Mr. Holliday had become the transferee, and Mr. Holliday warned him not to take action, as he would lose the case. All his transactions were cash, and he did not know much of the custom of the Stock Exchange.

Cross-examined by Mr. Benjamin: He did not have "too many" dealings on the Stock Exchange. He commenced dealing in 1902, and his intention was to buy and sell. He trusted everything to his broker. Witness did not recognise the certificate produced, and would not contradict Mr. Holliday if he said the name had been blank when he bought. He admitted lodging Coronation East Syndicate shares, and the receipt produced said distinctly "for safe custody."

Re-examined by Mr. Bissett: Mr. Lomas made out the first receipt and Mr. Barnett the latter, but each had received the same instructions.

Max Barnett said that up to October, 1903, he was chief clerk for Mr. Langton. From time to time the plaintiff deposited scrip for safe keeping. The instructions of the plaintiff was for safe custody. The receipt of the shares was placed in Mr. Langton's share register. The scrip for safe custody was not kept separately, but he would be able to trace

it through a ticket attached to it. He remembered Mr. Langton occasionally handing over scrip for safe keeping to cover money received, and in one instance Mr. Holliday received such scrip. Among the scrip handed over he remembered the certificate of the New Floridas. The date on which the defendant called on Mr. Langton to pay his debts was about 15th September, 1903, and, in accordance with the rules of the Stock Exchange a forced sale was ordered. The plaintiff had made repeated efforts to get the scrip for the 100 New Floridas.

The share register produced did not show any distinction between those for sale and those for custody.

Cross-examined by Mr. Benjamin: He did not hand the Florida scrip over to Mr. Holliday.

Arthur Lomas said he was a clerk in Mr. Langton's employ until September, 1903. From time to time the plaintiff deposited shares with Mr. Langton for safe keeping. There was no particular book for these shares.

Cross-examined by Mr. Benjamin: If the shares had been lent to Mr. Langton he would not receipt them as "to be returned on demand." This closed the case for the plaintiff.

Mr. Benjamin called

John Holliday, the defendant, who said that he had been a stock and share broker until the end of last year. He was a dealer, and a contango broker. He first became acquainted with Mr. Langton in the early part of 1900. On the 2nd June, 1903, Mr. Langton submitted a list of shares, and asked him whether he would take them over on contango, and witness gave him a cheque, £3,044 14s., and accepted delivery of the shares. That loan was only for seven days, but Mr. Langton failed to redeem the loan, and the matter dragged on for five weeks, and, as a result, a broker's note was drawn up, which showed that witness was due £2,955, and it was provided Mr. Langton should take the shares up on the 15th September. Finally, witness instructed the secretary of the Stock Exchange to sell out the shares, and witness bought in the 100 New Floridas. Some two or three days afterwards there were rumours about that Mr. Langton was "shaky," and then witness sent up the shares to Johannesburg for registration. It was unusual for the purchaser to have his name entered on the certificate, the shares simply being passed from hand to hand with a blank transfer form, and shares might be transferred a hundred times without being registered. When he got the 100 New Floridas there was nothing to indicate that they had been pledged with Mr. Langton.

Cross-examined by Mr. M. Bissett: Mr. Langton might have been doing business on behalf of clients. When Mr. Langton required the loan of the £3,000 it was not an unusual transaction. He did not

suspect at that time that there was anything wrong, as he was prepared to lend him £10,000; but when a cheque was returned at the end of July, he became suspicious. In August and the early part of September Mr. Langton paid considerable differences, and witness thought he was pulling through. The loan was for seven days, but it was not on a business footing, and its redemption was allowed to drag on from day to day. On the 15th September Mr. Langton did not pay for the shares, but he did not know of a rule compelling him to immediately give notice to the Stock Exchange. It was not until after the forced sale that Mr. Langton was posted as a defaulter. Witness had the shares sent up at once to Johannesburg for registration, because he suspected there was something wrong; but that was merely on his financial position. He had no suspicion that Mr. Langton was dealing with other people's shares.

Charles H. Greenaway, secretary to the Cape Town Stock Exchange, said that he remembered Mr. Holliday instructing him to sell out certain shares against Mr. Langton. The shares were duly sold out on the 25th September, in accordance with the rules, and realised £2,656, the New Floridas bringing in £2 1s. 8d.

Cross-examined by Mr. M. Bisset: He posted a notice that 100 New Floridas had been stolen, on instructions from the plaintiff. The sale had already taken place then.

Mr. Holliday, recalled, said that he left a letter in Mr. Langton's office, giving him notice of the sale.

William Simkins, a member of the committee of the Stock Exchange, said that it was the custom to hand the scrip over in blank. The person who received the shares was entitled to fill his name in the blank space, and have transfer.

Cross-examined by Mr. M. Bisset: Many of his clients left shares with him for safe keeping without having any receipt.

Alfred O'Flaherty, chairman of the Stock Exchange, gave further evidence as to the custom of dealing prevailing here.

Chas. Ed. Pearson, secretary of the firm of Blakey and Pearson, Johannesburg, produced the certificate for the 100 New Florida shares. When the scrip came to the office first, it had "J. Holliday" on it, and subsequently it had to be altered to "John Holliday." According to the practice of the Johannesburg Exchange, shares were delivered with a blank endorsement, and the person who bought such scrip was entitled to put his name on the scrip, and if necessary, sue the company, in order to force transfer. This new scrip had not been issued to the defendant on information from the plaintiff. General brokers in Johannesburg got their clients' scrip registered in their own name in order

to find out if there was anything against it.

Cross-examined by Mr. M. Bisset: Mr. Holliday's name appearing in the books of the New Florida, he would be treated as the proprietor of the shares. There was no particular request from the defendant to rush the registration through.

Arthur Mulliner, broker, said he had experience of both Cape Town and Johannesburg Stock Exchanges, and he confirmed what Mr. Pearson had said about the custom in Johannesburg.

Mr. Bisset: The question is, are these scrip certificates negotiable instruments or not? They are not so regarded in England, see *Willison on Negotiable Instruments* (p. 6); see also *Clark v. France* (26 Ch. D., 257). Rule 85 of the Stock Exchange shows that there is no difference between these certificates and one with a blank transfer form. No man who accepts an instrument endorsed in blank is a purchaser for value without notice. *Williams v. Colonial Bank* (38, Ch. D., 388); *Grant v. Vaughan* (3, Bur., 1,516); *Eadie and Another v. East India Company* (2, Bur., 1,216).

[De Villiers, C.J.: No amount of evidence can make an instrument negotiable if it is not negotiable.]

As to negotiable instruments, see *Glyn v. Baker* (13, East., 507); *Dixon v. Bogle* (4, W.R., 813). We must have express legislation to make an instrument negotiable.

[De Villiers, C.J.: I find great difficulty in holding this certificate to be negotiable, and even if it is, what right has the plaintiff to it?]

In *Williams v. Colonial Bank* the shares were not registered.

[De Villiers, C.J.: But the executors were executors of the registered holder. Here the plaintiff has never been the owner of the shares, and defendant gave value for these shares before he knew of Longton's insolvency. It does not matter that he did not get transfer until after that event.]

On that point I would refer to *Crouch v. Credit Foncier* (8, Q.B., 374). As to vindication, see *Moorrees v. Jackson* (1, S.A.R. Rep., 285). The cases of *Goodwin v. Roberts* (1, Ap., 476) and *Rumbolt v. Metropolitan Bank* (2, Q.B.D., 194) are both distinguishable from the present case.

As to the question of estoppel, that doctrine does not apply in this case. Langton would be estopped from saying that he was only the agent of the plaintiff, since he held himself out as the owner of these shares. But that does not apply to us. As to estoppel, see *Goodwin v. Roberts* (1, Ap. C., 15) and *Rumbold v. Metropolitan Bank* (2, Q.B.D., 194).

Mr. Benjamin (for defendant): The plaintiff is estopped from setting up this case against the defendant. There are many instruments which are negoti-

able in English Law in addition to the old documents known to the law merchant. For instance, foreign bonds payable to bearer are negotiable. True, it is that these certificates endorsed in blank have not yet been declared negotiable in England, but they have been in America, and the only reason that there is no English decision on the point is because in England all transfers must be by deed. The law merchant in England is by no means so fixed and unalterable that it cannot be amplified by judicial decisions. Thus, quite recently bearer bonds have been added to the number of negotiable documents. *Colonial Bank v. Coley* (15, Ap., 267). The 12th Article of Association, which prohibits the transfer of unpaid-up shares is not in point. The *Credit Foncier* case (cited on the other side) has been overruled. The evidence shows that there is a recognised custom in Cape Town of recognising such instruments as negotiable. The equity of the case is in our favour, and equitable principles can be applied by this Court, if they do not come into conflict with any well-established rule of law. See *Story's Equity* (par. 385) and *Smith's Leading Cases* (Vol. 1, 473).

Mr. Bisset was not called upon in reply.

Cur. Adv. Vult.

Postea (February 9).

De Villiers, C.J.: This case raises some questions of great importance to persons dealing in Transvaal Gold Mining shares. The plaintiff, having bought 100 shares in the New Florida Gold Mining Company, left the certificate in the hands of his broker, Langton, for safe custody. The document consisted of a single certificate of the company to the effect that Earp was the registered holder, and on the back was an endorsement by Earp underneath a printed form of transfer with the name of the transferee left in blank. It would appear that the New Florida Company, like most other Transvaal Gold Mining companies, reserves the right of refusing to register the shares in the name of the person indicated by the holder only in case the shares have not been paid up in full, or in case the company holds a lien on the shares. Instead of keeping the scrip for the plaintiff, Langton delivered it to the defendant, along with a mass of other securities, in order to cover advances made to Langton. Subsequently the shares were sold under the rules of the Stock Exchange, and purchased by the defendant, who sent the scrip to Johannesburg for registration in his own name. At the time when the defendant bought the shares he had no knowledge of Langton's fraud. The plaintiff having been informed of the sale, gave notice to the company of his desire to stop transfer, but when the notice arrived the shares had already been transferred into

the defendant's name. The plaintiff by this action seeks to recover from the defendant the shares, or their value. The defence is, in effect, that the scrip in the form delivered by the plaintiff to Langton was a negotiable instrument, and that, therefore, the property in it was acquired by the defendant, who took it *bona fide*, and for value, and that even if it was not a negotiable instrument, the plaintiff is estopped by his conduct in the matter from claiming the shares or their value from the defendant.

Upon the question whether or not the scrip is a negotiable instrument evidence has been given of a general custom in Cape Town, as well as in Johannesburg. The 85th bye-law of the Cape Town Stock Exchange provides that "no scrip certificate shall be deemed good delivery, unless endorsed in blank by the registered holder of such certificate, or accompanied by the requisite transfer form signed in blank," and there is an exactly similar bye-law of the Johannesburg Stock Exchange. These bye-laws only carry out what appears to be a general custom in South Africa, namely, that in the purchase and sale of shares' certificates with a blank endorsement by the registered owner are considered to be in perfect order, and are accepted by the purchaser as good delivery of the shares bought. In spite, however, of this general custom, I am not prepared to lay down as a rule of law that share certificates indorsed in blank by the registered owner are negotiable instruments. The holder of the certificate obtains no property in the shares until he is himself registered as owner. The original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognised by the company until the transferee or holder for the time being obtains registration in his own name. In the Transvaal case of *African Mining Association v. De Catelin* (15 C.L.J., 130), one of the learned judges (Jorissen) expressed a decided opinion that shares thus endorsed are, according to the custom of trade in that country, negotiable instruments; but the two other judges were more guarded in their opinion. The Chief Justice (Kotze), although inclining in favour of the view that the certificates are negotiable, considered it unnecessary to decide the question, and Morice, J., pointed out that where the scrip has been taken from the holder by force or robbery, he would be entitled to reclaim the shares from an innocent third party. This last admission, if correct, would at once deprive the instrument of the quality of negotiability. Supposing in the present case the certificate had been kept in the plaintiff's own safe, and stolen without any negligence on his part, the thief would not, in my opinion, pass a good title to a

bona fide purchaser for value, whereas if banknotes had been stolen under similar circumstances, the purchaser would acquire a good title to the notes. The defence, therefore, of the negotiability of the scrip must fall to the ground.

As to the defence of estoppel, I must take this opportunity of saying that in my remarks in *Merriman v. Williams* (Foord's Rep., 172), I had no intention of expressing the opinion that the doctrine of estoppel is entirely unknown in our law. What I did say was: that it is by no means clear that the principles of the English law relating to estoppel are applicable, without any modification, in the law of this colony, and to that view I still adhere. But I am satisfied that neither under the Roman nor under the Dutch law would a person who, by his words or conduct, has wilfully or negligently induced another to alter his own position in the belief that a certain state of facts exists, have been allowed to assert a right against such other person inconsistent with such state of facts. The Digest (l. 7, 25), for instance, mentions the case of a father who allowed his daughter to lead the life of an emancipated child, although the formalities of emancipation had not been complied with. The daughter died after having appointed heirs by her will. It was held by Ulpian that the father was estopped by his conduct from disputing the validity of the will. I am satisfied also that by our law, as by the law of England, a person who by his conduct has clothed his agent with the apparent ownership and right of disposition of a document, whether negotiable or not, is estopped from asserting his title as against a person to whom such agent has sold it, and who received it in good faith, and for value. In the present case the plaintiff himself accepted the scrip as being "in order," although bearing only the blank indorsement of the registered owner. He did not have the scrip registered in his own name, and without even taking the precaution to insert his name as the transferee on the back of the document, he handed it over to his broker, as he says, for safe custody. The document, when so handed over, contained an endorsement which, read by the light of the general custom in South Africa, amounted to a representation that the holder was entitled to deal with and transfer the shares. If the plaintiff had handed the certificate to any other person than a share broker for safe custody, there might have been room for the argument that it was the duty of the purchaser to inquire whether such person had the real as well as the apparent authority to deal with the shares, although I do not say that the argument would be sound. But the certificate was given to a person whose chief business it was to sell and deliver shares on behalf of his customers. A purchaser re-

ceiving a certificate in such a form from a broker is as much justified in assuming that the broker is entitled to deal with it as a person entering a shop is justified in assuming that the shopkeeper is entitled to deal with the goods in the shop. To test the applicability of the doctrine of estoppel in our law, let it be supposed that a person has handed over for safe custody to a shopkeeper goods of the kind ordinarily sold in the shop, knowing that the goods would be exposed in the shop, it is clear that by our law the owner would not be entitled—*contra suum factum*—to vindicate the goods as against a customer who has bought such goods in the ordinary way. The supposed case is an extreme one, but it serves to illustrate the principle. In regard to the law of England, the case of *Colonial Bank v. Cady* (15 A.C., 267), has been cited on behalf of the plaintiff as showing that the doctrine of estoppel would not apply to a case like the present, but the facts of that case were very different, and the remarks of some of the Lords of Appeal fully support the applicability of the doctrine to the present case. One Williams, was at his death the registered holder of 1,210 shares in a New York company for which he held certificates in the usual form. His executors were desirous of having the shares transferred to their own names, and for that purpose they sent the certificates to Thomas, Sons and Co., their London brokers, having previously as directed by that firm, signed as executors the blank transfer on the back of each certificate. Instead of using the certificates for the purpose for which they were sent, William Blakeway, one of the partners of Thomas, Sons and Co., delivered them to the Colonial Bank in order to cover advances made, and to be made to his firm. It was held in an action brought by the executors against the bank that the former were not estopped as against the bank. "Whether the re-estopped are estopped," said Lord Watson, "from saying that Blakeway had not their authority to dispose of the certificates in question is, in my opinion, the sole question presented for decision in these appeals. Had the transfers been executed by Williams, and the certificates thereafter sent by him to Thomas, Sons and Co., for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser, which his employer could not dispute. But that is not the case with which we have to deal. The transfers were signed by the respondents, who were not the registered owners of the shares, and were not named in the certificate. Whatever may be the effect of an instrument so executed, one thing is clear, that it cannot be regarded as, either in law or by custom, equivalent to a certificate, and trans-

fer executed by the registered owner himself." Lord Herschell was equally emphatic on the point, saying that if in that case the transfer had been signed by the registered owner and delivered by him to the brokers, his lordship would have come to the conclusion that the bank had obtained a good title as against him, and that he was estopped by his act from asserting any right to them. In the present case the transfer was signed by the registered owner, and, although the plaintiff was not the registered owner himself, he did not fill in the blank by inserting his own name as transferee, but delivered the certificate to his broker in exactly the same form in which he had accepted it as good delivery. If, therefore, the *dicta* which I have just quoted correctly lay down the law, there can be no doubt that under English law also the plaintiff would have been estopped from asserting his right to the shares. For the reasons already given I am of opinion that the judgment of the Court should be for the defendant, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinè; Defendant's Attorneys: W. E. Moore and Son.]

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

STEVENSON V. THE LIQUIDATORS OF THE INSOLVENT ESTATE OF W. STABLEFORD AND CO. 1904. Feb. 5th.

Master and servant—Breach of contract—Damages.

This was an action brought by Leonard Stevenson against the liquidators of W. Stableford and Co., Cape Town, for breach of contract. Damages were laid at £2,000.

From the pleadings, it appeared that on August 11, 1903, at Manchester, England, Mr. Stableford entered into a written agreement to engage the plaintiff as manager of the firm's printing works and cardboard box making factory, for a term of five years, the salary to be for the first year, £350, and for the remaining four years, £400 per annum. The defendants admitted this. The salary was to be paid monthly from August 15. It was agreed that the plaintiff should leave England on that date, and take up his duties within three days of his arrival here. This also the defendants admitted; but they alleged that it was essential that the plaintiff on arrival should invest £1,000 in preference shares in the company. It was acknowledged that plaintiff sailed on August 15, and that he was prepared to enter on his duties; but the defendants denied that they wrongfully and unlawfully refused to allow him to take up his duties.

Defendants said that the firm went into voluntary liquidation prior to the plaintiff's arrival. They alleged that the change in the firm's affairs was explained to the plaintiff on arrival, and he was told that as the shares were below their normal value at the time, they could not be issued, as arranged in the agreement. Plaintiff, the defendants said, declined to take the shares under any arrangement other than that set forth in the agreement. The plaintiff claimed damages, to the extent of £2,000, as he had lost his employment, had been put to the expense of coming to South Africa, and had otherwise suffered loss to the extent of the sum mentioned. The plaintiff denied the statement that he refused to take up the £1,000 shares, and the point for consideration was, therefore, which of the parties broke the contract. The defendants admitted that plaintiff placed £1,000 in the bank, to be paid over against the scrip, but they denied that from the time the position of the company was explained to him the plaintiff had ever offered to take up the shares.

Mr. D. Buchanan (with him Mr. Sutton) for plaintiff, Mr. Searle (with him Mr. Close) for defendants.

Mr. Searle said that the defendants now admitted that they broke the contract, because the company, having gone into voluntary liquidation, they could not carry the contract out.

[Hopley, J.: That being so, the jury only have to consider the question of damages to come out of the liquidation.]

Mr. Buchanan called

Leonard Stevenson, the plaintiff in the case, who stated that he was a printer and boxmaker by profession. He had been employed by Messrs. Hugh Stevenson and Co., cardboard box makers, of Manchester, England, as manager of the printing department, where he was in receipt of a salary of £300 per annum. He entered into an agreement with Mr. Wm. Stableford, acting on behalf of the defendant company, on August 11, 1903. Previously Mr. Stableford had seen him, and shown a set of balance sheets covering four years, which his (witness's) accountants had examined and pronounced satisfactory. Mr. Stableford told him that the firm's prospects were very good, and that they were going to start box-making. Mr. Stableford further told witness that his primary object in coming to England was to raise capital, and make the agreement with witness, who had previously had an offer of the position by cable. Mr. Stableford said he wanted to raise £25,000, and he had succeeded in getting the greater part of it. It was arranged that the £1,000 shares should be sent to England to witness's bank there, to be delivered against the £1,000 lying at the bank. He made arrangements for the money to be paid,

and then left for South Africa. He was not told anything about the firm being under inspection. On arrival here he attended a meeting of the directors, and tendered his services. Mr. Kidney, the secretary, or Mr. Lait—witness was not sure which—remarked to him that he had had a pleasant voyage out, and that he had better have a look round and go back again. The company made him no offer whatsoever. On September 8 he wrote again, tendering his services, but received no reply. He did not refuse to take up the shares, nor were they offered to him. Witness's salary at Home was £300 per annum, and that position was now lost to him. His travelling expenses came to about £40, and his expenses here averaged about £20 per month.

Cross-examined by Mr. Searle: He was advised by his doctor to come out here, but the state of his health in no way compelled him to come. He was not aware of the fact that his brother was a director of the defendant company before he (witness) left England. He had asked his brother to look out for a position in South Africa for him. He was not told that the company was working under inspection. At the meeting witness attended in Cape Town, Mr. Lait refused his services, stating that the company was embarrassed. He had been seeking employment in various parts of the country by answering advertisements. He had not tried to get work in Cape Town; his principal object was to try to secure a partnership business.

Re-examined by Mr. Buchanan: His father had received a letter from Mr. Stableford, prior to witness's departure from England, setting forth a most satisfactory account of the company's affairs. This communication was written five days before the company arranged to work under inspection. At the meeting which he attended, witness asked if he had not a claim on the company, and he received the reply that no doubt he had, but would it not be ungenerous for him to make a claim on the company, as they had saved him £1,000, the money which he was to have invested in shares.

Mr. Maynard Nash, accountant, stated that he had been trying to get a position for the plaintiff, preferably a partnership, but he had not succeeded.

Frank Stevenson, brother of the plaintiff, said that he became a director of the defendant company in June, 1903. On August 5, the inspectors cabled to Mr. Wm. Stableford: "Inspectors decline issue scrip or authorise Leonard's departure." This cable was sent on August 5, but it was not until August 18, three days after his brother left England, witness became aware that such a cable had been sent. Although the cable must have been in England many days before his brother left, his brother was also unaware of the existence

of such a cable. When his brother arrived on September 1, witness told him of the cable.

Cross-examined by Mr. Searle: He was aware of the fact that there were heavy bonds on the company. He did not suspect that the firm's finances were in a bad way. He thought that the inspectors were appointed to watch Mr. Stableford's interests in that gentleman's absence. He, at the meeting of the directors, had seconded the motion for the appointment of inspectors. He was kept in the dark about the company's affairs, and believed that he and his brother were victimised.

For the defence, Mr. Searle called J. E. P. Close, who stated that he was now one of the liquidators, and formerly an inspector of the company. The inspection started on June 30. At that time it was absolutely necessary that the company should get more capital. He took the plaintiff and his brother into his full confidence; he explained the whole history of the company. He told plaintiff that if he had put his £1,000 in the company, it would have been lost, and that he ought to feel thankful that the company was under inspection, for the circumstance had saved him £1,000.

Cross-examined by Mr. Buchanan: He thought that, as the plaintiff had been saved £1,000, he should have been content to set it off against any losses he might have sustained.

William James Lait, also one of the liquidators of the firm of W. Stableford and Co., stated that while he had not been an inspector he used to advise the inspectors on technical matters connected with the printing business. Witness explained the position of affairs to the plaintiff on arrival, and then he jocosely made the remark about the best thing the plaintiff could do was to go Home again.

William Stableford stated that on July 1 he proceeded to England for the purpose of raising £25,000 additional capital. Before that date there had been correspondence with the firm of Messrs. Hughes, Stevenson and Co., Manchester, about young Mr. Stevenson coming out and putting some money into the business of Stableford and Co. Before the contract was entered into with the plaintiff, witness told Mr. Leonard Stevenson the position of the company's affairs, adding that unless the money was raised the firm would have to go into liquidation. He also explained that the company was then working under inspection. The last thing he told the plaintiff was that he had raised £8,000 debentures and £5,000 credit, under the provision that the whole of the £25,000 was raised. That statement was made to the plaintiff on the evening before he (plaintiff) sailed for London. Throughout the whole course of the transaction, plaintiff was kept fully informed as to the progress

of affairs. When the agreement was made plaintiff had been informed that witness had raised £5,500 and £5,000 credit. The whole of plaintiff's family, as well as the plaintiff himself, knew that the company was under inspection. The firm had been doing a good business, and witness was sanguine of success if the £25,000 could be raised. He was still of the opinion that had the £25,000 been forthcoming, all would have been well. It was to the extreme tightness of the money market that failure was due. During the second or third week in October plaintiff told witness in St. George's-street, Cape Town, that, as he was going to get £2,000 out of Stableford's, he had no intention of seeking employment. Plaintiff appeared quite serious.

Cross-examined by Mr. Buchanan: He adhered to the statement regarding what plaintiff had said. Plaintiff's remark was that when he got the £2,000 out of Stableford's, it would be time enough to look for work. The balance-sheet produced was never placed before the public. The sheet was merely a draft for a prospectus drawn up by a company promoter in London, and witness sent it to Cape Town from England. The inspectors of the company in Cape Town disapproved of the publication of the document, and it was never placed before anyone in England. The plaintiff had never been shown that sheet by witness.

Mr. Buchanan: The plaintiff brought it with him from England.

[Hopley, J.: How does it come into the plaintiff's possession?]

The Witness: The plaintiff never had that document in England.

Hopley, J. pressed for an explanation as to how the plaintiff could have come into possession of the document if it had been sent to Mr. Kidney.

The witness persisted in the statement that he had posted the document to Mr. W. L. Kidney from England. He did not, however, deny any of the statements in the document; he merely denied the source from which it now came.

Mr. Buchanan: You may be quite correct, and still be quibbling. You might have posted this identical sheet to Mr. Kidney, but you might have struck off a copy and given it to Stevenson.

The Witness: I did make a copy. Mr. Kidney got one, and not another living soul received any other I am not playing with words.

Mr. Buchanan: What happened to the second copy?

The Witness: It was destroyed in England.

Continuing under cross-examination, witness said that he repudiated the document when he saw it—he did not repudiate the figures on it, but he did not use the manner in which affairs were set forth. Witness did not show

the cable received on August 5, reading "Inspectors refuse to issue, etc.," to the plaintiff. On the evening of its receipt he was in evening dress, and had not the cable on him. He, in various conversations, however, informed the plaintiff and his father of the position of affairs. He adhered to a statement made in a letter dated August 1, addressed to the elder Mr. Stevenson, that he (witness) had received a cable from Cape Town that the scrip of the £1,000 shares had been issued.

[Hopley, J.: You waited until Leonard Stevenson was on the water before letting the inspectors know that you disregarded their order of August 5.]

The Witness: I thought that the progress I was making in England was a justification for my action. As regards the suggestion that I delayed so that Leonard, being on the water, could not be stopped that never entered my mind.

This closed the case for the defence, and counsel proceeded to address the jury on the question of damages.

Hopley, J., in summing up, remarked that the issues in the case appeared to be simple. The one question they would have to determine was how much damages they would award the plaintiff. They would have to look at the full circumstances under which he was brought to this far country, how the contract was entered into, and how he was treated on arrival. He did not think that the taking up of the shares was a condition precedent to the plaintiff's entering the company's service. There was a good deal in what the plaintiff said when he remarked that he regarded the investment of the money in the company as a guarantee of good faith. It was clear that when Mr. Stableford went to England the company needed money badly. He went there, knowing that the company was under inspection, and he appeared to be the moving spirit in bringing about his mission to England. If Mr. Frank Stevenson, a director of the company, knew all about the affairs of the company, and realised the position, it was scarcely likely that he would not have warned his father against putting money in the company. There was not the slightest doubt but that Mr. Stableford was of a most sanguine disposition as regarded the prospects of the company. Knowing the position of affairs, and the company's need of ready money, Mr. Stableford was naturally anxious to get Stevenson to South Africa and so get the £1,000. As regards the document which Mr. Stableford denied having given to Stevenson, and which Stevenson alleged had greatly influenced him in his decision to come out here, his lordship pointed out to the jury that there were certain pencilled remarks on the document, which would be quite superfluous were the document sent to Mr. Kidney,

—as Mr. Stableford said it was—who, as secretary of the company, would be in full possession of the information noted in pencil, but which would be information indeed for old Mr. Stevenson in Manchester. His lordship proceeded to comment on the fact that Stableford, who at the time was in communication with the Stevensons, did not tell them of the receipt of the cable, saying that the inspectors refused to issue the scrip. As regards the amount of the damages, it was usual in cases of wrongful dismissal to award twelve months' salary as a compensation, the Courts usually holding that it was only fair to give a man twelve months to look round for a suitable post. Damages should not be reduced because the Inspectors had with their knowledge of the position refrained from taking plaintiff's £1,000 for what would have been worthless shares. That was proper conduct on their part, but it was only common honesty.

The jury, after fifteen minutes' deliberation, found for the plaintiff, fixing the damages at £500.

Mr. Buchanan moved for judgment for £500 with costs.

Judgment was entered accordingly.

[Plaintiff's Attorney: G. Trollip; defendants' Attorneys: Tredgold, McIntyre and Bisset.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

WALKER V. WALKER. { 1904.
Feb. 8th.

This was an action for divorce on the ground of the misconduct of the defendant, Harriet Jane Frances Walker.

The declaration set forth that the parties were married at Graham's Town on the 3rd July, 1890. Plaintiff now resided at Port Elizabeth, and defendant was believed to be at present resident at Shipley, Yorkshire. Plaintiff alleged that defendant deserted him on the 24th February, 1898, and that thereafter she was guilty of misconduct, a child being born to her in 1900, of which plaintiff swore he was not the father. Plaintiff prayed for a decree of divorce, with forfeiture of benefits arising out of marriage in community.

Mr. Benjamin for plaintiff, defendant in default.

Counsel stated that at a previous hearing of the case certain evidence was

led. See (13 C.T.R., 668 and 1093). He now produced further evidence, taken on commission, as to the misconduct.

A decree of divorce was granted as prayed.

CONNOLLY V. CONNOLLY.

This was an action for judicial separation, on the ground of the defendant's cruelty.

Charles W. H. Smith, clerk in the Colonial Registry Office, produced the original certificate of marriage.

Mr. Benjamin for plaintiff. Defendant in default.

Mrs. Connolly said she was married on the 6th February, 1882. For some time they lived happily together, but about ten years ago defendant began to drink. He had treated her unkindly at times when in liquor, and had struck her and thrown things at her.

A decree of separation was granted, with costs, plaintiff to have the custody of the children.

Buchanan, J. added that, as interference was feared, defendant would be interdicted from interfering with any property in the possession of the plaintiff until further order of the Court. If the defendant came into Court and showed that he had any right to any of the property, then the interdict could be removed.

SPIILHAUS AND CO. V. { 1904.
WEBNER. { Feb. 5th.

Guarantee—Verbal revocation—Evidence.

This was an action to recover the sum of £24 7s. 3d. The declaration stated that on the 2nd October, 1900, the plaintiff, Jacob Christian Werner, entered into a deed of suretyship whereby he undertook to be surety for the payment of any sum, not exceeding £25, for which one Johan Christian Werner should become indebted to the plaintiffs. In June, 1902, Johan Werner was indebted to the plaintiffs in the sum of £27 6s. 7d. His estate was then sequestered, and the plaintiffs only recovered £2 19s. 4d. They now sued defendant for the balance, £24 7s. 3d.

In his plea, the defendant stated that in December, 1900, he had an interview with one of the partners of the defendant firm, in which the defendant withdrew his suretyship, being then informed that Johan Werner was not indebted to plaintiffs in any sum. Defendant pleaded, therefore, that the deed had been revoked, and that he was not liable thereunder.

Mr. Benjamin for plaintiff. Mr. McGregor for defendant.

Carl Antonia Spilhaus, called, stated that he was one of the managers for

Wm. Spilhaus and Co. In October, 1900, defendant called on him regarding the granting of credit to his son. As a consequence of the negotiations, the deed of suretyship (produced) was entered into. The son was given credit from time to time, as per account produced. Defendant did not come to witness in December, 1900, and ask how much did his son owe; there was no repudiation of the deed.

Cross-examined by Mr. McGregor: In December, 1900, a balance of about £40 was due. Witness did not remember seeing defendant in December, 1900. In December, 1900, defendant did not say to witness that he would not stand good for any further debts contracted by his son; witness would not agree to such a thing, he would have stopped credit. For the defence, Mr. McGregor called

Jacob Werner, who stated that he entered into the guarantee for a sum up to £25. He saw the previous witness some time later; he thought it was in December, 1900. He told Mr. Spilhaus that he would not be responsible for any more of his son's liabilities. Witness's son went insolvent in 1902, but it was not until June, 1903, that Messrs. Spilhaus wrote to witness for payment.

Cross-examined by Mr. Benjamin: It did not occur to him to ask for the return of the guarantee in December, 1900.

John C. Werner gave evidence as to the drawing up of the guarantee.

This closed the case for the defence.

Counsel having been heard in argument on the facts.

Buchanan, J.: It is common cause between the parties that in October, 1900, the defendant's son, being about to start a small shop, applied to the plaintiff for credit. This was refused, unless the father became surety for £25. The defendant thereupon entered into a written contract guaranteeing his son's purchases to the amount of £25. for goods then or at any future time supplied. In 1902, the son's estate was sequestrated. At the time of the insolvency there was an amount of £27 due to the plaintiffs. The defence to the claim now set up is that in the month of December, the father was told his son had paid for all goods purchased up to that date, whereupon the defendant verbally revoked the guarantee. The defendant further states that he had told Carl Spilhaus that the guarantee was only for the first lot of goods ordered. The issue before the Court is whether there has been revocation or not. On this point we have the assertion of the defendant, and the positive denial of Carl Spilhaus. It might have been expected that the defendant would have asked for the document back, or have written a letter cancelling it, but there was nothing of the kind done. We have, therefore, the written document of

guarantee against which there is only the contradicted statement of the defendant. On the evidence we must hold that the document stood good, and that defendant was liable. Judgment for the amount prayed, with costs.

[Plaintiff's Attorney: Syfret God-lonton and Low; Defendants Attorney: A. W. Steer.]

GENERAL MOTIONS.

SUTTON V. PHILLIP BROS.

Mr. Gardiner, for the petitioner, moved for an order of release from civil imprisonment. A decree of civil imprisonment had been granted against the petitioner on the 18th September, 1903, and on the 6th October he was lodged in the East London gaol. Petitioner had a wife and six minor children, and he believed that he had lost his position in the Customs through which he was in receipt of £9 per month. If released he would be able to pay off the debt by small sums weekly.

Mr. Buchanan, on behalf of the plaintiffs, opposed the application on the ground that the petitioner had ceded to his wife certain shares to the value of £1,000, and that the debt had been owing for several years.

Order granted as prayed.

THERON V. GREEN.

Mr. Gardiner, moved to make absolute a rule nisi compelling the respondent to vacate a certain store in the district of Stockenstroom. Mr. Benjamin, for the respondent, submitted that his client should be left in possession pending an action.

The interdict in operation restraining the respondent from removing any material from the store was ordered to be continued pending an action to be tried either at the next circuit or before the end of the next term in the Eastern District Court. No order as to ejectment, costs to abide the result, and the applicant to bring the action.

KOENIG V. LANDESHUT.

This was an application for leave to take the evidence of the plaintiff on commission.

Mr. Alexander appeared for the applicant; Mr. Bisset for the respondent.

The affidavit of the applicant set forth that the applicant had been prepared to go to trial during the November term, but on account of an application for commission by the defendant to examine certain witnesses in England and Australia it was then impossible to go to trial. Applicant intended in the course

of a few days to go to the Transvaal. The case was set down for the 15th inst. and was the fourth on the list for that date. If prevented from going to the Transvaal plaintiff would probably suffer considerable loss.

On behalf of the respondent William Templer Buissonne, respondent's attorney, deposed that it would be greatly to the detriment of the plaintiff if the defendant did not appear personally in the witness-box. Deponent believed it would be of advantage to the Court, and would lead to a fair decision if the plaintiff were to give his evidence personally, in their lordships' presence.

Mr. Bisset said the action was in respect to the use of certain play rights.

[Buchanan, J.: Does the case depend on the document or on *viva voce* evidence?]

Mr. Bisset: Yes, it would chiefly depend on *viva voce* evidence.

Mr. Alexander said that the case would depend chiefly on the documents, and would largely be a matter for argument. There was an award of the arbitrators, and the plaintiff alleged that the award would settle the matter. The evidence of all the defendant's witnesses had been taken on commission, and so far as he (counsel) was instructed the plaintiff was now the only witness who had to give evidence in the case. The matter was originally set down for the 29th of May, but a postponement was then granted on account of the plaintiff's illness.

After hearing counsel in argument, the Court granted the application.

Buchanan, J.: This is an action for a partnership account. The action would have been heard last May, but owing to the plaintiff's illness, it could not then come on. The defendant thereupon applied to the Court for a statement of a partnership account. The action would have been heard last May, but owing to the plaintiff's illness, it could not then come on. The defendant thereupon applied to have her own evidence taken on commission, and also the evidence of her witnesses, who were then, some of them in London, and some of them in Australia, and the Court granted the commission. Owing to a delay in the return of these commissions, the plaintiff could not go to trial until this term. He now applies, owing to pressure of business, to be allowed to give his own evidence on commission; to have granted to him the same concession as has been granted to the defendant. This is opposed on the ground—the only ground so far as the affidavit goes—that it would be to the advantage of the Court in arriving at a decision if the defendant gave his evidence before the Court. In looking at the pleadings, I find that the case greatly depends upon the construction of the documents, and also upon legal argument as to the effect of the agreement

arrived at between the parties. I see no reason why the defendant should not be allowed to have the same advantage as the defendant in this case. The Court will therefore grant the application, and appoint Mr. P. S. Jones as commissioner.

Buchanan, J., pointed out that it was usual for the Court to appoint a commissioner, instead of a commissioner being suggested, as had been done in this case.

Mr. Alexander said that the reason the name of Mr. Advocate Jones had been suggested was because Mr. Jones had taken the other evidence in the case.

[Buchanan, J.: That is a very good reason why Mr. Jones should be appointed.]

Costs were ordered to be costs in the cause.

LAITA V. HESSEN.

Mahommedan marriage—Custody of children.

Applicant and respondent had been married according to Mahommedan rites: whether by a duly appointed marriage officer or not did not appear. Thereafter the respondent obtained a divorce from the authorities of his church and retained the custody of the children of the marriage. Applicant now asked for their custody.

Held, that as there was no evidence that the marriage had not been solemnised by a marriage officer, the application must be refused.

This was an application upon notice calling on the respondent to show cause why he should not be ordered to hand over the custody to the applicant of minor children now unlawfully detained by him; why he should not be ordered to contribute to the support of the children a sum of £3 per month in respect of each; and why he should not be ordered to pay the costs of this application. The affidavit of the applicant set forth that in July, 1898, she was married to respondent according to the rites of the Mahommedan Church. She lived with him until December, 1902, and during that time they had three children, of whom respondent was the father. Two of the children were still living. Respondent had divorced her according to Mahommedan law, and the children were now in charge of one of his Mahommedan servants.

The answering affidavit of the respondent said that he had divorced applicant because of her misconduct. He did not consider her a fit person to have the care of the children. A nurse deposed that respondent had neglected her children.

Applicant filed a replying affidavit, denying that she was guilty of misconduct, or that she had neglected the children.

Mr. Benjamin (for the applicant): The parties were married according to Mahommedan rites, but that was not a legal marriage, hence the children are illegitimate, and the mother should have the legal custody of them. See *Bronn v. Bronn's Executor* (3 Searle, 313). There the marriage was contracted in 1811, years before the Marriage Ordinance of 1839 was enacted. Section 4 of Act 16 of 1860 provides for the appointment of marriage officers to officiate at Jewish or Mohammedan marriages: but this marriage was not solemnised by a marriage officer.

[Hopley, J.: How does that appear?]

There are no Mahommedan marriage officers here.

[Hopley, J.: Even if the children are illegitimate, does it follow that the mother should have the custody of them? A Kafir would not admit that?]

Native customs are recognised by law in Native Territories, but as to Colonial Law, see *Van Rooyen v. Werner* (9 S.C.R., 425) and *Van der Linden* (1, 4, 2). The mother is always entitled to the custody of illegitimate children.

[Hopley, J.: Much depends upon the conduct of the mother: she has been divorced.]

The Court cannot recognise the acts of a tribunal of which it knows nothing. There have been cases in which the Court has given the custody of very young children to the mother, even when she has been guilty of immoral conduct. The law of Scotland agrees with our own law as to the custody of illegitimate children.

[Buchanan, J.: It does not appear on affidavit that these children are illegitimate.]

Then I would ask that the matter be allowed to stand over for further affidavits as to who married the parties.

Mr. Buchanan (for respondent): I simply go on the affidavit, which says that the parties were married according to Mohammedan rites. I do not know that they were not married by a marriage officer. But even if the children are illegitimate, I submit that in the children's interest the Court will not allow the mother to have the custody of them. Applicant's counsel has spoken of her maternal instincts, but she seems to be devoid of maternal instincts. She went away quite happy from Mafeking, and left her children with their father, and when the younger child was ill she

grossly neglected it. Then, again, it is not usual to grant the custody of children on motion, unless the motion arises out of a previous action.

Mr. Benjamin asked that the matter be allowed to stand over for further information if the Court considered that the marriage was good in civil law.

Buchanan, J.: The applicant in this case alleges that she was married according to the rites of the Mahommedan Church to the respondent. She cohabited with him after marriage, and certain children of the marriage were born. Since that time she left her husband—or rather, her husband divorced her, according to the rites of the Mahommedan Church. She now claims custody of the children, and in answer to this, the respondent admits the marriage, and states that he divorced his wife according to the custom of the Mahommedan Church. He alleges further that on the separation there was an agreement between them that he was to retain the custody of the children. He moreover alleges that before the divorce there was neglect by the applicant of her children, and this alleged neglect is supported by the affidavit of another witness. He also alleges that the applicant has misconducted herself, and was therefore not a proper person to be entrusted with the custody of the children. The learned counsel for the applicant wishes to take for granted that there was no legal marriage between the parties; and that these children are illegitimate. The mere fact that the marriage was according to the rites of the Mahommedan Church does not necessarily make it illegal. Act No. 16, 1860, which was passed to afford additional facilities for contracting legal marriages, expressly provides for solemnising marriages between persons professing the Mohammedan faith, and in the absence of any allegation, the Court cannot assume that the marriage so contracted was an illegal one. There is no question of a polygamous marriage. If the applicant can say that there was no marriage at all, she can renew her application, or bring an action for the custody of the children. But we cannot brand these children with the stamp of illegitimacy, without some evidence. I am with the counsel so far that the Court is the only body which can pronounce a valid divorce. At the Mohammedan divorce there seems to have been an agreement that the father should have the custody of the children of which he was the father. If the applicant can show she never was married at all, and that she is the proper person to have the custody of the children she can repeat her application or bring an action to have the marriage declared illegal. At present we are not inclined to interfere with the present condition of affairs, and we will make no order. The application will

therefore be dismissed without any order as to costs.

Hopley, J.: I am also of opinion that this application should be refused, as it is impossible for the Court to decide the matter on motion. The parties were married according to Mahomedan rites, in a manner which they no doubt thought binding. They lived together as man and wife, and had three children before any rupture between them took place, and the allegation that the intercourse was illicit, and the children illegitimate now comes with very bad grace from the applicant. After some years of cohabitation as man and wife, the respondent "divorced" the applicant according to their religious rites or recognized customs on the ground of her alleged infidelity to him. This, of course, is no legal divorce, presuming the original marriage to have been of legal effect—but at all events, it may have the effect of a separation by consent, and on such an arrangement, the disposal of the children would probably form a part. The respondent alleges that the children were by mutual consent left in his care and under his guardianship, and the fact that their mother left Mafeking without them, or apparently without making any attempt, by invoking the local authorities or the assistance of the High Court at Kimberley, to assert her claims, goes far to confirm the assertion that she consented to abandon her claims in this respect. It is true that she now denies that such arrangement was come to—but that raises an important issue of fact that cannot be determined in the manner now attempted. If the applicant has any rights in the matter, she must assert them in an action.

[Applicant's Attorney: T. P. Peters;
Respondent's Attorney: G. J. O'Reilly]

LOCHNER AND VAN DER HOFF V. GROMAN.

Mr. Buchanan moved to set aside a provisional judgment granted against the applicant on the ground that no summons had been received by him. Counsel put in the affidavit of the defendant, which set out that when the judgment was obtained a tender was made of the amount, less the costs, which was refused.

Mr. M. Bisset, for the respondent, put in replying affidavits which set out that the summons had been served on Mrs. Schwalbe, at 5, Mill-street, where the defendant was living, and that on several occasions the defendant had failed to pay the balance of the purchase price of a certain piece of land at Somerset West Strand.

The application was refused, with costs.

Ex parte KENMUIR.

Mr. Searle, K.C., moved for the appointment of a provisional trustee in the sequestrated estate of William Sharp, with whom the applicant had entered into partnership in a contract for alterations and additions at the Town Hall, King William's Town. Petitioner had completed his portion of the work, and several sub-contracts had been entered into with contractors. The work should have been completed on the 15th December last, and there was a penalty of £15 per week for delay, which the architects gave notice of enforcing in February. It was necessary a provisional trustee should be appointed with power to complete the work under the contract, and the name of William George Robertson was suggested as trustee.

Order granted as prayed.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice HOPLEY.]

SHANAHAN V. SHANAHAN. { 1901.
{ Feb. 9th.

This was an action for divorce instituted by Mary Miriam Shanahan against her husband, Henry John Shanahan, by reason of his alleged infidelity. The declaration set forth that the parties both resided in Cape Town. They were married in community of property at St. Mary's Cathedral, Cape Town, on January 17, 1894. It was alleged that during the latter part of 1902, and the beginning of 1903, defendant had committed adultery with one Mrs. Bagley. Plaintiff prayed for a decree of divorce, with forfeiture of benefits arising out of community, and custody of the two minor children. She also asked for an order on the defendant to pay the sum of £20 a month for the maintenance of the children.

Defendant filed a plea in which he denied the allegations of misconduct. In respect of the property, he said that in 1900, certain property in the joint estate was realised, and that out of the proceeds thereof, the plaintiff was paid her share of the community.

In her replication, the plaintiff admitted the sale of the property, but denied that she had received her share of the joint assets.

Mr. C. W. de Villiers appeared for the plaintiff; defendant appeared in person.

Mary Miriam Shanahan, the plaintiff, said she was married on January 17, 1894, in community of property. Defendant was then a lance-corporal in the Royal Artillery, and she bought him out. There were two children of the marriage, aged eight and five and a half years. They lived happily for four years. At the time of the marriage, witness was lessee of the Diamond Bar, in Harrington-street. In 1898 defendant took to drink, and neglected the business. He used to frequent a low music-hall. Witness then took steps to obtain a judicial separation, but she abandoned the proceedings on defendant promising to amend. There was a disagreement over defendant's conduct with a certain young lady, and for some time there had been an estrangement between witness and defendant. Defendant had no property when married. After marriage, the licence of the hotel was transferred to defendant. Towards the end of 1900, an agreement was drawn up, in which defendant agreed to hand over to witness half the landed property, and to share the profits from the hotel. Defendant signed that agreement; witness did not. The landed property was sold, and an amount of £3,700 odd was realised, this being divided equally between witness and her husband. After receiving the money, witness invested it on her own behalf, and she now had three mortgage bonds. Defendant thereafter had sole control of the business. He had handed witness sums of money from time to time, being her part of the profits from the hotel. Defendant started as a broker, and afterwards opened a tailor's shop, and witness was obliged to look after the business. Defendant was now insolvent, his estate having been compulsorily sequestrated. There was a deficiency of about £1,200. Witness attributed the insolvency to defendant's neglect of the business, which was paying up to about nine months ago.

In reply to the Court, Mr. De Villiers said that the trustees would claim on the property now in the plaintiff's possession for the deficiency; but there would be a surplus, and the plaintiff wished an order from the Court with respect to this surplus.

Plaintiff said this action was commenced before defendant became insolvent.

William O'Brien, formerly a barman at the Diamond Bar, said that defendant did not treat his wife as he ought to have done. He used to neglect his business, and to go out with a young lady he was fond of. He had been with the defendant in the company of two ladies who lived in St. John's-road, Sea Point. One was a Mrs. Bagley, with whom the defendant became very intimate. He had seen defendant with Mrs. Bagley under

compromising circumstances. He had seen them, in a bedroom together in Mrs. Bagley's house. They used to go to Mrs. Bagley's house in the daytime, when Mr. Bagley was away. Afterwards Mrs. Bagley lived apart from her husband, going to Observatory-road to live. Defendant and witness visited her house there. In February of last year, Mrs. Bagley became reconciled to her husband, and went to England.

In cross-examination by the defendant, the witness said that when the former discharged him, he (witness) went to the house next day to get his clothes. Defendant then assaulted him, and witness threw a knife at him. He did so because he was alone, and there were three or four other men with defendant. He was not paid for the evidence he was now giving.

This closed the case for the plaintiff.

Defendant called,

William D. Shanahan, nephew of the defendant, who said that he had been with defendant and the last witness to Mrs. Bagley's house on a number of occasions, and had never observed anything wrong about the conduct of defendant and Mrs. Bagley. Witness was in defendant's service at the same time as O'Brien. The latter was lazy and drunk.

Cross-examined by Mr. De Villiers: Witness never went to the house at Observatory-road. Witness believed he had seen defendant with his arm round Mrs. Bagley while walking. He had never seen defendant kissing her.

The defendant, Shanahan, gave evidence. He denied the truth of O'Brien's evidence. He never put his arms around Mrs. Bagley, as the last witness had just said.

Cross-examined by Mr. De Villiers: He had never been in Mrs. Bagley's bedroom, excepting on an occasion on which he had helped to shift furniture. He denied that he went to see her frequently; he had not been to her house more than nine times. He attributed his insolvency to the differences which had arisen between himself and his wife. He denied that he had assaulted O'Brien some days ago.

At the instance of his lordship, the witness O'Brien was recalled. He stated that he had seen the defendant in a compromising position with a Mrs. Smythe.

The defendant, in addressing the Court, attributed the institution of the present proceedings to malice on the part of O'Brien.

De Villiers, C.J.: The Court is satisfied that the defendant committed adultery, and the only question now is as to the property. The Court will grant a decree of divorce, with costs; plaintiff to have custody of the children of the marriage, and the Court will declare the defendant to have forfeited the benefits arising out of the community of pro-

party. The effect of this will be that the plaintiff will only be entitled to any surplus out of the insolvent estate. On the question of alimony, I don't think we can go further.

GENERAL MOTIONS.

SHUTTE V. HEDLEY BROS. { 1904.
 { Feb. 9th.

Mr. Searle, K.C., moved on notice of motion for the appointment of the Resident Magistrate of Prieska as commissioner to take the evidence of a necessary and material witness in the case, and to fix a date other than the 22nd inst. for hearing.

Mr. Gardiner (for the respondent) raised no objection, but suggested that the commission might be a joint one.

Commission granted, the Resident Magistrate of Prieska to act as commissioner.

RIX V. RIX.

Mr. Alexander moved for an order compelling the respondent to contribute a certain sum, in order that the applicant might bring an action for divorce. The affidavit of the petitioner set out in 1892 she was married in community of property to the respondent, and as there were no children of the marriage. He adopted a child. Up till 1902 she lived happily with her husband, but in the early part of that year he commenced to pay attention to a woman named Sarah Moss, and thereafter they separated, and he agreed to allow her £3 per month for the support of herself and the child.

Mr. Buchanan (for the respondent) pointed out that he only earned £9 a month, and obtained about £1 5s. a month after paying rates, etc., on a property.

An order was granted calling on the defendant to advance the sum of £10 to the applicant, to enable her to bring the action, in addition to the £3 a month which she was entitled to under the agreement.

BEYERS V. GROENEWALD.

Administrator—Removal.

Mr. Searle, K.C., moved for an order calling on the respondent to show cause why he should not be removed from the office of executor testamentary in the estate of the late Peter Christian van der Groenewald, why the applicant should not solely administer the estate, and why the respondent should not be interdicted from receiving the proceeds of a sale of portion of the estate, pending an action to be brought by the applicant

for an account of the administration of the estate. Counsel put in affidavits which set out that the respondent had neglected the estate, and could not account for the rent of certain property in Orphan-lane for ten years. Three years ago the applicant discovered that the respondent was wholly incompetent to administer the estate, and through a deed of assumption, he acted as co-executor. The respondent was addicted to drink, and he had refused to sign documents necessary to the administration of the estate. The respondent was one of six heirs under the will, and the other five, including applicant's wife, agreed that it was necessary the respondent should be removed from his office of trust.

Mr. Benjamin put in the answering affidavit of the respondent, which set out that he was at present farming at the Paarl. He denied he had ever received any rent for the houses in Orphan-lane, or that he had given way to drink. He admitted that the applicant was in a better position to administer the estate than he was. Other affidavits were filed, testifying to his sober habits.

Mr. Benjamin: There is no precedent for ousting an administrator who is willing to administer the estate. The respondent is willing to do so, and the only evidence against him is that on one occasion he refused to sign a document unless its purport was explained to him in Dutch.

De Villiers, C.J.: I don't think justice would be done in this matter without an opportunity of seeing the parties—both applicant and respondent—and the case will be postponed until the 17th. In the meanwhile, I would suggest that the respondent should give an undertaking to the applicant that he will in future attend to his duties, and if an undertaking of that kind is given, I think it should suffice. If no further costs are incurred, I think that, on the whole, as both parties seem to have acted for the interests of the estate, costs should come out of the estate.

Ex parte LATEGAN.

Usufructuary — Expenditure on usufructuary estate — Law costs.

A usufructuary and administrator should obtain the leave of the Court before incurring costs of defending an action in respect of a usufructuary estate in which minors are interested.

This was an application for leave to the petitioner, who is the executrix of the estate of her late husband, Cornelius

Johannes de Jager, to raise certain money on bond on landed property in the estate. The petition set forth that petitioner enjoyed the usufruct of the property under the will, but the property was bequeathed to the son—a minor—under certain conditions. Certain money had been spent in defending a law suit; which was lost. The property had been improved, and application was now made to raise money to meet the costs of the law suit, and of improvements. The Master reported adversely to the petition, objecting to money expended on behalf of the minor in the law suit being refunded to the petitioner.

Mr. Buchanan (for applicant): In this case the will gave the property to both children, but the terms of the codicil are not quite in agreement with those of the will. But be that as it may, the applicant not only entered upon possession of works already existing, but has constructed new works; particularly dams.

[De Villiers, C.J.: Why did she expend this money without the leave of the Court?]

She says that she was acting under legal advice.

[De Villiers, C.J.: There is no evidence that her attorney advised her to go on with the case.]

It is the presumption that he did so, but the Master takes up the position that the Court has already decided against us.

[De Villiers, C.J.: You should have had a *curator ad litem* appointed to represent the minors.]

Yes, no doubt that would have been more regular.

De Villiers, C.J.: Before defending the law suit, petitioner should have applied to the Court to appoint a *curator ad litem*. The applicant will be authorised to raise a sum of £650 for payment of the improvements and costs of this application. I think, however, that the Master has very properly objected to the costs of the law suit being included, and that before any costs were incurred on behalf of the minor the Court should have been applied to for leave to appoint a *curator ad litem*, or at any rate, for leave to defend the action on behalf of the minor. Interest on the bond will not be paid by the petitioner as usufructory.

Ex parte ZACHARY STANLEY BAYLEY AND OTHERS.

Election expenses—Amendment of returns.

Mr. Buchanan moved for an order authorising the amendment of certain election returns. The petitioners were Messrs. Bayley, Barrable, and Hughes, who were candidates for the Legislative

Council. In the return of expenditure made to the returning officer, there had been a miscalculation, and certain items had been omitted. Application was now made to amend the returns under subsection 1 of section 25 of Act 26 of 1902.

[De Villiers, C.J.: Will the total amount exceed what is allowed by the Act?]

No; for a Council election a man may spend £500; or in the case of a joint candidature (such as this) less by one-third, that would be £1,000 in all for the three candidates.

A rule was granted calling on all concerned to show cause on the last day of term why the error should not be amended as prayed, rule to be published once in the "East London Despatch."

The Chief Justice said it must clearly be understood that if this addition should make the expenses exceed what was authorised by the Act, this order must not be held to sanction the excess.

BIRD V. BIRD.

This was an application made by the wife to compel her husband to pay her £30 to enable her to defend an action for divorce instituted by him, and to pay a sum of £2 10s. a week, for the maintenance of herself and two children.

Mr. J. E. R. de Villiers appeared for the applicant; Mr. Gardiner for the respondent.

The Court ordered the respondent to pay £30 to applicant's attorney to enable her to defend the action, costs to abide the result.

Ex parte PRETORIUS.

Mr. Gardiner moved for leave to transfer certain property in the estate of applicant and her husband. Applicant deposed on affidavit that she lived at Sterkstroom. Her husband left her in May, 1893, and in 1896 it was discovered that he was living at Bloemfontein. There was reason to believe that he was killed in the explosion which occurred at Bloemfontein at that time. Applicant was indebted to certain people for goods supplied for the maintenance of herself and the minors, and she now applied for leave to sell certain property, and to apply the proceeds to the payment of these debts. Counsel cited the case of *Hoffmeester* (17, Supreme Court Reports, p. 539), and said that in this case it would require nearly all the assets in the estate to pay the debts.

The Chief Justice said an order would be granted in terms of the judgment in the case of *Hoffmeester*.

HIDDINGH V. ESTATE OF HERTZOG.

Mr. Benjamin moved on behalf of the executors of the estate of the late Judge

Hertzog, for judgment in terms of a certain letter, in which plaintiff abandoned an action instituted by him to have the validity of a will declared.

[De Villiers, C.J.: Is there no Rule under which you can get final judgment?]

No; we could only get absolution from the instance, and that will only result in further costs.

De Villiers, C.J.: Application had better be made under the Rule of Court, which provides that a defendant may move for judgment in case an action is not proceeded with within a stipulated period.

Ex parte C. C. DE VILLIERS.

Mr. M. de Villiers moved for authority to the petitioner to pass transfer in the estate of the late J. C. Stephan. The matter stood over for a report from the Registrar, who raised no objection, and pointed out the general practice that transfer could not be allowed under general power of attorney.

De Villiers, C.J. said that as the Registrar raised no objection to the transfer in this particular case, the Court would authorise it in reference only to such property as Mr. Stephan had sold prior to his departure for Europe. Confining it to that the Court would make the order without any prejudice to Mr. Stephan's rights if he should repudiate the offer.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

TUROK V. CHRISTOPOULOS } 1904.
AND VOYIARITSIS. } Feb. 10th.

This was an action for the rectification of a certain written document—a lease, dated the 10th July, 1903. From the pleadings it appeared that it was common cause that certain premises, consisting of a shop and two rooms and kitchen, were let by the plaintiff to the defendants, and these premises were described in the lease as No. 161, Commercial buildings, Albert-road, Woodstock. The plaintiff alleged that the words "No. 161" were put into the lease either by mutual mistake, or alternatively owing to the fraud of the defendants. The plaintiff said that the premises were not No. 161, but were numbered 165, the latter being the premises understood to be leased,

and which, apart from the mistake in number, were otherwise perfectly well identified by the parties when the lease was drawn up. Plaintiff claimed a rectification of the lease, in order that the number of the premises let should be made 165. He also claimed £27 as rent. The plaintiff was the landlord of the premises, and defendants were now actually in possession of No. 165. In their plea, defendants said they had not had possession of the premises let to them under the lease. They claimed in reconvention an order declaring them entitled to the possession of No. 161. They further claimed £25 damages; and as an alternative claim, they asked for judgment for £250 as damages.

The matter had previously been brought before the Court by way of motion, and it was then ordered that the applicant, the present plaintiff, should proceed by action.

Mr. Alexander for the plaintiff; Mr. Pyemont for the defendant.

Hyman Turok, the plaintiff, was called, and said he owned the Commercial Buildings, in Albert-road, Woodstock, the numbers of which were 161, 163, 165, and 167. No. 165 was formerly a fruit shop. There were two rooms and a kitchen behind 165, but there were none behind 161. There were four rooms and a kitchen above 161 and 163, the entrance to which rooms was from Railway-street. Before July last, the tenant of 165 was a man named Cambrez, who used it as a fruit shop. There was a Malay grocer named Saladien in 161. A man named Cammaris occupied the rooms behind 165 in July, and was still there.

Mr. Alexander said that in regard to this, it was stated by plaintiff on the pleadings that he had given this man notice, in order to give defendant possession of the rooms, and had taken no rent from Cammaris.

Witness (proceeding) said in July the defendant Christopoulos came and saw him at the premises, and said he wanted to take the shop. Cambrez said he wanted to give over the shop to Christopoulos. Witness said he could do nothing there, but that they must come to the office of his agent. This took place in Cambrez's shop. Christopoulos and two other men afterwards met witnesses in the office of Messrs. Silberbauer, Wahl and Fuller, and a lease was made in respect of the shop and two rooms and kitchen. It was agreed that the rent should be £9 a month. Cambrez had been paying £6 for the shop only. Witness ordered that notice should be given to Cammaris, and it was agreed that, as possession of the rooms could not be given in July, the rent should only be £6 for that month. Christopoulos asked witness the number of the shop. Witness said he did not know. One of the Greeks with Christopoulos said it was

161, and so this number was put in the lease. Witness did not collect the rent himself, and did not know the numbers of the shops. There was a clause in the lease which stipulated that no fruit or green vegetables were to be sold in any of the adjoining shops. This was done so that Saladien should not sell fruit or vegetables, while Christopoulos was not to sell groceries. Since then a little fruit, such as tomatoes, had been sold in 161. This was done because the tenant of 161 complained that defendants sold groceries. The witness deposed as to certain correspondence in the case.

By the Court: Saladien was still in possession of 161, and witness was satisfied with him as a tenant. No. 161 had never been let with two rooms and kitchen.

Cross-examined by Mr. Pyemont: Saladien paid £7 10s. for the shop, and rented the four rooms above for £4 a month. There was a way to these rooms through a passage from the shop, as well as from Railway-street.

James Grainer, clerk in the office of Messrs. Silberbauer, Wahl and Fuller, said he was in charge of the rent-collecting branch. According to the rent ledger, Cambrez paid the shop rent for 165 up to July, and Cammaris paid rent for the rooms behind. Witness gave a receipt in July. This was for £9 paid by the defendants. It was credited to the August rent, and witness took the amount from the lease. £6 was collected from Cambrez for July before the lease was made. Witness gave notice to Cammaris to quit on the 1st August. The four rooms above 161 and 163 were always let as one dwelling-house, and were never let separately.

By the Court: Nothing was said in witness's presence about turning the Coolie out of 161.

S. J. Mostert, articulated clerk in the office of Silberbauer, Wahl and Fuller, said he prepared the lease. He asked the number of the premises. Turok was uncertain, and the interpreter, having spoken to defendants, said the number was 161. Defendants had tendered certain amounts since the case was commenced as rent for 161, but were told the money could not be accepted as rent for 161.

Jno. S. Innes, clerk in the same office, deposed that on August 2 defendants came to the office, and tendered £6 as rent on behalf of Cambrez, and £9 as rent for themselves for 161. The tenders were refused.

Charles Marais, surveyor, Charles P. Miller, and Mohamet Perquhuan also gave evidence. Perquhuan, who is the present occupier of 161, said that about six months ago defendants came to him and warned him not to sell fruit, as they had a lease of the shop next door but one (165). In cross-examination, the

witness denied that in July he was told he would have to leave the shop.

For the defence,

Joe Christopoulos, one of the defendants, gave evidence. He said that when the lease was drawn up he went to the office of Silberbauer, Wahl and Fuller, according to arrangement with Turok. Witness first saw Turok in May in his (witness's) shop. Witness then occupied 165. Cambrez was not there then. Witness asked Turok about the shop at the corner (161), and Turok agreed to let him have that shop. They conversed through an interpreter. Witness subsequently saw Turok near the latter's office, and they came to terms. In consequence of that he went to the attorneys' office to have the lease drawn up. The lease was read over to witness by the interpreter, and was in accordance with what he had intended. He had always given Turok to understand that what he wanted was the corner shop (161). Witness afterwards went to the corner shop and saw Perquhuan. An interpreter was present. Witness told the coolie that he had taken the shop. He did not tell the coolie that he had taken a lease of 165. The coolie said he would not go out for six months, and witness thereupon went to see the landlord, and informed him, through an interpreter, of what the coolie had said. Turok said he would see that the coolie was turned out, but on condition that three months' rent was paid in advance. Witness refused to agree to this. Witness then went to his lawyer.

Cross-examined by Mr. Alexander: The interpreter was now in Johannesburg.

By the Court: Witness took the business at 165 from Cambrez in April or May. Witness wanted to go to the corner shop because it was a better one. He was not willing to keep on at 165 if he could not get the corner shop.

Elias Cammaris said he had lived in the rooms behind 165 for nine months, and had never had notice to quit. He paid his rent in August, and had since offered to pay the rent through his brother.

Efthin Yaxoqlaw, tobacco merchant, said he was in the office of the plaintiff's attorneys when the lease was drawn up, and was a witness to the document. Witness explained the lease to the defendants, who signed it as being according to their intent. The figures "161" were there when he read the lease over to defendants.

Joseph Barnard Shaxinowits gave evidence as to the position of certain rooms over 161 and 165.

This concluded the evidence, and counsel were then heard in argument on the facts.

Buchanan, J. expressed the opinion that counsel for the plaintiff should unreservedly withdraw the allegation as to

fraud, as there was absolutely no evidence on that point.

Mr. Alexander said he was prepared to withdraw the allegation.

Buchanan, J.: The plaintiff in his declaration alleges that he was the owner of a block of buildings known as Commercial Buildings, situated at Woodstock, and that on the 10th July last he agreed to let to the defendants a certain portion of the buildings, consisting of a shop and two rooms and kitchen, adjoining for the sum of £9 per month. Thereafter, when this agreement was concluded between the parties, it was reduced to writing in the office of the plaintiff's solicitors, and plaintiff, not knowing the actual number of the shop, it was stated by the defendants to be 161, and 161 was inserted in the written lease. It was discovered, however, that 165 should have been written instead of 161, and the plaintiff brings this action to amend the written document in so far as it describes the number. He also claims for three months' rent, due under the agreement. The defendants admit in their plea that they are in occupation of No. 165, but they say that the agreement of lease was really in respect of 161. The first question we, therefore, have to decide, is: What was the contract between the parties. From the evidence given by Christopoulos himself, it appears that one Cambrez was in possession of a green-grocer's and fruit shop, carried on at No. 165, that in April he bought the goodwill of this business for £50, and that he paid the rent in Cambrez's name before he entered into this agreement. The plaintiff says—and it seems reasonable to think that it was so—that the defendants came with Cambrez, and said they were going to take over this business and wanted a lease of the shop; that he agreed to grant them a lease of the shop, and that he made an appointment with them to appear at the attorneys' office to enter into a contract of lease. They duly appeared at the attorney's office. I think it is beyond all question that the plaintiff in this case intended to let 165, and the two rooms and kitchen behind 165. I think this is beyond question, because of the facts that the rent stipulated for 165, and for the rooms and kitchen behind, was the same as had previously been paid, and that at that time the plaintiff had a tenant for the shop at 161, and for the rooms above at a higher rental, and I do not think he can be presumed to have intended to take a tenant for those premises at a much lower rate. I have no doubt, as far as any rate, as the plaintiff is concerned, that he considered he was letting the shop 165; but the question is whether the defendants also think they were hiring that shop. Now these same considerations induce me to come to the conclusion that the contract they entered

into with the plaintiff was to hire the shop 165, and not 161. One reason for concluding so is that on looking at the lease, I find these words: "In which said shop two rooms and kitchen are to be used." Now the only shop which has two rooms and a kitchen available to go with the shop is 165. It is true that there are certain rooms over the shop 161, but these rooms are above both 161 and 163, and from the evidence before us these form one compact building, and not two separate sets of rooms. Moreover, these rooms are available by entrance from the side street, and not from the shop 161 at all, and have been always let separately, and not with either of the shops. Therefore, the description in the lease as to the shop and rooms let is the only one consistent with the contract to let the shop 165, and the two rooms and kitchen behind, and is totally inconsistent with the idea that the shop let was the one at the corner, with two of the four rooms over the two shops. Then we have the fact that after the contract had been entered into, the defendants did not say: "Give us possession of the corner shop," but actually went into and took over Cambrez's business, and were left in possession from that time to the present. I think, under these circumstances the Court is forced irresistibly to the conclusion that it was a clerical error at the attorney's office in putting the wrong number into the agreement of lease. I must say it doesn't reflect very great credit on the clerks—junior clerks, apparently—who drew up the agreement. There was carelessness on their part, but we have evidence before us which shows how this particular number was put in. It was the defendants who suggested the number 161, and I think that while they were not acting fraudulently, they made an erroneous statement, and that while they were intending to take this other shop, 165, they gave the wrong number. If the defendants actually intended to mislead the plaintiff by giving the number as 161, instead of 165, it certainly would have amounted to fraud, but there is absolutely no evidence to show this, and it seems that it was through an inadvertence due to the defendants themselves, and not to the plaintiff that 161 was written. We are convinced from the evidence that the contract was to hire the shop 165, and the two rooms and kitchen behind. That being the case, the error in the lease is one that can be rectified. It does not alter the contract itself; it is only an amendment to make the written document in accordance with the actual contract itself. I think the plaintiff is, therefore, entitled to have the contract rectified by substituting the number 165 for 161. The next point is as to the rent. It was agreed under this contract that the rent should be £9, but the parties agreed that as the rooms in

the back were in the possession of Commaris, defendants should only pay £6 a month, as for the shop, until possession was given of the rooms at the back. According to his evidence, plaintiff gave Commaris notice to vacate the rooms, but the latter never did so, and plaintiff never took the trouble to eject Commaris, and never tendered to the defendants the use of these rooms. It is the duty of the landlord to tender vacant possession to the tenant. Plaintiff agreed to take £6 per month until he gave possession of the rooms. He claims rent for three months, and judgment will be given for the sum of £18 for three months' rent. The only remaining question is that of costs, and on this subject if it had been simply a question for the amendment of the contract the costs might have been avoided, or very little costs incurred by the defendants, but they have chosen after they got this lease by erroneous information to come into court and defend this case, and to adhere to this erroneous statement in the lease. Under these circumstances defendants should be ordered to pay the costs. As regards the costs of the survey, I think a survey in such a small case as this was unnecessary, and the question of whether the costs of the survey will be allowed will be left to the Master.

Hopley, J. concurred.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorney: F. B. Andrews.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

{ 1904.
{ Feb. 11th.

Mr. M. Bisset moved for the admission of Petrus Joachim van Wyk as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Oudtshoorn.

PROVISIONAL ROLL.

HOFFMANN V. BLACK.

Sequestration, compulsory—Petition of creditor.

The petition of a creditor who applies for the sequestration of

an estate must either allege that the debtor has committed an act of insolvency, or (1) that his claim is for £100 or more, (2) that the debtor is insolvent, and (3) that it is for the benefit of his creditors that his estate should be sequestrated.

Mr. Benjamin moved for the provisional order for the sequestration of the defendant's estate to be made final. Mr. W. P. Buchanan was for the respondent.

The petition of Josef Hoffmann stated that he was a manufacturer, carrying on business in Austria, and that the respondent was a merchant carrying on business in Burgstreet, Cape Town. Some few months ago the defendant executed a deed of inspection, which gave full powers to Mr. Gibson, of Gibson, Croese and Co., to carry on the estate. The defendant owed the petitioner £183 14s. 4d. for goods supplied to him. The petitioner was informed that all the creditors had not signed the deed, and, further, that some of the creditors absolutely refused to do so. Mr. Gibson stated that the conduct of the respondent had been most unsatisfactory, and that certain of his transactions before the execution of the deed required investigation. Judgment had been obtained against him at the instance of another creditor, and certain goods had been attached by the Deputy-Sheriff.

An affidavit by Mr. F. B. Andrews, the petitioner's attorney, spoke to a judgment having been obtained against the defendant.

Mr. Buchanan said that, before he read the respondent's affidavit, he wished to take the objection that the petition was not drawn in conformity with the requirements of Section 3 of Act 38 of 1884. The application was not based upon any act of insolvency, and the section under which the application was made required that the petition should state whether the other party was insolvent, and that it would be for the benefit of the creditors that such estate should be sequestrated, and setting forth the grounds upon which such statements were based. Counsel contended that the petition was absolutely unique in the method in which it had been presented to the Court. It had been held that in such matters the petition should follow the language of the section. There was no specific statement that the respondent was insolvent, and the only point that the application could be founded upon was this deed of inspection, which only showed that the respondent was in temporary difficulties.

The Court: But suppose we hold that the objection is good, would not the only result be that a fresh order would be made?

Mr. Buchanan said if that were done, arrangements could be made with the parties to bring the whole matter to an end. It was of importance to the respondent whether the objection was upheld.

Mr. Benjamin submitted that the whole tenour of the petition showed that the respondent was insolvent. He contended that the whole of the affidavits should be read to the Court, and that it would then appear from the respondent's own affidavit that his estate was insolvent. The deed of inspection shows that he is insolvent, and the fact that Mr. Justice Kotzé, in Chambers, saw fit to grant a provisional order, was some evidence of the insolvency of the respondent.

The Court: That is not a good argument.

Mr. Benjamin admitted that there was no specific statement that he was insolvent, but he submitted that the whole tenour of the petition showed that the estate was in insolvent circumstances.

[Buchanan, J.: The only question is whether the petition is in order.]

[Hopley, J.: The petition does not state that the estate is insolvent, or that it is for the benefit of the creditors that it should be sequestrated.]

I submit that there is sufficient in the general terms of the petition to show that the estate is insolvent, and that the exception which has been raised should be overruled.

Mr. Buchanan was not called upon in reply.

Buchanan, J.: If a debtor commits an act of insolvency within the terms of the old Insolvent Ordinance, it is competent for any creditor who can comply with the conditions of the Ordinance to obtain a compulsory sequestration of his estate. In this case, it is not alleged that the debtor has committed any act of insolvency, consequently the Ordinance does not apply. By Act 38 of 1884, certain additional remedies are given to creditors. The third section of that Act provides that a creditor wishing to sequester the estate of his debtor, who has not committed an act of insolvency, must, in the petition which he presents, state certain facts. He must state that his claim is for £100 or more; he must state that the debtor is insolvent; he must state that it is for the benefit of the creditors that the sequestration should take place; and he must state the grounds on which these statements are made. These are the provisions of the Act setting forth what the petitioning creditor must state in his petition. In this case the petition has not complied with these provisions, with the

exception that it sets forth that the petitioning creditor has a claim exceeding £100. The learned counsel who appears for the petitioning creditor has to admit that there is no allegation in the petition that the debtor is insolvent, nor is there any direct statement that it would be to the benefit of all creditors that the estate should be sequestrated. When the extraordinary remedies which the law allows to creditors are taken advantage of, it is essential that the conditions on which these remedies are given be complied with. The Court has repeatedly insisted upon a petition complying with the requirements of the statute before granting a sequestration of an estate. Mr. Benjamin urges that if we look at the additional affidavits now filed, these deficiencies will be cured. But that is not the question before the Court. An objection has been taken to the petition itself, that it does not comply with the Act. It may be that this may prove to be only a temporary obstacle to the creditor, and that a fresh application may be forthwith made upon an amended petition; but that we have nothing to do with. The Court must see that the requirements of the Act are complied with. If creditors wish to avail themselves of these extraordinary remedies, they must observe the conditions. The petitioner has not complied with the Act, and the Court has no option but to set aside the sequestration. The summons will be discharged, with costs.

Mr. Justice Hopley concurred.

KETS V. NOORDEN.

Conditions of sale.

The defendant had purchased certain property for £8,000 odd subject to the condition that a Trust Company should advance £5,000 on mortgage on the property purchased, and further £1,000 on certain other property of the defendant. The defendant alleged that the Trust Company subsequent to the sale demanded additional security for the advance of £5,000. This security he refused to provide. Part of the purchase price of the property had been paid by defendant, but a balance of £840 still remained due, and for this sum the plaintiff now asked for provisional sentence.

Held, that provisional sentence

must be granted as prayed, with costs.

Mr. Searle, K.C., moved for judgment for £840 1s. 1d. under conditions of sale. The sum due was not in dispute between the parties, and defendant tendered payment thereof—viz., £401 16s. 7d. capital, and £438 4s. 2d. interest. Defendant, however, claimed that on tender being made, plaintiff should fulfil the conditions of the sale. The conditions provided that the Colonial Orphan Chamber should allow £5,000 of the purchase price to remain on bond, and that a further £1,000 should be secured on a second bond on the property to Kets. The affidavit of defendant alleged that the Colonial Orphan Chamber, who acted as agents for the plaintiff, had demanded that to secure the £5,000 defendant should hypothecate this and further property. The answering affidavit of the applicant stated that the Colonial Orphan Chamber were prepared to grant £5,000 on bond on the property at the time the sale was made. Defendant, however, did not take transfer, and owing to the change in the value of the property, and other circumstances, the Chamber advised defendant that they could only give £4,500, unless additional security was given. Defendant had voluntarily tendered additional security, and it was only since summons was taken out that the defendant had taken up the position that he would not hypothecate further property.

Mr. Gardiner (for the respondent) contended that defendant was justified in coming to Court, because plaintiff had not been prepared to pass transfer in accordance with the provisions of the conditions of sale.

Buchanan, J.: The summons in this case is founded on conditions of sale entered into between the agent of the plaintiff and the defendant. By these conditions, certain moneys had to be paid on fixed dates, and the balance of the purchase price of the property, amounting to £6,000, was to be secured first by a mortgage bond for £5,000 in favour of the Colonial Orphan Chamber and Trust Company, and secondly by a mortgage bond for £1,000 in favour of Kets. The summons calls upon the defendant to fulfil the conditions of sale. It is said that some dispute has arisen between Mr. Steytler, the secretary of the Colonial Orphan Chamber, and defendant; but that is not before us now. Mr. Steytler is not before the Court, and all we can do is to give judgment for the plaintiff as asked in the summons. Provisional sentence will, therefore, be granted for £401 16s. 7d., and £438 4s. 6d., upon the plaintiff giving transfer, and defend-

ant passing the mortgage bonds stipulated for. As there was no actual tender before summons, the costs will have to be paid by the defendant.

ALFORD, WILLS AND OTHERS V. MARKS.

Mr. Benjamin moved for the provisional order for the sequestration of the defendant's estate to be made final. The matter had previously been before the Court.

No appearance was entered for defendant.

Order granted as prayed.

SUBURBAN ESTATES DEVELOPMENT AND BUILDING CO. V. JANKLOWITZ.

Mr. C. W. de Villiers moved for provisional sentence on certain conditions of sale for £37, less £16, paid since summons was issued, with interest *a tempore morae*, and costs.

Order granted.

IRELAND V. PENKIN.

Mr. M. Bisset moved for a provisional order of sequestration to be made final.

Order granted as prayed.

PEDERSEN V. KENNEDY.

Novation—Promissory note

Provisional sentence refused where plaintiff still held a promissory note which defendant had given in lieu of that sued upon.

Mr. Russell moved for provisional sentence on a promissory note for £350, with interest and costs.

Defendant said that there was another note given by him, which would be due on the 20th inst. The other note was given in place of the present one sued upon.

The Court advised the defendant to put the statement on affidavit.

The case was ordered to stand over until Thursday next.

Postea (February 18).

Defendant's affidavit stated that on taking over a certain licensed house he also took over certain debts owed to plaintiff by the outgoing tenants. He gave plaintiff the promissory note now in dispute, but on the due date defendant agreed to accept a new promissory note for the amount, payable on the 27th March, 1904. Plaintiff told defendant to get the new note signed by

the persons who had signed the note in suit as sureties. In accordance with this arrangement, defendant drew up a new note, and sent it to plaintiff, minus the signature of one of the sureties. This had never been returned to defendant, and he claimed that the present action was premature on the ground that a novation had taken place, and that he would not become plaintiff's debtor until the 27th March.

In a replying affidavit the plaintiff stated that he only agreed to accept a new note on the express condition that it would be endorsed by the persons who were sureties on the other note. The new note was sent to him without the signature of one of the sureties, and he refused to sign it and returned the document to one Hempel, another of the sureties, who was a personal friend of the defendant and was interested in the bill.

Mr. Russell for plaintiff, Mr. Buchanan for defendant.

After hearing counsel in argument, the Court refused provisional sentence.

De Villiers, C.J.: The defendant admits that he signed the first note now sued upon, but he says that he afterwards gave another promissory note, which was payable to the plaintiff, and which was sent to plaintiff. That second note has never been returned, and he may still be held liable upon that. If the plaintiff has endorsed the note, the *bona fide* holder might sue the defendant. The defendant is, therefore, entitled to say: "Before you can sue me on the first promissory note you must hand me back the second." There is no tender of the note. The plaintiff says it has been sent to another person, who is one of the sureties, but the defendant ought to have had this note returned to him. Provisional sentence must be refused, with costs. Of course, if the plaintiff can prove he has lost this promissory note, then different considerations will arise.

GREENSHIELDS V. STEPHAN.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £100.

Order granted.

GOURLAY, CAVANAGH AND CO. V. MOSS.

Mr. Gardiner moved for provisional sentences on a mortgage bond for £1,000, with interest and costs.

Order granted.

HAUSANT V. MANCHESTER.

Mr. P. S. T. Jones moved for judgment on a mortgage bond for £1,000, with interest and costs, and for property

specially hypothecated, to be declared executable.

Order granted.

HEINAMANN V. SCHOLTZ.

Mr. Buchanan moved for the discharge of a provisional order of sequestration.

Order granted.

ORLANDINI V. STRYDOM.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £750, with interest, and for specially hypothecated property to be declared executable.

Order granted.

MCLEOD V. LA GRANGE.

Mr. Gardiner moved for provisional sentence for interest on a mortgage bond, and for costs.

Order granted.

HEIDE V. BOYCE.

Mr. C. W. de Villiers moved for provisional sentence on a mortgage bond for £2,200, for interest, and for specially hypothecated property to be declared executable.

Order granted.

DALY V. LATEGAN.

Mr. De Waal moved for provisional sentence for £50 on a dishonoured cheque and for £75 on a promissory note, with interest and costs.

Order granted.

LINDENBERG V. DE JONGH.

Mr. Gardiner moved for provisional sentence for £900 on a promissory note, with interest and costs.

Order granted.

ESTATE HERTZOG V. MACMULLEN.

Mr. Nightingale moved for a provisional order of sequestration to be made final.

Order granted.

SMITH AND CO. V. VAN AS.

Mr. Russell moved for a provisional order of sequestration to be made final. A letter was read from the defendant saying that he had insufficient money to pay his railway fare to attend court.

Order granted as prayed.

ILLIQUID ROLL.

GERECKE v. WAGGEMANN. { 1904.
Feb. 11th.

Mr. Alexander moved for an order, under Rule 319, on a certain declaration requiring the respondent to take all necessary steps to procure certain articles mentioned in the declaration from the Criminal Investigation Department, and forthwith restore them to the plaintiff. (See 14, C.T.R., 32.)

Order granted.

ROBERTSON AND CO. v. WOLFAERT.

Mr. D. B. Buchanan moved for judgment, under Rule 329d, for £32 14s. 11d., goods sold and delivered.

Order granted.

REYNOLDS VEHICLE CO. v. HILL.

Mr. M. Bisset moved for judgment, under Rule 329d, for £25 6s. 10d., balance of account for work and labour done, with interest *a tempore morae* and costs of suit.

Order granted.

CAPE TIMES LTD. v. PFUHL BROS.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £42 2s., advertising charges, with interest *a tempore morae*, and costs of suit.

Order granted.

PLATE WALL CO. v. LIPMAN.

Mr. M. Bisset moved for judgment, under Rule 329d, for £65 16s., together with interest *a tempore morae* and costs.

Order granted.

PLATE WALL CO. v. MACLEOD.

Mr. M. Bisset moved for judgment, under Rule 329d, for £34, less £20, paid since the issue of summons, with interest *a tempore morae* and costs.

Order granted.

COOMER v. HARTFORD.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £24, for feeding, baiting, and keep of certain horses, and storage of certain carts, etc.

Order granted.

BUTTER v. TAYLOR.

Mr. Russell moved for judgment, under Rule 329d, for £161, rent due, and costs of suit.

Order granted.

CAPE TIMES LTD. v. MILLS.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £89, advertising charges, with interest and costs.

Order granted.

GENERAL MOTIONS.

Ex parte SEDGWICK.

Liquidation—Receivers.

Mr. Gardiner appeared for the applicant; Mr. Searle, K.C., for the respondent.

Mr. Gardiner said that this was a matter which had been before the Court previously. It first came before Sir John Buchanan. The parties agreed upon a liquidation of the business, and in December application was made in Chambers for the appointment of such receiver or receivers as the Court might deem fit. Applicant then suggested Mr. E. R. Syfret as receiver to look after his interests, and Mr. Douglas, of Johannesburg, to look after respondent's interests. Mr. Douglas's name having previously been suggested by the respondent. Applicant also suggested that Mr. G. W. Steytler should be appointed as a third liquidator, to arbitrate between the two, if necessary. He now asked for the appointment of Mr. Syfret to represent him; Mr. Gibson to represent the respondent, who had already substituted that gentleman for Mr. Douglas; and Mr. Steytler for the parties mutually. The respondent opposed the appointment of Mr. Steytler, contending that two receivers were sufficient.

Buchanan, J., said that when the matter came before him originally, both parties had agreed to go into liquidation, and then there were several names mentioned. He appointed Mr. Syfret as receiver, but he understood some agreement would be come to.

Mr. Gardiner: So I thought, my lord.

[Hopley, J.: The whole matter is as to the appointment of liquidators?]

Mr. Gardiner: Yes, we want Messrs. Syfret, Gibson, and Steytler appointed, and the respondent only wants Mr. Syfret and Mr. Gibson. We say it is necessary to have a third man; they say it is not.

[Hopley, J.: You say there is a possibility of disagreement, and you want this third gentleman appointed as a sort of umpire?]

Mr. Gardiner: Yes, my lord.

Buchanan, J. (to Mr. Searle): Do you object to a third liquidator being appointed?

Yes; we say it is unnecessary, and we also say that no reasons have been set out why Mr. Steytler should be appointed. I think

it only fair to mention to your lordships that the application in Chambers was an *ex parte* application, and we had no notice of it.

Mr. Gardiner: That was so, my lord. Mr. Gardiner then read the petition of the applicant, in which it was set forth that in the first instance Mr. Steytler was appointed liquidator. Being agreed upon mutually by the two parties; but he was subsequently objected to by the respondent, on the ground that he was a director in a rival company, the Van Rhyn Wine and Spirit Co. The petitioner stated that he was the owner of two-thirds of the business, and was entitled to a three-fifth share of the profits. He said, therefore, that he was entitled to more representation than the respondent, but was willing to have equal representation, and he asked for the appointment of Mr. Syfret as an impartial man. He further stated that the delay in the appointment of permanent liquidators would seriously prejudice the business, especially as arrangements had to be made in regard to this season's vintage. He asked for the appointment of the three liquidators named, with full powers to carry on the business, pending liquidation, and to dispose of the business to either of the late partners or to other persons. An affidavit was read, made by applicant, in support of the petition.

Mr. Searle read an answering affidavit by the respondent, in which he stated that he agreed to the appointment of Mr. E. R. Syfret and Mr. Gibson. He stated that he had originally agreed to the appointment of Mr. Steytler, but subsequently found that Mr. Steytler was connected with a rival firm, the Van Rhyn Company, and he objected to his acting.

In a replying affidavit, Mr. Steytler said that on the occasion of his appointment as liquidator, he fully understood that he was appointed by both parties. He denied that he was a director of the Van Rhyn Wine and Spirit Co., and said he had only acted in that capacity temporarily.

Mr. Gardiner said that, although his client owned two-thirds of the capital, he did not ask for any special favour. He simply suggested Mr. Steytler as an impartial man; and he asked for his appointment as such. It had been explained to him that he was not his (applicant's) nominee, but the nominee of both parties. This was a big business, and counsel submitted that it was necessary that three liquidators should be appointed. It was estimated that the respective values of the shares were £80,000 and £40,000. He submitted that the only course now was to have a third liquidator; the applicant wanted Mr. Syfret, and Mr. A. M. Sedgwick wanted Mr. Gibson.

[Buchanan, J.: What is the objection to one liquidator, Mr. Searle?]

They want their man and we want

ours. We quite admit that two such men as Messrs. Steytler and Syfret could liquidate the estate. But the applicants take up the position that they are entitled to appoint two liquidators. I have never heard of any such position being assumed before. It has not been shown that the services of a third liquidator are required, and it is only in very exceptional cases that the Court will appoint a third liquidator. Even in such cases as those of the Union Bank and the Cape of Good Hope Building Society, only two liquidators were employed. Even if three liquidators should be appointed, in the event of their disagreement, it would still be necessary to come to Court, and the Court might possibly decide in favour of the one. A. M. S. Sedgwick has now been absent from the Colony for many years, and it is his interests rather than those of other persons that the Court should protect.

Mr. Gardiner was not called upon in reply.

Buchanan, J.: Application was made in Chambers to appoint a receiver, as the partnership was coming to an end, and the partners had not agreed as to who should liquidate the partnership. I appointed Mr. Syfret as provisional receiver, leaving the parties to agree to the appointment of a permanent liquidator. The parties met, and appointed Mr. Syfret and Mr. Douglas, and these two persons approached Mr. Steytler with the request to act as a third liquidator in the matter. The whole opposition now is as to whether there should be a third person appointed. Looking at the correspondence which has taken place between the parties, it is very likely that there may be difficulties arising in this liquidation. It is a large estate, and under the exceptional circumstances, as the parties object to having one liquidator, I think it fair that there should be three. Each party has nominated one liquidator. The applicant has nominated Mr. Syfret, and the respondent has nominated Mr. Gibson; and the Court feels very much inclined to follow the suggestion of the two liquidators, and to appoint Mr. Steytler, who was nominated by them. Mr. Steytler has been objected to on the ground that he has an interest in a similar business, being a director of the Van Rhyn Wine and Spirit Co. Mr. Steytler deposes that he has not now any interest in or connection with that company, and is no longer one of its directors, and that he had only acted as a director temporarily. I think the experience so gained would assist him in acting in the liquidation of this business. There is now no reason why he should not be appointed as a third receiver. The Court will appoint Mr. Syfret, Mr. Gibson, and Mr. Steytler as receivers to liquidate this partnership, and the costs of this application will be costs of liquidation.

Mr. Gardiner: Will your lordship give authority as to the disposal of the business assets?

[Buchanan, J.: Of course, the liquidators will have power to deal with that.]

I understand that Mr. A. M. Sedgwick will leave for England next week, and I don't know whether the liquidators will have power to give transfer of the property.

[Buchanan, J.: Any property vested in the partnership will now vest in the liquidators.]

Mr. Gardiner: There are assets, I am informed, my lord; two-thirds registered in the name of the applicant, and one-third in the name of A. M. Sedgwick, without mentioning the firm.

[Buchanan, J.: Is it firm property?]

So I understand.

[Buchanan, J.: That will be a question to be found out, and if it is firm property the liquidators will have to deal with it.]

CHABAUD V. HARTMANN.

Mr. Searle, K.C., applied for judgment, in terms of a certain consent paper. The matter arose out of an alleged libel published by the defendant in his newspaper "Scandinavia," in the course of an article headed "Consula." The defendant had made a retraction of all allegations against the plaintiff, and had consented to judgment being entered against him for £25, with costs, as between attorney and client.

Mr. Benjamin (for the defendant) said that he had been unable to see his client, but he supposed he should accede to the application.

Judgment in terms of consent paper.

LYONS V. KELLAWAY.

This was an application to make final a rule nisi restraining the District Paymaster at the Castle, Cape Town, from paying over to any other person than applicant certain moneys in the possession of the said paymaster. Mr. Benjamin was for the applicant, and Mr. C. W. de Villiers was for the respondent. No appearance was entered for George C. Withinshaw, who had been joined as co-respondent.

The affidavit of the applicant said that the respondent entered into a contract with the Imperial military authorities, in connection with the Wynberg Camp. Petitioner guaranteed to the Imperial authorities the due performance of the contract, and undertook to make advances to the defendant, and, in consideration, he was to receive 5 per cent. commission on all moneys thus advanced, and was given the respondent's power of attorney, authorising him to receive all moneys due and payable to him upon

any contract with the military authorities. There was still due to the applicant £638 18s. 3d. for cash lent, and goods supplied, and money paid on his account at his request. At the termination of the last contract there still remained £270 in the hands of the paymaster in Cape Town, but this was not paid to the applicant, because the power of attorney had been withdrawn in favour of a third party—Withinshaw.

The affidavit of the respondent's brother stated that the respondent died in December, 1903, and that deponent was appointed executor. Deceased had informed him that he cancelled the power of attorney, because the applicant would not render him a proper account.

The applicant, in an answering affidavit, denied that he had refused to render an account, and said that he should be quite willing to render an account to the executor. He had since ascertained that the sum in the hands of the paymaster was £224.

Mr. Benjamin, replying to the Court, said that an action had not yet been instituted by the applicant.

Mr. De Villiers having been heard in argument,

The rule nisi was made absolute, costs to be costs in the cause, and applicant to proceed with his action forthwith. The following words were added to the order: "Unless by consent of the parties, it is agreed to pay the moneys into the hands of the Registrar of the Court, the moneys will be attached pending the result of the action."

CORBALLIS V. PHILLIPS AND CO. AND ANOTHER.

This was an application to make final a rule restraining the Customs officers at East London from parting with certain cases of whiskey to anyone except the representatives of Alexander and McDonald, of Leith, Scotland. Mr. Gardiner was for the applicant; Mr. Benjamin was for the respondent, John J. Ellis, auctioneer and commission agent, East London. Phillips and Co. were not represented.

The affidavit of the petitioner stated that he was the representative in South Africa of the firm of Alexander and McDonald. The firm were unable to secure payment of the debt from the defendant firm, and deponent understood that the firm of Phillips and Co. would be placed under sequestration in a few days. J. J. Phillips, the principal of the defendant firm, has been arrested on a charge of embezzlement.

The affidavit of John J. Ellis, stated that he had advanced £150 to Phillips on security of the goods in dispute, which the said Phillips alleged to be his property. Phillips produced the bill of lading. Deponent added that the estate of

Phillips and Co. had been placed under provisional sequestration, and the principal, J. J. Phillips, had been arrested. Deponent was willing to surrender his right to the goods on payment of £150 and interest.

The answering affidavit of the applicant, Corballis, said that he was not fully acquainted with all the details of the transaction in question, but the fact remained that no duty had been paid by Phillips, that he had not attempted to take the whiskey out of bond, and that the whiskey was still retained by the Customs authorities in transit.

Mr. Gardiner having been heard in argument on the facts,

The rule was made absolute on condition that within two months the applicant first discharged the claim of Ellis for advances made on the bill of lading, applicant to pay costs.

Ex parte NCHORIN AND ANOTHER.

Mr. Benjamin moved on behalf of the petitioners, who lived in the district of Matatiele, and were widows, who had been married according to Basuto custom, for the payment of the sum of £100, standing to the credit of one Adam Nchorin, in the Post Office Savings Bank. A sum of £10 was in dispute as to succession.

A rule *nisi* was granted, calling on all interested to show cause why the prayer in the petition should not be granted, one publication in the "Kokstad Advertiser," the rule to be returnable on the 12th March, a report to be obtained from the Resident Magistrate of Matatiele as to the right of one Elizabeth Nchorin to receive the sum of £10, part of the said £100, with interest thereon, as successor to her late husband.

Postea (March 17th).

The rule was made absolute.

Ex parte ALLY.

Mr. Pyemont moved for an order authorising the amendment of certain mortgage bonds by the insertion of the correct name of petitioner's principal, and also authorising the Registrar of Deeds to issue a certified copy of a mortgage bond passed in favour of petitioner's principal, which had been destroyed by fire.

The matter was ordered to stand over until Thursday next, pending a report by the Registrar.

ASTON V. ASTON.

Mr. Rowson moved for leave to sue by edictal citation. Petitioner stated that he came out to this country to improve his position, and obtained an ap-

pointment on the C.G.R. He was now domiciled in this colony. He had repeatedly requested respondent to come out and join him, but she refused, and the last letter that he received from her said she would rather die than come out, and told petitioner that he had better obtain a divorce. The parties were married within the county of Salop in England. The wife's present whereabouts were unknown, though two months ago she was living with a minister's widow in Radnor.

Leave was given to sue by edictal citation, citation to be returnable on the 14th May, personal service to be effected, with leave to serve *intendit* and notice of trial with citation.

KOENIG V. LANDESHUT.

Mr. M. Bisset moved for the inclusion of Frank Wheeler as a witness to be examined by the Commission appointed to take evidence in this action. Mr. Wheeler was about to leave town for a while.

Order granted.

Ex parte MONGAMELE.

Mr. Searle, K.C., moved for the appointment of a *curator ad litem* to represent petitioner in an arbitration on legal proceedings which were pending. Petitioner was a minor. The matter had been referred to the Resident Magistrate of the district of Eastern Pondoland, who suggested that Mr. Charles Behr should act as *curator ad litem*.

Order granted, appointing Mr. Behr as *curator ad litem*.

VAN DEN HEEVER V. CLOETE.

Mr. W. P. Buchanan moved as a matter of urgency for a rule *nisi* calling upon the respondent or any other person who may become possessed of a certain sheep lease to show cause why he should not deliver up the same to the applicant upon payment to the respondent of the sum of £16 10s., or be interdicted from disposing of the said lease. The lease had been given to one Zinn as security, and had subsequently been ceded to the respondent. Zinn had been away in Johannesburg, and was intending to return there, and the petitioner proposed to bring an action against him. The parties lived at Lady Grey, in the division of Aliwal North.

Rule *nisi* granted as prayed, to operate as a temporary interdict, rule to be returnable on the 25th inst.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSE.

BENNETT V. BENNETT AND J. 1904.
ANOTHER. } Feb. 12th.

This was an action brought by George Bennett, now of Johannesburg, and formerly of Cape Town, against his wife, residing at Sea Point, for divorce, on the ground of her alleged adultery with one Garrett.

The declaration set out that the parties were married in January, 1884, in the parish of St. Giles, Cripplegate, London, and that there were four children issue of the marriage living, all being minors. The plaintiff was domiciled in this colony, but at present resided in Johannesburg. It was alleged that the defendant committed adultery with Garrett at divers times in 1902 and 1903 in Cape Town.

The defendant, in her plea, denied that the plaintiff was domiciled in this colony, and declared there were five children of the marriage, all minors, still living. She denied the charges of adultery. As a claim in reconvention, she craved leave to refer to the foregoing allegations, and she went on to declare further that during the past two years her husband had failed to provide for her and the children, in consequence of which she had had to expend £100. For twelve months they had lived apart from each other. She claimed a decree of judicial separation, judgment for £100, custody of the three minor children of the marriage now living with her, and reasonable access to the two children now living with the plaintiff. She also asked for maintenance at £6 a month for herself and £3 a month for each of the three minor children until they should attain the age of 21 years, or should marry.

The plaintiff, in his replication, denied that there were more than four children issue of the marriage, or that he had neglected to provide for his wife, and declared that she had always refused to join him.

Defendant, in her rejoinder, said that since her plea was filed the youngest child of the marriage had died, and she prayed for judgment, except in regard to the youngest child.

Mr. C. W. de Villiers for plaintiff.

Mr. Alexander for defendant.

Mr. De Villiers said he understood that his learned friend had abandoned

the position set up in the pleadings, and that he was prepared, subject to proof of adultery, to come to terms.

Mr. Alexander said that he did not propose to call any evidence in support of the allegations in the plea or the claim in reconvention, and he would simply put the plaintiff to proof of the adultery alleged against the defendant. The defendant admitted the plaintiff's domicile. Counsel was instructed to ask for custody of the two girls now living with her, and to ask for maintenance for the two girls at the rate of £6 a month until they should attain the age of 21 years, or should marry. As to the claim for £100 as money expended on maintenance, the defendant had accepted £25, and therefore she abandoned that claim. Really, they only came into court now for custody and maintenance of the two girls.

Evidence was then called.

George Bennett, the plaintiff, said that he came out to this colony from Home about 14 years ago. He first lived at Northcote House, Cape Town. Mr. Garrett lived there for some time. Witness afterwards lived at another place, where Garrett went also. His wife kept a boarding-house at that place. She seemed to be frequently in Garrett's company, and took his breakfast to his bedroom. Witness remonstrated with her, but she said Garrett was only the same as any other boarder. They had quarrels almost every day on the subject. Witness afterwards went to Johannesburg. He requested his wife to get rid of Garrett.

Caroline Jophta, a coloured servant in the employ of Mrs. Bennett, spoke to the intimate relations between the defendant and Mr. Garrett at the house kept by the defendant.

Corroborative evidence was given by another coloured girl.

This closed the evidence.

Mr. Alexander moved for custody of the two girls. Replying to the Chief Justice, counsel said that the defendant was keeping a boarding-house in the Gardens. His learned friend did not object to the retention by the defendant of the two girls.

Mr. De Villiers said the defendant was quite prepared to pay £6 a month for the maintenance of the children. He did not ask for any order as to costs.

The Court granted a decree of divorce, plaintiff to have custody of the two sons of the marriage, and the defendant to have custody of the two daughters, so long as she should live a chaste and virtuous life, the plaintiff paying £6 per month in respect of the daughters until the daughters should have attained the ages respectively of 21 years, the parties to have access to the children at all reasonable times and places; no order as to costs.

APPEAL.

VERGOTINE V. CERES { 1901.
MUNICIPALITY. { Feb. 12th.

**Voluntary payment—Protest—
Duress of goods.**

The plaintiff having under protest paid licence money demanded from him by the C. Municipality for the grazing of his cattle on municipal pasture land, sought to recover back the money so paid, but produced no evidence that the cattle would have been detained unless the money were paid, or that there was duress of any kind.

Held, that the payment must be regarded as voluntary and that the plaintiff was not entitled to succeed.

This was an appeal from a judgment of the Resident Magistrate of Ceres, in an action brought by the appellant against the Municipality to recover the sum of 10s., paid under protest by him for a licence to pasture certain ten head of cattle on the common lands. The Magistrate found for the defendant, and in his reasons for judgment, said that the plaintiff was not a resident householder of the Municipality, and that the Municipality had acted *bona fide* in making the charge for the licence. Mr. Close was for the appellant; Mr. Benjamin was for the respondent.

Mr. Close said that the main point in this case was, had the Municipality powers to levy rates or grazing fees or licence fees, or whatever it might be called, in respect of commonage lands. There was no question that the plaintiff held a Municipal erf.

The appellant has occupied his small erf for about twenty years. The Magistrate seems to have distinguished between householders and erf-holders, and to have held that only the former had rights of pasturage. If the appellant was not a resident householder he would not have obtained a grazing licence.

[De Villiers, C.J.: Section 26 of the regulations defines a resident householder, and the Magistrate held that the appellant was not one.]

By the mere fact of issuing a licence to him they are estopped from denying that he is a resident householder.

[De Villiers, C.J.: A resident householder does not require a licence.]

Oh, yes; see section 29 of the Municipal regulations.

[De Villiers, C.J.: Section 29 refers only to persons who are not resident householders.]

Section 27 does not allow persons who are not resident to be licensed at all.

[De Villiers, C.J.: If the land is subject to the control of the Town Council, surely they can allow anybody to graze cattle there?]

There is nothing to show that the appellant does not occupy a house, and he pays £2 10s. a year for his erf.

[De Villiers, C.J.: He paid his licence voluntarily, and now he wants to recover the money, but how can he do that?]

When he paid this money he was in ignorance of his rights, and when he ascertained what those rights were he at once protested. And then he was, in a sense, under duress at the time he paid. He could not do without grazing, and therefore he paid: not unconditionally, but under protest—a genuine, *bona fide* protest.

[De Villiers, C.J.: He has continued to pay for three years.]

Yes, but he does not now seek to recover these payments, because they were out-and-out payments.

Mr. Benjamin (for respondents): I submit that the Magistrate's decision was quite correct. In the first place, the appellant cannot recover what he has paid. See *George v. Kimberley Town Council* (2 Lawrence, 231).

[De Villiers, C.J.: This point was fully discussed in the case of *Cook Bros v. Colonial Government* (12 S.C., 86.)

That case goes to show that there must be something in the nature of duress to entitle a man to recover money paid under protest.

In the next place, I submit that the Municipal regulations are quite *ultra vires*. Counsel for the appellant holds that the term "resident householder" is used in one sense in the Act and in another in the regulations. These regulations are framed under the Act, and there is nothing to show that the appellant is a registered householder. The onus is on him to prove that, and that onus has not been discharged. Hence he is not entitled under the 25th section of the regulations to graze cattle, and the only section under which he can have any right is the 29th. It appears from the regulations that every householder has the right to pasture a certain number of stock, and people who are not resident householders may pasture stock under licence. The appellant, having taken out a licence, is bound by its terms. The case of *Langfield v. Whittlesea Board* (4 C.T.R., 231) is not in point, because there the regulation was framed for the purpose of raising revenue, but here it was only for the purpose of protecting the pasture land.

De Villiers, C.J.: It appears to me that in this case the payment must be regarded as a voluntary payment. There was nothing in the nature of duress. If it had appeared that the

Municipality would have detained the cattle unless the money were paid, and the plaintiff had then paid the money under protest, there would have been sufficient duress to entitle the plaintiff to recover the money. But there is nothing of the kind in the present case. For all the Court knows the plaintiff could have obtained his cattle without payment of the money, but he chose to pay it. No doubt at the time he paid the money he said that he reserved the right to recover the money back. But that is not enough to make the payment involuntary. As to the effect of such a payment, I adhere to the views expressed in *White v. Treasurer-General* (2 Juta, 322), which it is unnecessary to repeat. The appeal must be dismissed, with costs.

GENERAL MOTIONS.

Ex parte THE CREDITORS (1904.
OF PENKIN. (Feb. 12th.

Mr. W. P. Buchanan moved, as a matter of urgency, for the appointment of a provisional trustee in the sequestrated estate of Levy Penkin on the petition of the two largest creditors, the S.A. Milling Company and the City Flour Milling Company, to whom the estate was indebted to the amounts of £994 18s. 9d. and £220 5s. respectively. The estate consisted of certain perishables, and there were several orders to be executed.

Order granted. Mr. John Edmund Paul Close to be provisional trustee.

LIQUIDATOR OF BROMLEY (1904.
AND CO. V. SHENKER. (Feb. 12th.

Companies Act—Voluntary winding up—Attachment—Interdict.

After the respondent had obtained judgment against a company, a resolution was duly passed and advertised for the voluntary winding up of the company. Notwithstanding such winding up, the respondent claimed the right to attach property of the company in execution of the judgment.

Held, that the Court had the power under the 186th section of the Companies Act, 1892, to restrain such attachment.

Mr. Benjamin moved for an order calling on the respondent to show cause why

an interdict should not be granted restraining him from taking further proceedings in a certain suit, in which he had obtained judgment against the company in the Magistrate's Court. The petition was supported by the affidavit of the applicant, which set out that on the 23rd December last at a meeting of the shareholders it was resolved that the company should be voluntarily wound up. This was confirmed at a further meeting on the 4th January, and on the 7th January the respondent obtained a judgment against the company for the sum of £10 3s. 11d., and thereupon a writ was issued, and, as a result, the messenger of the Court, attached certain goods. In consequence of the action of the respondent, the company would become liable for a certain amount of unnecessary legal expense, and the interests of the creditors would be seriously injured.

Mr. Close, for the respondent, read the affidavit of Mr. De Kock, a clerk in the office of the respondent's attorneys, which set out that the claim of a certain firm for the goods was ultimately agreed to.

De Villiers, C. J.: The company in question has been voluntarily wound up, and it has not been suggested to the Court that the winding up has been otherwise than in good faith. If there had been any proof that the winding up was for the purpose of defeating the creditors different considerations would have arisen, but for the purposes of the present case, the Court must assume it to be a *bona fide* winding up, and that the liquidators have been honest in the performance of their duty. The first consequence to ensue from the voluntary winding up of a company is that the property of the company shall be applied in satisfaction of its liabilities in the legal order of their preference, and subject thereto shall, unless it be otherwise provided by the regulations of the company be distributed amongst the members according to their rights and interests in the company. I can quite understand that supposing, before the winding up took place there had been an attachment of property belonging to the company the creditor could object to his *pignus practorium* being defeated by the voluntary winding up. That point, however, does not arise in the present case, because although there has been an attachment the goods so attached have been claimed by third parties, and have been given up to those third parties. The question which now arises is whether the applicant is entitled to an order restraining any future attachment in respect of the judgment already obtained. If the respondents had at once said to the applicant that they would surrender all their rights under their judgment, and that they would undertake to have

no further attachment, we should have heard no more about the case, but the respondents led the applicants to believe that they insisted upon their rights to attach more goods. Consequently it became necessary for the applicant to come into court to restrain any further attachment of goods. The 186th section of the Act gives very large powers to the Court, and these powers should be liberally construed for the purpose of enabling the Court to give effect to the different sections of this Act. If creditors were to be allowed to continue to bring actions, and to issue attachments against the property of a company, which has been voluntarily wound up, the first part of section 182 would be wholly ineffectual. It would be wholly impossible for the liquidators to apply the property of the company in satisfaction of its liabilities in the legal order of their preference, or to distribute the property amongst the members. In order, therefore, to enable the liquidators to perform their duty under section 182, it appears to me the Court is quite justified in construing section 186 as large enough to enable the Court to restrain any such attachment as was contemplated. For these reasons I am of opinion that the order prayed for should be granted, with costs.

Hopley, J., concurred
 [Appellant's Attorneys: Herold and Gie; Respondent's Attorneys: Faure and Zietsman.]

KELLER V. STEYN AND OTHERS.

Mr. Russell moved for an order for payment of costs of an application made in this court for ejectment and trespass. The Court granted a rule *nisi*, and afterwards made it absolute, but gave no direction as to costs.

De Villiers, C.J., said that an order would be granted as prayed, in respect to the application; but there would be no order in regard to the present application.

SPANGENBERG V. SPANGENBERG.

Mr. J. E. R. de Villiers said that this was the return day of a rule *nisi* for leave to the plaintiff to sue *in forma pauperis*. There had been service of the rule, and counsel now asked that the rule be made absolute.

Rule made absolute, Mr. De Villiers consenting to act as counsel in the matter.

KALK BAY MUNICIPALITY V. JOSEPH

Mr. M. de Villiers moved for an order requiring the respondent, Mrs. Joseph, wife of Henry Walter Joseph, of Cape Town, to remove a certain fence, and for an interdict restraining her from

encroaching upon a certain public road known as Hillside-road, at Muizenberg. Counsel produced affidavit of service upon the respondent and her husband. No appearance was entered for the defendant.

An affidavit by the Mayor of the Kalk Bay Municipality stated that the respondent was the owner of a certain plot bordering on the Hillside-road, Muizenberg. On the 8th March last a galvanised iron fence was erected on the property, which encroached 12 feet on the public road. Respondent had been given notice to remove the fence, but without effect.

[Hopley, J.: What seems to have happened is, that these people have enlarged their backyards at the expense of the road.]

Mr. De Villiers: Quite so, my lord.
 De Villiers, C.J.: There is no appearance on behalf of the respondent, and we must therefore take it that the facts are admitted, that there is this encroachment on the road, and the respondent must therefore be ordered within 14 days to remove the fence as prayed, failing which, the Court will authorise the applicant to remove the same, the respondent to pay the costs.

Ex parte BERNING AND ANOTHER.

Mr. Benjamin moved on behalf of the petitioners, who were the only unmarried daughters of the late Hannah M. Berning, for leave to sell certain property at Worcester. The property was bequeathed by the deceased lady to her daughters, and was now registered in their names, three of the daughters being married. All the daughters, married and single, consented to the application. The petitioners said that they desired to sell part of the property, but to retain the house occupied by them as unmarried daughters, in terms of the will. They were informed that, in view of the high prices now realised by landed property in Worcester, they could obtain a price for it which, if invested, would yield a much larger income than was derived from the present rent. They proposed to invest the proceeds at first mortgage on landed property. The Master, in his report, expressed his opinion that the proposal was contrary to the terms of the will, but counsel submitted that the provisions of the will would not be violated. Under the will, the property was left to the unmarried daughters, to be occupied by them until their marriage, in which case the property was to be sold by public auction for the benefit of all the daughters. The land proposed to be sold was vacant, and practically produced very little income.

De Villiers, C.J.: An order will be granted authorising the sale,

it being understood that the interest must be paid to the unmarried daughters, the sale and mortgage to be to the satisfaction of the Master of the Supreme Court.

Ex parte ELTON AND ANOTHER.

Mr. Gardiner moved for a further order authorising the sale of certain property at Port Elizabeth for £400, instead of £500, as set out in the original order. The parties had been unable to obtain the original figure, and they now asked for leave to sell the property for £400, and pay the costs of the application out of the proceeds.

Order granted as prayed.

GRAAMANS BROS. V. RENARD.

Mr. Benjamin moved for an order setting aside the rule *nisi* made absolute on the 16th November last, applied for by the respondent, whereby certain eleven cases of motors and cycles, the property of the applicants, now lying at Port Elizabeth, were interdicted, the ground of the application being that service of the notice of the proceeding was irregular.

No appearance was entered for the respondent, Jacques Renard.

The affidavit of Marius Gosinius Hendrik Graamaus, of Johannesburg, set out on the 18th October, 1903, the respondent purchased from Van der Laun and Co., of Rotterdam, eleven packages of goods, to be consigned to him by the S.S. Mashona. The conditions were that the respondent should pay for the goods on the afternoon of the day of purchase. The respondent failed to pay for the goods, and they were bought by applicants for the sum of £189 3s. 6d. The consignor instructed the shippers to cable to Messrs. Bucknall Bros. not to deliver the goods in Cape Town to the respondent, but to tranship them to Port Elizabeth for delivery to the applicants' agents. On the 11th November, the respondent obtained an interdict, restraining Bucknall Bros. from delivering the packages to the applicants' firm. On the 14th December, 1903, deponent received a letter from his agents informing his firm of the rule *nisi* having been granted, and it was not until the 31st December that formal notice of the proceedings came to the notice of the firm. Other goods, to the value of £81 10s., had also been interdicted, but there was no mention of these in the respondents' petition. Since the rule *nisi* had been made absolute, the respondent had admitted he had no right to the goods by offering to pay the sum of £133 8s. 8d., which had been refused.

Order granted as prayed, with costs of this application.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSE.

ADAM V. ADAM.

This was an action for divorce, instituted by the wife against the husband, on the ground of misconduct.

Mr. Sutton appeared for the plaintiff, the defendant appeared in person.

Maria Adams, the plaintiff, deposed that she was married to the defendant in August, 1881, at Kimberley, in community of property. They lived there for some 15 years, but their relations were unhappy, owing to defendant's fondness for drink, and his intimacy with other women. She ultimately left him, with his consent, and went to Johannesburg, subsequently to Kronstadt, where she worked as a cook. She came to Cape Town in 1902. About three months ago the defendant came to her house at West London. Up to that time she thought her husband was dead. He told her he wanted her to give him a divorce, as he was married to a woman named Dora. She found that he was living at Helliger-road in a house with Dora. There were children there. Dora admitted she was defendant's "wife."

In answer to the defendant, the witness denied that she ever lived with a man named Black Tom for four years subsequent to 1895. She rented a house from Black Tom, and got a living by keeping a coffee shop. Tom lived in the same house. She did not take any money or a wagon away with her.

By the Court: She wanted to keep the property now in her possession; it was all hers. When she left Adam, he had a good deal of property.

Sophia Abrahams, defendant's daughter, said defendant came to her house in January last, with Dora and five young children, whom he said were his.

The defendant admitted that he was living with Dora, and had had children by her. He alleged that the plaintiff had been living with another man. "If his wife would not divide the property, he would not give her a divorce."

Hopley, J.: In this case there is nothing on the defendant's plea, which was drawn by an advocate of this Court, alleging any improper conduct on the part of the plaintiff, nor is there any allegation that she has obtained the small property she is now possessed of by means of capital which she unjustly possessed herself of at the time she left the defendant. It appears that many years ago, these people, who were not getting on well together, parted. Defendant says in a loose way

in Court that his wife went away with another man, and he apparently throws out the allegation that she was living in adultery with this man, Black Tom. But that should have been specially pleaded, and I cannot help thinking that this is an after-thought which comes to him, because if he had told his counsel of this, counsel must have pleaded it, and it would have been a complete defence to the action. I cannot, therefore, have my mind influenced by these allegations. With regard to the money said to have been taken away, I may say that defendant does not seem to be the sort of man who would sit still and see a theft of his property. He would, at all events, have been able to claim half of it, by virtue of the marriage in community. For all these years he has been lying quite still about this, and now he suddenly comes into Court, and lays claim to something on this ground. He himself admits he cares nothing about the woman. All he wants is to get a portion of the property, which, by her own industry, it seems to me, the plaintiff has gained. He admits that he has been and is still living in adultery with this woman Dora. He must have been living with her for some years, treating her as a wife, and having children by her, and he says he is now perfectly prepared to desert this woman and the children and to go back to the plaintiff, practically for the reason that he thinks he will be able to get hold of some of her property. That is an absurd position to take up, and one which, of course, cannot be acceded to. A decree of divorce will be granted; defendant will be declared to have forfeited all benefits arising out of the marriage in community. He must also pay the costs.

SUPREME COURT

[Before the Hon. Sir J. BUCHANAN and the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

EATON V. EATON. } 1904.
 } Feb. 15th.

This was an action brought by Isaac Philip Eaton, gardener, Mowbray, against his wife for divorce, on the ground of adultery.

The declaration set forth that the parties were married in community of property at St. Paul's, Rondebosch, in 1891, that there were three children of the

marriage, and that the defendant had deserted the plaintiff and gone to live with one Window, with whom she had committed adultery on divers dates. Plaintiff prayed for a divorce, for custody of the three minor children of the marriage, and for the defendant to be declared to have forfeited all the benefits of the marriage in community.

The defendant in her plea admitted paragraphs 1 and 2 as to the names of the parties and the marriage, but denied the allegations in the subsequent paragraphs.

Mr. W. P. Buchanan for plaintiff; Mr. S. Williams for defendant.

Mr. Williams applied for an order against the plaintiff for payment of £20 security for the costs of the defence.

The Court held that the case was now ripe for trial and must be proceeded with.

Isaac Philip Eaton, plaintiff, said he was a gardener at Wheatfields, Mowbray. The children born of the marriage were respectively in their twelfth, sixth, and fifth years. They were all living with the defendant. Witness and his wife first kept a boarding-house and shop in the Main-road at Rondebosch. His mother-in-law lived on the premises. A man named Window came and visited his house as a friend. Witness had occasion to tell defendant that his mother-in-law had informed him that Window had been sitting on her lap, and that after witness went to his work Window went to her room. His wife left him on September 22, 1899. Window denied that he had been sitting on his (witness's) wife's lap. He told Window that he must clear out of the place. His wife said that she would go as well if Window had to go. On returning to his home one night he found that half his furniture had been removed. On the following morning he locked up the place, but, on going there in the evening, he found that a window had been broken and that the rest of the furniture had been taken away. His wife went away and lived first with her mother and Window, and afterwards at a house in Woodstock with Window. His wife and Window were keeping a boarding-house in Norfolk-street.

Cross-examined by Mr. Williams: He had not beaten his wife. He knew a man named Alfred Taylor (his wife's brother). He did not know that Taylor had remonstrated with him for beating her; Taylor was always interfering between witness and his wife. He had not bought an action previously because he had been without means. He was now head gardener for Mr. P. J. Marais.

Catherine Rosa Dan, a midwife, said she attended the wife of the plaintiff in 1901 at 3, Sussex-street, Woodstock. She was known to witness as Mrs. Window. Mr. Window called in witness. The defendant and Window were now keeping a boarding-house. Witness at-

tended the defendant for a second child just before last Christmas.

Mr. Buchanan closed his case.

Evelyn Eaton, the defendant, said she left the plaintiff in August, 1899, on account of his ill-treatment.

The Court pointed out to counsel that there was no allegation of that kind in the plea, and evidence, therefore, could not be led on the point.

Witness, replying to the Court, said she admitted the adultery, but she declared that the plaintiff had neglected to support her and the children during all the time. Replying to Mr. Buchanan, she said that plaintiff now had access to the children; she sent them to the day and Sunday-school.

Alfred Taylor, brother of the defendant, said that the plaintiff ill-treated the defendant. He had flogged her on several occasions, and had also chased her out of the house while she only had on her nightgown. Witness had been living with his sister until he got married recently.

The plaintiff (recalled by the Court) said he desired to have all the three children in his custody. He should be prepared to obtain places for them in a home.

The Court granted a decree of divorce, and gave the plaintiff custody of the children, ordering the defendant to deliver them to him by the end of the month, and giving her right of access to them at all reasonable times and places.

HYMAN V. HYMAN.

This was an action for divorce, brought by Abram Hyman, of Cape Town, against his wife, on the ground of her malicious desertion and of adultery with divers persons unknown to the plaintiff.

Mr. P. S. T. Jones, who appeared for the plaintiff, said that the Court had granted leave to sue by edictal citation. The defendant was in default, but personal service had been effected upon her at Delagoa Bay.

Abram Hyman, the plaintiff, said that he had lived in Cape Town for three years. He was married to the defendant before a J.P. in New Jersey, America, in 1890. After marriage, they lived in New York. Four years later, in 1894, his wife left him without making any statement to him. He found subsequently that she was living in a house of ill-fame at Buenos Ayres. He had several times seen her soliciting in the streets there. He offered her a home, but she refused. He remained in Buenos Ayres for five months, and then returned to New York. When he married the defendant she was a poor servant girl. He had obtained information to the effect that she was now living in Delagoa Bay. The property that he had now was entirely his

own, and no part belonged to the defendant.

Harry Jonklovitz, a tailor, now of Cape Town, said he had known the defendant in Buenos Ayres. He saw the defendant with a man named Callas in Buenos Ayres, with whom she was living as his wife. She next lived in a disorderly house, a little way from the place where she lived with Callas. She went to England, and afterwards came out to South Africa with Callas.

A decree of divorce was granted, with no order as to the property.

KOENIG V. LANDESHUT. { 1904.
Feb. 15th.
" 16th.

Copyright—Plays—Award of arbitrators—*Res judicata*—Partnership.

This was an action brought by Julius Koenig, general merchant, Cape Town, against Alice Landeshut, theatrical proprietress, late of Australia. The matter arose out of the South African tour of Hall's Australian Juveniles, a company which was recently dispersed after an unfortunate split, and the plaintiff claimed from Mrs. Landeshut a sum of £1,260, or, in the alternative, an account of the alleged partnership.

The declaration was as follows:

1. The plaintiff is a general merchant, carrying on business in Cape Town. The defendant is a theatrical proprietress, lately residing in Cape Town, but at present in Australia, and represented in this action by her attorneys, Messrs. Van Zyl and Buisinne, who hold the defendant's general power of attorney, dated February 1, 1902.

2. The plaintiff is and was at the dates hereinafter referred to, by lawful assignments, entitled to the sole and exclusive right of representation and performance in South Africa of the following plays, to wit, "The Girl From Up There," "The Gay Grisette," "The New Barmaid," "Morocco Bound," "An American Beauty," "The Transit of Venus," and the "Dandy Fifth."

3. The defendant has staged and performed the said plays at various places from the 20th July, 1902, up to and including the 29th November, 1902, as will more fully appear by reference to the annexed statement and accounts, which have been duly stated and rendered to the defendant.

4. The plaintiff notified to the defendant that he would require payment of the sum of £15 15s. for each and every performance of any of the said plays. The defendant did not agree to pay the said sum, but from time to time staged and performed the said plays as aforesaid.

5. The defendant is liable to the plaintiff in the sum of £15 15s. for each and every performance of any of the said plays, which amount is a fair and reasonable remuneration to the plaintiff by reason of the premises.

6. The defendant is by reason of the premises indebted to the plaintiff in the sum of £1,260, as will more fully appear from the statement and accounts aforesaid.

7. All things have happened, all conditions have been performed, and all times have elapsed and passed, necessary to entitle the plaintiff to claim, and he has claimed payment of the said sum from the defendant, but the defendant has refused and still refuses to pay the said sum or any part thereof.

8. In the alternative to paragraphs 4, 5, 6, and 7, and in case this Honourable Court does not grant judgment in terms thereof, but not otherwise, the plaintiff says that he has not authorised the defendant to stage and perform the said plays or any of them as aforesaid, for her own account and benefit, and by reason of the premises the defendant is bound to render to him a true and correct account of all moneys by her received from the public attending the performance of any of the said plays, to debate such account, and to pay to him the profits of every such performance.

Wherefore the plaintiff claims: (a) Judgment in the sum of £1,260 sterling with interest *a tempore morae*, or in the alternative an order compelling the defendant to render forthwith a true and correct account of all moneys received from the public attending the performance of any of the said plays, and to debate such account with the plaintiff, and judgment for the amount of profits found after debate to have resulted from every such performance. (b) Alternative relief. (c) Costs of suit.

For a plea to the declaration the defendant pleaded as follows:

1. Paragraph 1 is admitted.

2. On or about the 24th day of January, 1900, the plaintiff entered into a written agreement with the defendant and one Harry Hill, jointly. A copy of the said agreement is hereunto annexed marked A, and the plaintiff craves leave to refer to the terms thereof as if inserted herein.

3. By the said agreement it was *inter alia* provided that in consideration of a certain advance therein set forth to be made by the plaintiff to the defendant jointly with the said Harry Hall for the purpose of financing the defendant, and the said Harry Hall in a certain joint theatrical enterprise known as "Hall's Australian Juveniles," the plaintiff should become entitled to and receive 20 per cent. of the net profits of the said joint enterprise from and after the date upon which the said advance should be repaid until the expiration of a period of two years from the said date.

4. The said advance was made, and was duly repaid on the 21st day of July, 1900.

5. Thereafter, in or about the month of October, 1900, and during the existence of the said agreement, the plaintiff, who was then about to proceed to England and America upon his own business, agreed, in consideration of the premises and for other and valuable consideration, to purchase out of the funds of the said joint venture, and acquire for and on behalf of the defendant and the said Harry Hall, jointly in their said enterprise and for the purposes and benefit thereof, the sole and exclusive rights of representation and performance in South Africa of sufficient and suitable plays for the said purposes.

6. The defendant and the said Harry Hall thereupon furnished the plaintiff with letters of introduction to certain theatrical agents and proprietors of the said rights, and supplied him with valuable information, for the purpose of enabling him to carry out the said undertaking, and the plaintiff received under the said agreement and for the said purposes the sum of £1,500 sterling from the funds of the said joint enterprise.

7. Thereafter the plaintiff proceeded to England and America, and made use of the said letters and information, and there purchased the sole and exclusive right of representation and performance in South Africa of certain plays, including the plays set out in paragraph 2; but the plaintiff wrongfully, unlawfully, and in breach of his duty under the said agreement, and without the knowledge and consent of the defendant or the said Harry Hall, obtained assignments thereof, in his own name, which are the assignments referred to in the said paragraph.

8. Thereafter, on or about the 2nd day of April, 1901, the partnership which had theretofore at all times material subsisted between the defendant and the said Harry Hall was dissolved by mutual consent, and the defendant thereupon became entitled to all the right, title, and interest of the said Harry Hall in and to the said joint enterprise.

9. The defendant admits that she has staged and performed the said plays set forth in paragraph 2, as alleged in paragraph 3, and also admits the allegations in paragraph 4.

10. Save as above, the defendant denies all the allegations contained in paragraphs 2, 3, 5, 6, 7, and 8.

11. By reason of the premises, the plaintiff is not entitled to claim from the defendant in respect of the said performance more than the sum for which plaintiff is himself liable in respect thereof as assignee of the said rights, namely, the sum of £295 7s., which said sum the defendant has always been ready and willing and now tenders to pay to

the plaintiff, together with taxed costs to date.

Wherefore, subject to the above tender, the defendant prays that the plaintiff's claim may be dismissed, with costs.

The plaintiff, in his replication, said, with regard to that portion of the plea dealing with the playing rights, these rights were dealt with in the arbitrator's award.

Mr. Searle, K.C. (with him Mr. Alexander) for plaintiff; Mr. Upington (with him Mr. Bisset) for defendant.

Mr. Searle said that the action was to recover £1,260, being in respect of certain contracts made for rights of plays which the plaintiff alleged were his property, or, in the alternative, for, an account of the moneys received from the public in the performances of those plays during certain dates, when it was admitted that the plays were performed, and to pay to the plaintiff such amount of the profits as was found to be due to him. Koenig and Landeshut were connected with theatrical performances during a certain period. Koenig came in originally by advancing a certain sum of money to Mrs. Landeshut and her partner, Mr. Hall. The first agreement was in January, 1900, when he advanced £700 to Mrs. Landeshut and to Hall, on certain conditions set out in an agreement, the main conditions being that this sum was to be repaid from time to time as they could repay it, and that from the date when the £700 was to be repaid and for two years afterwards he was to get a certain percentage of the profits of the company. The amount was actually repaid in July, 1900, and from that date for two years onward Koenig was entitled to a certain percentage (20 per cent, originally) of all the profits of the company. Then, in April, 1901, Hall having in the meantime dissolved partnership with Mrs. Landeshut, Mrs. Landeshut carrying on, Mrs. Landeshut and Koenig entered into a further agreement whereunder the percentage was increased to 30 and a certain remuneration, £50 a month from a certain date, was to be given to Koenig. In July, 1902, the agreement came to an end, and thus the claim was from the 19th July, 1902, to the 29th November, 1902. There were a number of disputes between Mrs. Landeshut and Koenig arising partly in the year 1901, but more particularly in 1902, and in April, 1902, a deed of submission was entered into between the parties in favour of Mr. Nash. Great delay ensued in bringing the disputes before Mr. Nash, and the arbitration actually commenced in September, 1902, and continued until December, 1902, when Mr. Nash made his award in the matter. It was admitted that he had not to deal with the question raised in the present case, because the deed of submission was signed long before. Their (the plaintiff's) position was that

Mr. Nash, whose award must be put in and read, decided in the award that these plays belonged to Koenig, and they (plaintiff) said that that concluded the matter. The defendant denied that. The plaintiff had taken up the position throughout that the award decided the matter as to the ownership of the plays. The question of the particular remuneration was not before Mr. Nash, because he only dealt with the accounts of the parties up to the date of the deed of submission. The first question was as to the ownership of these plays. The plaintiff said that the plays were his, and, if not, then he said that he was a partner with Mrs. Landeshut in these plays, and that he was entitled to an account of the money she had made by producing the plays, and to an equal share of the profits of the performances. If it should be held that the agreement terminated, and that the plaintiff was only entitled to the same percentage as before, then he should be entitled to only 20 per cent. The plaintiff said that originally the playing rights were his, and that he was entitled to make the charge he had made. After a certain date, the defendant disputed his rights. There was no dispute between them as to the profits made. The plaintiff said that he was the sole owner of the playing rights, and that he was entitled to fifteen guineas for each performance, but if it were a partnership affair, then the defendant must account to the plaintiff for the profits she had made out of staging these plays, and pay over the proportion of profit to which the plaintiff was entitled. The plaintiff rendered services up to July, 1902, but after that date, he rendered no services. He claimed a sum of £1,260, but at 30 per cent, it would probably be found that the plaintiff was entitled to more than that sum.

Mr. Upington (interposing) said that the books of Hall's Juveniles, which formed the joint venture referred to, were out of the country. They had made every effort to obtain the books, but without success.

Mr. Searle said that Mrs. Landeshut, in her evidence, stated that the books were at the office of Mr. Nash, and that they would be produced at the trial.

Mr. Upington said that, while defendant disputed that Koenig was the owner of these assignments, she also took up the defence that he was her agent in acquiring these playing rights, that in undertaking the assignments in his own name he committed a breach of trust, and that therefore he could not make any profit out of these plays. He (Mr. Upington) only mentioned this as a good defence, and not to show that defendant claimed the assignments.

Mr. Upington called George Herbert Smith, partner in the theatrical firm of Messrs. B. and F. Wheeler, who said he had had about

four years' experience off and on in theatrical management in South Africa. He had seen four of the seven plays now in question, and knew the others. A charge of 15 guineas per night for any of these plays was absurd. He considered that a fair charge for performing any of these plays was £3 per performance in the two principal towns, Johannesburg and Cape Town; £2 for Durban and Pretoria; and £1 for the smaller towns. A juvenile company would probably be charged less.

Cross-examined by Mr. Searle: Occasionally in London 10 per cent. of the gross receipts were taken for the playing rights. Witness's firm had never paid 10 per cent., nor had they paid higher than £5 a performance. Mr. George Edwardes was a partner in witness's firm, and there was a special arrangement with him as to the Gaiety pieces produced out here.

By the Court: Quite the highest charge would be £5 a night for the two biggest towns in South Africa, and £3 for the other towns, £3 would be fair; £5 would be liberal.

Mr. Searle read the award and notes of the arbitrator under the deed of submission, and contended that by this award the question of the ownership of the rights of the plays was determined in the plaintiff's favour.

Buchanan, J., said that before deciding this the Court would hear the evidence adduced on commission.

Mr. Searle read the evidence, given on commission, of Julius Koenig, the plaintiff, who deposed that after the agreement of partnership was entered into he went, in October, 1900, to England on certain private business. He arranged with Mrs. Landeshut (then Mrs. McKirby) to acquire certain playing rights, of which a list was given him. This list did not comprise the plays now in suit. Before he left it was arranged that he should be paid £60 a month extra, and it was understood that a letter embodying this agreement would be despatched after he sailed. Instead of this being done, a letter was forwarded to him by defendant, stating that she had understood the arrangement to be that a man should be engaged here to look after the affairs of the company during his absence in England. In the course of further evidence the plaintiff said that he obtained from Mr. Musgrove's representative the playing rights of "The Belle of New York." Certain fees were remitted from time to time by Mrs. McKirby at the rate of five guineas for each performance. Under the agreement of the 24th January, 1900, he banked £850 in his own name to form the capital account of the company. He kept a separate account until the capital was paid up. After the capital was paid up, he kept a separate account for the company. When he went to Europe he took £3,000—£1,500

of his private money and £1,500 of the firm's account. His travelling expenses were about £1,000. In connection with the power granted to one Wilkinson, on behalf of the Australian Juveniles in London, he expended about £516 18s. 6d. He brought back from Europe money belonging to his private account to the amount of £1,092. He paid £385 17s. 6d. for the playing rights out of the firm's money. He did not refer to the company when he spoke of "the firm." He arrived in England in October, 1900, and returned from Europe in March, 1901, and saw Mrs. McKirby. He told her the terms upon which he would be prepared to let the playing rights to her. She agreed to the terms. In April, 1901, he sent her an account for (1) playing licences, (2) sundry expenses, (3) advances to Hall. Witness charged £30 for the playing rights of the "New Barmaid," which he had acquired outright. His charges were based on actual cost. It was understood that he should receive towards travelling expenses at the conclusion of his interest in the company an allowance of £300. Mrs. Landeshut did not object to the terms. In cross-examination he admitted that he had had no previous experience in theatrical enterprise. He had practically sole charge of the commercial management of the venture. It if had not been for his financial interest in Hall's Juveniles, he should not have sought the playing rights.

Mr. Upton read the evidence taken on commission on behalf of the defendant.

Frank Wheeler said that he was a theatrical manager, carrying on business in South Africa. He remembered the plaintiff meeting him on one occasion at Mr. Wilkinson's office in London in 1900. They had an interview in regard to certain playing rights. The impression that he gathered from the interview was that the plaintiff was going to America, and that he was wishful to do Hall's Juveniles a good turn in regard to securing them certain playing rights. As to the terms charged by the plaintiff in his account, witness had never paid more than three guineas for the right to produce any play in this country. There was one exception, when they paid five guineas for the playing rights of the "Casino Girl." That price was quite exceptional. The charge for most plays in South Africa of the class, for instance, of "Florodora," "San Toy," and so forth, was 30s. a night. With regard to the charge of fifteen guineas made for one of the plays, he would not have the play at all. He had never heard before of such a charge being made for the playing rights of a piece in South Africa. He considered that, generally speaking, the amounts offered in the defendant's tender were quite reasonable. He fancied that Collins and Wilkinson were trying to

make a little money out of the plaintiff. Only a few of the plays which plaintiff mentioned had been a success. Witness paid 30s. a night for the playing rights of Gaiety plays. He had an arrangement with Mr. George Edwardes for his Gaiety pieces. He also paid Mr. Edwardes a certain percentage of the profits; but Mr. Edwardes allowed him to use his name, and also arranged the matter of the wardrobe.

Miss May Pollard deposed that she formerly played in the "Belle of New York" with Mr. Musgrove. In 1899 she left London with her brother to play in the "Belle of New York" and "The Geisha" in South Africa. Mrs. McKirby was her sister. When the plaintiff expressed his intention of going to Europe he offered on behalf of the company to attend to the matter of getting new plays for the company in London. When Mrs. McKirby was in South Africa she was married; but she subsequently obtained a divorce from her husband in Victoria.

E. H. Collins, formerly manager for Geo. Musgrove, deposed that he was waited upon in London by the plaintiff, who had a letter of introduction from Miss May Pollard. He was asked to assist the plaintiff to secure the rights of production in South Africa of several plays. Witness spoke to introducing the plaintiff to several of the proprietors, from whom Koenig obtained rights of production in South Africa. Witness added that the plaintiff told him that he had a big financial interest in the company, and he understood that the plays were obtained for the benefit of Hall's Juveniles. He knew of no set being made against Hall's Juveniles in London. He advised the plaintiff to take the rights in his own name, so that he should protect his own financial interests. Hall's Juveniles could have secured the plays in their own names, if they had paid the fees and guaranteed future fees. He did not think any one in London would have assigned the plays to Hall's Juveniles. He did not think any one in London knew the combination.

Mr. Wilkinson, solicitor, of London, deposed that he acted as plaintiff's attorney in acquiring certain playing rights. Plaintiff told him he was financing Hall's Australian Juveniles.

Mrs. McKirby, in her evidence on commission, said that plaintiff took with him to England £1,500 of the company's funds, which she understood were to be spent in acquiring playing rights and various stage properties. She had no idea that plaintiff was going to buy playing rights on his own account. When Koenig returned to Cape Town in March, 1901, he did not tell her that the arrangement for the purchase of the playing rights was to be revoked, or that the arrangements were in his name. She gave Koenig, before he left, letters of

introduction and information to enable him to acquire playing rights.

Postea (February 16).

Mr. Searle, K.C.: It is quite clear that the plaintiff is entitled to an account in any case.

[Hopley, J.: What for?]

To ascertain the sum to which we are entitled. Mrs. Landeschut undertook to produce her books at the trial, so she cannot now say that she is unable to produce books as they are in Australia. An undertaking was given to produce the books in order to show how these large profits were made.

[Buchanan, J.: The whole question is, are you entitled to an interest in these plays or not?]

Yes; and the defendant, in her letter of August 20, admits that we have a share in these plays.

[Buchanan, J.: Did a partnership ever exist?]

[Hopley, J.: Or is it not merely a question of a loan? When did they secure this loan?]

Long after the £700 was paid off. If the transaction between the parties was not a partnership, it was at all events a joint venture. Plaintiff spent large sums of money in order to obtain these rights, and there is nothing to show that he ever got back any of the money. He undertook to produce his books.

[Mr. Uppington: No, he volunteered to do so.]

Well, yes, he volunteered. Both the parties hold this to have been a joint venture, and the plaintiff, in his letter of July 28, actually speaks of Mrs. Landeschut as his partner. Surely that is good evidence to show that Mrs. Landeschut considered that Koenig had an interest in the business. Then again, there is the letter of July 28, from which it is evident that the plaintiff made the whole concern.

Then as the letters of November 15 and January 1 show, the rights in these plays were assignable. To be sure, in the case of one play, there is a prohibition against assignment: but that was not so in the case of the other plays.

The arbitrator found that Koenig obtained the plays for himself, otherwise why had he disallowed the sum of £300 odd travelling expenses? The arbitrator put in these remarks to show why he had disallowed those expenses. If the award was interpreted in any other way, then it was senseless.

[Hopley, J.: It is unfortunate that Koenig, if he did not want to play a fair game with these people when he got home, should not have said outright that he had determined to secure these plays for himself. The whole thing was wrung out of the documents by means of innuendo and suggestion.]

A month after the agreement as to the 30 per cent. of the profits had terminated, a letter was written to the

plaintiff acknowledging that he was a partner with regard to the plays. Surely it was not sufficient that one of the partners should be paid merely the charges that he had to pay to the owners of the plays, while the other partner took all the profits.

[Hopley, J. (interposing), said he did not think that the profits were entirely due to the plays which were staged. He supposed that the company would have drawn good houses as juveniles, whatever the plays had been.]

The juveniles performed these plays, and they must have some means of attraction. The position taken up by the defendant in the plea was that, although the plaintiff should go on remitting the fees to the owners of the plays, he was not entitled to share in the profits of the performances. It is very difficult indeed to understand the tender of the defendant (£285 7s.). In some cases it was based upon the fees the plaintiff had to pay to the owners, and in other cases it was not. For example, the defendant offered five guineas for the performing rights of "The New Barmid." As a matter of fact, he (plaintiff) had acquired that play outright. The defendant said that the plaintiff's interest ceased in July, 1902, and yet the company went on performing these plays of the plaintiff's, and never obtained an assignment from him, while he was liable to the owners all the time for the playing fees.

[Hopley, J., observed that it was quite evident that somebody was the lamb was getting fleeced, but he did not know exactly who. The plaintiff was getting £50 a month remuneration, and 20 or 30 per cent. of the profits that remained, and yet he had no risk. It seemed to him that except for his name and the little business acumen he brought to bear, the plaintiff had very little work to do.]

It does not seem to affect the question whether the plaintiff did much or little work, though the letters show that Koenig did an enormous amount of work for the company, as had been acknowledged by Mrs. Landeshut herself. We have now to consider the legal principles at issue. The whole point is whether the plaintiff has or has not an interest in the plays set out in the declaration? If he has, as I submit he has, then the declaration is sufficient to cover his claim. Any assets acquired in the course of the agreement should be divided when the agreement terminated, and if the arbitrator decided that the assets belonged to the company, that will mean Koenig and Mrs. Landeshut. The plaintiff has spent considerable sums of money, and I submit that under the circumstances he had got some claim as having some interest in the plays. If the Court should consider that Koenig was not the sole owner, but that he had

an interest, then the plaintiff is entitled to an account, and it could then be determined what interest the plaintiff had.

Without calling upon Mr. Upington, Buchanan, J.: The plaintiff's declaration alleges that he was entitled to the sole and exclusive rights in certain plays as performed in South Africa for the period of six months named, and that during this period the defendant staged and performed these plays at certain places, and on certain dates between the 20th July and the 29th November, 1902, in infringement of plaintiff's rights. Plaintiff says that he had informed the defendant that he would require from defendant 15 guineas for each performance of any of these plays, that the plays have been performed a number of times, and that there is now due to him a sum of £1,200, for which he prays judgment, or, in the alternative, for the defendant to render a true and correct account of all moneys received for the performance of these plays, and pay him the profits gained by such performances. The defendant pleads that these plays were acquired through her own agency by the plaintiff on a visit to England, and were acquired by the plaintiff for the defendant and her then partner (Mr. Hall). She admits that for the performance of these plays during the dates mentioned in the declaration there were certain royalties payable to the assignee of the plays in England amounting to £259 7s., which amount she tenders with taxed costs up to date of plea. In his replication, the plaintiff alleges that the matters raised by the plea, viz., the right of the defendant to these plays, was fully dealt with in an arbitrator's award, which declared the plaintiff to be the sole owner of the plays. It will thus be seen from the pleadings that the question on which this case depends is whether the plaintiff or the defendant was the owner of these plays. With regard to the replication alleging that there has been a decision in favour of the plaintiff that the plays were his, I may say that it has been admitted that the reference to the arbitrator did not include a reference on the question of the ownership of the plays. The reference was only in regard to certain accounts in dispute between the parties. But it is said that the decision of the arbitrator on certain items in the accounts was in effect an award in favour of the plaintiffs. Now, I must say, on looking at the arbitration, I cannot find that the arbitration can in any way be set up as *res judicata*, on the question of the disputed ownership of the plays. The questions submitted to the arbitrator arose before this dispute arose between the parties as to their rights in these plays, and the award of the arbitrator makes no reference whatever to this question. It is true in the notes that the arbitrator has

appended to his decision, which may be looked upon more or less as giving his reasons for certain decisions, he does refer to a charge of £300, which the plaintiff claimed from the defendant as travelling expenses on the occasion when these plays were secured. The arbitrator refuses to allow this sum of £300 on two grounds—one was that the plaintiff had taken these plays in his own name, instead of the name of the so-called partnership; and the other was that he had afterwards been remunerated for his services in this matter. But, as far as the decision of the arbitrator is concerned, it is plain and distinct against the plaintiff. He says: "I have decided that, although the playing rights are in Koenig's name, they were secured on behalf of the company by him." If, therefore, there is any *res judicata* in this matter, it is to the effect, that the plaintiff had no right in these plays. But to ascertain whether or not the plays belonged to the plaintiff or the defendant, we must look at the nature of the transaction between the parties. In January, 1900, the defendant (Mrs. Landeshut) and one Harry Hall, wished to start what is called the Hall's Australian Juveniles' Company, a company to be formed for the purpose of performing certain plays in South Africa. They were short of means, and they applied to the plaintiff, and the plaintiff entered into an agreement which has been annexed to the plea. By this agreement the plaintiff was to advance the sum of £700 for the purpose of enabling these persons to finance their undertaking. It is said that the plaintiff became a partner with the other two, but looking at the agreement, it is clear that no partnership in the true sense ever existed between Mrs. Landeshut and her partner Hall and the defendant; on the contrary, the plaintiff makes a certain advance, and takes security for the advance. For making this advance, plaintiff was to receive the gross takings of the company, and out of these takings he was to recoup himself for the money he had lent to the undertaking, plus interest and expenses. As an additional inducement to him to lend his money, it was agreed that as soon as the amount was repaid, for at least two years thereafter he should have 20 per cent. of the profits of the venture entered into by Hall and Landeshut. The agreement further goes on to state that Koenig was not to be liable in any way for any of the debts or engagements, but merely that he financed the venture to the extent of £700; it also provides that the whole of the assets were to be ceded to Koenig as security, and also that Landeshut and Hall and Company (that must mean the so-called Juveniles' Company) were to

pass a bond in his favour as collateral security for the advance made. It was an advance made by the plaintiff, the security was given by the takings of the company, a general bond, a cession to him of all the assets of the company; and, as a further inducement, he was to take the 20 per cent. during the period of two years, should the company prove successful. Had there been a sequestration of Hall's Juveniles' Company, under this agreement it could not possibly have been said that Koenig was a partner. He would rather have stood in the position of a secured creditor, and would have come forward and claimed against the estate. The venture proved successful, and in July, six months after the agreement was entered into, the total amount advanced by Koenig was repaid to him, and the two years began to run from that date. Later on in that year Koenig also lent his assistance as a manager, looking after the commercial interests of the company, and for this work he received a sum of £20 a month. Towards the end of the year, the plaintiff being about to proceed to Europe on other business, it was further agreed that he should also secure additional members of the company, and secure rights of acting plays for the benefit of the company; and for this purpose he took with him moneys of the company. In England and America he obtained additional members for the company, and he also bought the right to perform certain plays. Some of these rights were bought out and out, while for others he secured the right to perform for a certain number of times, after which a royalty was to be paid for further performances. On his return to the country, and before disputes had arisen, Mrs. Landeshut had dissolved partnership with Hall, as appears from an agreement between them, to which plaintiff gave his assent, but was not otherwise a party. The defendant thus became sole proprietor of the company. She thereafter made an agreement with the plaintiff to give him £50 a month from the commencement of the two years from the 1st August, 1900, as an extra remuneration for his services, and also agreed to increase the percentage given to him during the running of the two years from the 20 per cent. to 30 per cent. Disputes arose between the parties in respect of their accounts, and these were referred to Mr. Nash. Among other things, the plaintiff claimed £300 travelling expenses. The arbitrator considered the plaintiff not entitled to this amount, and, although he expressly says that the plaintiff had bought these plays for the company, in the reasons he gives for disallowing the amount, there is some slight grounds for plaintiff's contention, as he gives as one

ground for his decision on the item in dispute that the plaintiff took cession of the right in the plays in his own name. That is one of the reasons, but the arbitrator also gives another reason, namely, that the plaintiff was further remunerated by getting a monthly allowance of £50 and by having his percentage increased from 20 to 30 per cent. The plaintiff took cessions of the plays in his own name, but I am convinced from the evidence, and from the correspondence in this case, this was done for convenience sake only, and that the plaintiff never had any personal right to these plays at all. They were bought with the company's money, he charged the whole expense that they cost to the company, he was remunerated for his labour in obtaining these plays, and he had no claim whatever to them in any way. True, these plays, when obtained, caused greater success to the company during the remaining period of two years, but the plaintiff got the benefit of the extra profit. He has been most handsomely repaid for the £700 or £800 which he advanced. But that does not dispose of the question as to whether these plays did or did not belong to the plaintiff. I think from the evidence these plays were never intended to be bought for the plaintiff. His taking cession in his own name is a matter that the defendant might have complained of if she had chosen. She might have brought an action to compel him to cede the rights to her. But the present action is founded solely on the ground that these plays belonged to the plaintiff. On the evidence we cannot hold that the plays ever belonged to the plaintiff, and if the plays did not belong to the plaintiff the plaintiff's cause of action falls away entirely. The defendant, it is true, has tendered an amount, but has not tendered the amount on the grounds on which the plaintiff has brought his action. It was tendered in accordance with the statements contained in her plea. These statements amount to this, that after the agreement between the plaintiff and herself came to an end, and after the reference to Mr. Nash as arbitrator, she continued to perform these plays which had been bought for the company, and on each of the performances a certain amount of royalty was due to the persons who had ceded the plays to the plaintiff. As the plaintiff still continued to be personally liable for these amounts, she tendered this amount to the plaintiff with costs up to the filing of the plea. The evidence is not very clear as to the amount actually payable, but, as far as the evidence does go, the tender seems to be more than absolutely was necessary, and is certainly the full amount, if not in excess of the amount that the plaintiff would have to pay to the persons who ceded the playing rights. Judgment will be given for the plaintiff

on the tender for £250 7s. with costs, to date of plea, but after that, the plaintiff must pay the subsequent costs of the action.

Hopley, J., concurred.

[Plaintiff's Attorney: D. Tennant, jun.;
Defendant's Attorneys: Van Zyl and
Buisinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon.
Sir J. H. DE VILLIERS, P.C., K.C.M.G.,
LL.D.]

WRIGHT V. WRIGHT. { 1901.
{ Feb. 16th.

This was an action brought by Rose Mary Wright against her husband, Daniel Wright, for restitution of conjugal rights, failing which, a decree of divorce.

The declaration set out that the parties were married in Melbourne in December, 1895, and there had been one child of the marriage. Shortly after the marriage they came to this colony, with the intention of settling here. The defendant had a good position with the Cape Town Gas Company, but on the 12th October, 1901, he went to Melbourne in connection with a partnership in a produce business, which he was to establish there and return to South Africa. Since then he had sent his wife no money towards the maintenance of herself and child, and had wrongfully and maliciously deserted her. Plaintiff claimed an order for restitution of conjugal rights, failing which, a decree of divorce, custody of the minor child, forfeiture of the benefits under marriage, and payment of £5 a month for the support of the child, together with the sum of £72, being the amount of debt incurred for maintenance during the defendant's absence.

Mr. Close for the plaintiff. Defendant in default.

Rose Mary Wright (plaintiff) said that within a day or two of the marriage her husband left for South Africa to find employment. About six months afterwards she joined him here, and they intended settling in the Colony. The defendant developed a bad temper, and finally she had temporarily to leave him and stay with a friend. The defendant left his position in the Gas Company, and entered into a partnership in a produce business with one Pickering

In consequence of the partnership agreement, her husband, in October, 1901, went to Australia to establish the business there, and promised to send money every month towards her support. He paid no attention to a request she sent to him for money, and the defendant had further written to her telling her to apply to his brother or his brother-in-law for money. The defendant's brother told her that the defendant had written telling him to give her no money.

Mr. Close said that when a letter of demand was sent through the attorneys, the defendant replied that, instead of applying to him for £72 for twelve months' maintenance of the child, that it would be better to reply to his two previous letters. On the 20th September, the defendant's attorneys wrote from Melbourne that their client had written to his wife that if she was willing to come to Australia, that her passage and that of the child would be secured, but plaintiff's attorneys in Cape Town replied that the defendant's conduct had been so extraordinary that they advised their client that it would be hazardous on her part to run the risk of desertion again in Melbourne; and further, that she could not leave until her debts were settled. The defendant, in reply to that through his attorneys, refused to make any offer towards support, but again offered to pay her passage money to Melbourne.

[De Villiers, C.J.: Are you ready to go back to him if he sends you money?]

Witness: Yes.

How much? My passage money and the amount of my support in Cape Town.

Wm. Alfred Humphreys, assistant manager of the Cape Town Gas Co., said that while the defendant was with the company, he had a permanent position. When he left, witness understood that he was going over to make the preliminary arrangements in Melbourne, and then return to the Colony.

Wm. Anderson stated that he understood from the defendant that he would return to the Colony and make it his home.

Alfred Thomas, stepbrother of the plaintiff, said that the defendant was quite satisfied with his prospects in the Gas Co., and when he left, witness was under the impression that he would return to Cape Town. Witness never got anything towards the board and lodging of his stepister, and, further medical expenses had been incurred.

De Villiers, C.J.: A decree of restitution of conjugal rights will be granted, defendant to return to or receive the plaintiff on or before the 15th July. I allow ample time, so that the defendant may make all the necessary arrangements to bring his wife back, provided it will

be a sufficient compliance with this order if the defendant sends to the plaintiff's attorneys, on or before that date, a sum of £100 for the payment of the passage money of the plaintiff and the child of the marriage, of the costs of suit and other incidental expenses. Failing compliance with such order, the Court grants a rule calling on the defendant to show cause on the 1st August why a decree of divorce should not be granted, with costs, and the plaintiff declared to be entitled to the custody of the child of the marriage, and why defendant should not pay to the plaintiff the sum of £5 per month until the child attains the age of sixteen years; with leave to the defendant to raise the question of jurisdiction. It will be understood that this £100 is to be sent to the plaintiff's attorneys, and they will be responsible for the distribution of the money. If she doesn't go back, the money is not to be paid to her; the attorneys will have to see that no part of this £100 is paid until the passage is taken for plaintiff and the child.

VAN HOLDT V. BLAKE. { 1901.
Feb. 16th.
Mar. 28th.

Sale and purchase—Patent defect.

This was an action to recover the sum of £237 5s. 6d. for certain bricks, stone, and granite, supplied to the defendant. The declaration set forth that in April or May, 1903, plaintiff, who is a brick-maker, residing at Rosebank, sold, and defendant, a builder, of Newlands, bought, 300,000 bricks of the quality known as seconds, at a price of 7s. per thousand. Plaintiff had delivered 77,500, the purchase price of which amounted to £290 12s. 6d. Plaintiff had been ready and willing to deliver the balance, but defendant had refused to accept the same. Plaintiff made a further claim in respect of concrete and stone supplied. He said that payment had been made of £180, and that a further sum of £237 5s. 6d. was due, for which he prayed judgment.

In his plea the defendant said that the agreement was that the bricks should consist of a quality known as seconds, to be delivered in quantities of not less than 20,000 per week. Thereafter the plaintiff delivered 40,000 bricks, and in June the defendant notified plaintiff that he refused to accept the balance of the contracted number, and called upon plaintiff to deliver bricks according to contract. In regard to the contract for the supply of concrete and stone, the defendant alleged that, instead of the price being 9s. and 8s., as alleged by the plaintiff, it was 7s. 6d. and 6s. per load respectively, and he put the plaintiff to

proof as to the amount delivered. He pleaded that the sum of £180 covered his indebtedness to the plaintiff. As a claim in reconvention, the defendant alleged that he had suffered £500 as damages through breach of contract on the part of the plaintiff, he having been compelled, by reason of such breach of contract, to purchase bricks at an enhanced price, and to abandon the construction of certain premises.

The replication was general.

Mr. Benjamin (with him Mr. Sutton) for plaintiff. Sir H. Juta, K.C. (with him Mr. Upington) for defendants.

Hendrik Christian von Holdt, the plaintiff, said that in April last defendant came to see him at the brickfields. The bricks there were all burnt at the time, and defendant examined them, and said he was satisfied with them, and wanted to purchase 400,000. Witness agreed to let him have 300,000 bricks. It was arranged that the price should be 75s., delivered at the building in Palmyra-road. Defendant examined the bricks thoroughly. Witness delivered a certain quantity, and afterwards received complaints from defendant. Witness produced certain vouchers. Some were not signed, owing to no one being there to sign them.

Mr. Benjamin said the plaintiff had not got vouchers for certain concrete and stone claimed to have been struck out of the account annexed to the declarations. The concrete was reduced by seven loads, and the stone by twenty.

Witness (proceeding) said that in June he received a letter of complaint from defendant, wherein the latter said 50 per cent. of the bricks were not fit to use. In July, defendant again wrote, saying he would hold plaintiff responsible for any damages. After those letters, defendant still continued to take a considerable quantity of bricks. Witness did not reply to these letters, as he considered that if defendant had any complaint he should make it personally. He had many opportunities to see witness. Subsequently, witness went down to the building, and found a few bricks had got a little soft. He offered to allow for these. There was a good deal of rain at that time. Witness went with defendant to see the Municipal Inspector at Claremont. They saw one of the clerks there, who said the Municipality would not object if good bricks were used. Blake took some of the bricks with him, but the official said nothing as to these. Witness gave instructions to his foreman to give Mr. Blake the best bricks, and so far as he saw, good bricks were delivered to Blake. Witness had supplied other parties with bricks from the same kilns, and had received no complaints. It was agreed that the price of the stone should be 9s. a load, and of the concrete 8s. Witness supplied other people at these prices at the time.

Cross-examined by Sir H. Juta: The Municipal Surveyor, Mr. Richardson, had not complained on the ground in witness's presence of the quality of the bricks.

Sir H. Juta: How many thousands of the bricks you brought there turned into clay on the ground?

Witness said he had no idea.

In further cross-examination, witness said he did not know that the Municipality had applied to the Court for an interdict to stop the building. Witness agreed that the bricks should be sorted, and approved or rejected by a municipal official. Witness had to send seconds, which were a good class of brick. Witness understood the objection of the Municipality to have been made because the bricks were white, not because they were bad bricks. The bricks at these eight kilns were all of one quality—seconds.

By the Court: Defendant inspected the kilns before buying. Witness considered he bought the bricks in the kilns. [De Villiers, C.J.: You don't say so in your declaration. You say "300,000 bricks of the quality known to us as seconds."]

Witness: They were all seconds.

[De Villiers, C.J.: If you say he bought the bricks at the kilns and was bound to take them, why were you willing to take some of them back?—No answer.]

John Henry Wood said he obtained 70,000 bricks from plaintiff between March and October last year. They were white bricks, made from white clay. The bricks were the best and hardest witness could get at the time. Witness tried three other kilns, but could not get such good bricks as those from plaintiffs. The bricks supplied by plaintiff were of the quality known as seconds.

Cross examined by Sir H. Juta: Witness used these bricks in a building in the Claremont Municipality. No objection was made to the quality of the bricks by the Municipality.

Edward Blumberg, plaintiff's foreman, said he remembered Blake coming to plaintiff's brick yard. Witness saw the bricks as they were put on the wagons, and these were all right. They were seconds. Wood had the same bricks as Blake. There was not much difference in the bricks made at these kilns.

Cross-examined by Sir H. Juta: Bad bricks were put aside. There might have been many thousands of bad bricks. Witness had never heard Blake complain about the bricks. He used to come there, and tell them to send the best bricks. He said he had paid for the best, and so he wanted the best.

Phillip Kleins, brick packer, in the employ of Mr. Van Holdt, said the bricks were "second," and were of good quality.

Alexander Barron, contractor, said that in May, June, and July he purchased bricks from the plaintiff. They were uniformly good "second" bricks.

Mr. Benjamin closed his case.

Sir H. Juta called

James Richardson, surveyor in the employ of the Claremont Municipality, who said that it was his duty to supervise the building which defendant was erecting. He saw the bricks brought there. Some 40 per cent. of the bricks were not seconds, and witness complained. Witness told Mr. Blake in plaintiff's presence, that about 40 per cent. of the bricks were not fit for use. On this occasion witness dug his knife into some of the bricks to show that they were bad. Blake promised that only the good bricks should be used. Plaintiff said nothing. About 60 per cent. of the bricks were usable as "seconds." As to the others, one could take a brick in one's hand and break it. Witness allowed the work to go on on the understanding that only good bricks would be used. In June, plaintiff and defendant came to witness. Van Holdt produced bricks which he contended were good. Witness thereupon produced two bad bricks which he had taken from the property. It was understood that the bricks would be sorted, and only good bricks used. Witness found that this was not done, and proceedings were then taken by the Municipality to obtain an interdict to stop the building. These proceedings were withdrawn on condition that Mr. Blake would get good, hard brick to build the outside walls, and that the best of those supplied by the plaintiff would be used on the inside walls, the brickwork already constructed to be cemented. Witness considered 7s. a fair price for seconds.

Cross-examined by Mr. Benjamin: When the conversation witness had spoken of took place, plaintiff was standing within a yard of witness and Blake. Witness thought plaintiff must have heard what was said. There were very heavy rains at that time, and the bricks were stacked in the open without covering.

Wm. David Jones, assistant engineer, in the employ of the Claremont Municipality, gave corroborative evidence as to the conversation between Richardson, Blake, and Van Holdt, in the office of the first named. Witness saw the bricks on Wood's property, and considered that these were generally of a decidedly better quality than those on the defendant's ground. He only very occasionally saw bricks on Wood's property as bad as those on defendant's land.

Leopold Hendricks, a mason said he was engaged on the building in Palmyra-road in June. He had to complain of the bricks. Witness saw Van Holdt, and told him he must send better bricks. Van Holdt said he would send good bricks. Subsequently witness com-

plained to the men who brought the bricks. The bricks were often short. Some of them melted when the rain came. Witness heard a conversation in June, in the course of which Blake told Van Holdt that he would only pay for the bricks that were used. Van Holdt then said nothing, except that he would send good bricks. Witness had been stopped building three times by the Municipal authorities.

Robert Esdon, civil engineer, said in his opinion the brickwork in Blake's building consisted of fair seconds. He saw heaps on the ground which were not good enough to be called "seconds." They were raw. There were large numbers of halves lying about. There were about four or five thousand bricks lying in the floors of the building submerged in water, which should not have been there, having regard to their quality. A well-burnt brick should stand a good winter's rain.

Alfred Walter Blake, the defendant, said he contracted with plaintiff to buy 300,000 bricks, nothing worse than good seconds to be delivered to him, in not less quantity than was sufficient to keep four masons at work, and not less than 20,000 a week. Witness went to the brickfields, and on the outside of the kilns he saw some good bricks. He expected to find better bricks inside. Witness told plaintiff to strip the outsides properly. There were some bricks not burned, and plaintiff said he would strip the outsides, and burn them in another kiln. The masons continually complained to witness about the unusual number of halves. Witness had previously told plaintiff that he must not send so many halves, and that a number of the bricks were not burnt. Van Holdt said that his (Van Holdt's) boys were humbugging him, and that he would allow witness for such bricks. Witness frequently complained to Van Holdt, personally, and through messengers. The witness confirmed the evidence of Richardson. Witness had once refused to take the whole of a load of bricks, because they were all bad. Witness told Van Holdt about the interdict proceedings. When Van Holdt wanted a settlement, witness told him he could not settle until the bricks were measured in the walls, and the account against Van Holdt made out. Witness measured the brickwork in the building, and on the most liberal allowance there were not more than 46,000 or 47,000 bricks used. Witness had had to buy 14,800 bricks from the Rochester Company at 25s. per thousand to use in the building, and he had had to allow £10 for extra work to the bricklayers on account of their having to use halves. He had also had to spend £18, £13 10s., and £27 8s. 6d., for cementing, plastering, and sorting respectively. He was building some cottages, but could not get bricks from Van Holdt to do so.

Cross-examined by Mr. Benjamin: Witness was manager for the Cape Lime Company. That company was the plaintiff in an action against one Schoeman, which action was dismissed, because the Court came to the conclusion that the defendant did not know what he was signing when he signed the document on which the company founded its claim. The bricks delivered by the plaintiff were not counted as they arrived, for the reason that they could easily be counted in the building. Witness was glad to get Van Holdt's bricks at the price. He did not try to get Rochester bricks, because there was no necessity to use these superior bricks. The 47,000 bricks in the building included an allowance for wastage.

Joseph van der Riet, builder and contractor, deposed to having heard Blake ask Van Holdt "when he was going to shift his muck." Van Holdt replied that he would do so in the following week, as his carts were busy then. Blake said that the sooner he did so the better for him, as he wanted to occupy the premises.

This concluded the evidence, and counsel were heard in argument on the facts.

Cur. Adv. Vult.

Postea (March 28th).

De Villiers, C.J.: The evidence in this case shows that the defendant before he purchased bricks from the plaintiff had an opportunity of inspecting the bricks which he purchased. He looked at one of the kilns, and inspected it thoroughly, and, after having inspected it, he purchased a certain quantity. He had ample opportunity, therefore, of knowing the class of bricks which would be supplied to him by the plaintiff. The class of bricks which he bought was seconds, which is, admittedly, not the best quality, and the bricks in question had the admitted defect that they had not the proper colour, that they were white in colour, and were not considered on that account equal to an ordinary second; but this defect, if defect it were, the defendant also was aware of after the inspection of the bricks. The plaintiff proceeded to deliver the bricks from time to time as they were required, and the bricks were received on the premises apparently without any objection. The delivery notes were given, and the driver said that no objection was made by anyone as to the quality of the bricks. Subsequently, however, the Municipality found fault with the quality of the bricks, and I am satisfied that if the Municipality had not interfered, this dispute would not have arisen. Unfortunately for all parties, it was a very bad season—a very wet season—and these bricks being exposed to the rains, did not all survive, and many of them crumbled away and perished. A considerable portion of the bricks, however, were used

for the purpose of the building. The defendant admits that 47,000, at all events, were used. The quantity actually supplied was 77,500, and the first question to decide is whether the plaintiff should recover for the amount actually delivered, or the amount actually used. Well, after the plaintiff's own undertaking that only those bricks should be paid for which were of good quality and could be used, I do not consider that the plaintiff is entitled to recover for more than the bricks which were actually used in the building, and that would be for 47,000 bricks at the rate of 75s., which would be £176 5s. The concrete allowed at the rate of 8s. would be £13 10s., and the stone, allowed at the rate of 8s., would be £20 8s., making a total of £210 3s., which, with other minor items, would amount to £210 17s., and, if there were no counter claim in the case, that would be the amount for which the Court would give judgment, less £180 paid. There is, however, a counter claim for expenses, which the defendant has had in sorting, for cement, which he had to use for stoppage of the work, and for the Rochester bricks, which the defendant had thought necessary. As to the sorting, I think that it would not be fair to direct the plaintiff to pay the whole of the expenses of sorting, because the defendant himself is to blame for having bricks that could not be used brought on the ground. If he had at once insisted upon bricks that were of bad quality being taken back, all this difficulty would not have arisen, but he allowed his men on the spot to receive these bricks, and when there was an accumulation it became necessary to sort them, and I consider it would be only fair that the expense of sorting should be equally divided between the two, as they seem to be equally responsible for the accumulation of bricks, some of which could not be used. I am inclined, therefore, to allow the sum of £13 10s. to the defendant for his expenses of sorting, that is, one-half of the expenses, the plaintiff bearing the half-share. As to the cement, I am quite satisfied that the requirements of the Municipality at that time would have been that any seconds would have required cementing. It does not appear that the bricks which were actually used were one whit worse than any ordinary seconds. The evidence on this point is somewhat conflicting, but I am inclined to accept the evidence given on behalf of the plaintiff, and that is that the bricks supplied to the defendant were equal to the bricks which he had supplied to Wood and to Barron, and would fully serve their purpose. The evidence is, as I say, conflicting, but the impression on my mind is that the plaintiff supplied the defendant with the same quality of bricks as he supplied to Wood and to Barron. I can conceive of no reason why he should have acted differently—

he was equally willing to supply a large customer like the defendant as he was to supply Wood and Barron—and the men employed by him on his own premises said that the bricks were exactly of the same quality, and it seems to me to stand to reason that that would be the case. The cement, I think, was not required owing to the bad quality of the bricks, but owing to the peculiar requirements of the Municipality. As to the stoppage of work, I am not satisfied that there was any stoppage on account of the plaintiff's own fault. As to the Rochester bricks, these bricks were of the best quality, red hard, which the plaintiff never undertook to deliver. Even if the plaintiff had delivered seconds, it is quite possible that these Rochester bricks would have had to be ordered. Anyhow, I am not satisfied that it was a necessity of the case that Rochester bricks, red hard, should be used in lieu of the seconds which had been ordered from the plaintiff. On the whole, therefore, I am of opinion that there should be judgment for the plaintiff for £30 17s., less £13 14s. 3d., which, I think, might fairly be allowed for the expenses incurred by the defendant in sorting the bricks, leaving a balance in favour of the plaintiff of £17 2s. 9d., for which judgment must be given for the plaintiff with costs.

[Plaintiff's Attorneys: Herold and Gie; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

NETTLETON V. NETTLETON. ^{1901.}
(Feb. 16th.

This was an action for restitution of conjugal rights, or in the alternative for divorce, brought by Emily Sarah Elizabeth Nettleton, of East London, against her husband, who resides at Windsorton.

The declaration set out that the parties were married out of community at Queen's Town on the 1st September, 1874, and that there were three children now living, all majors. In 1886, and at East London, the defendant maliciously deserted the plaintiff, and refused, and still refused, to return to her. She claimed an order directing the defendant to return to her, or in the alternative a decree of divorce, and prayed for forfeiture of benefits under a certain ante-nuptial contract.

Mr. Upton for the plaintiff. Defendant in default.

C. W. H. Smith, clerk in charge of the marriage register at the Colonial Office, gave evidence as to the registration of the marriage.

Emily Sarah Elizabeth Nettleton, the plaintiff, said that for some time after the marriage they lived happily together. Seven children were born of the marriage, three of whom now survived—two sons and a daughter. About twelve years after the marriage they were living at East London, when her husband left her, stating that he was going to make a living and provide a home for her. He was a bookkeeper. He was away for two years, and wrote to her from Kimberley and other places. He sent her no money. At the end of two years he returned to East London, and stayed at an hotel at Cambridge. She frequently saw him during the month. She stayed with her father. After a month he went away to Willow Park, where he said he was going to put up a hut, and would have her living with him there. The defendant did not send for her, and had not supplied her with any funds. She had had to bring up the children out of her own money. In October her attorneys wrote to the defendant last year, but no reply was received by witness to that letter. In the same month her attorneys received a letter from defendant, enclosing a communication to herself. On the 22nd December her attorneys wrote a letter without prejudice. The letter from the defendant contained certain allegations, which were groundless. Witness was about to leave for England with a lady as her companion.

A decree of restitution was granted, defendant to return to and receive the plaintiff on or before the 1st June, failing which, the defendant to show cause on the 16th June why the prayer of the petition should not be granted.

ROWE V. FISHER.

Building contract—Bills of quantities—Architect's fees.

This was an action brought by Henry Rowe Rowe, architect, Cape Town, against John Fisher, a builder, carrying on business at Rondebosch, to recover the sum of £200 12s. 6d. for professional services rendered.

The declaration set out that in June, 1903, the plaintiff, acting as architect for one Robert Gilbert, prepared certain plans and specifications for a building proposed to be erected in Hall-road and Railway-street, Wynberg, and prepared certain bills of quantities. Upon the basis of these quantities tenders were called for by public advertisement for the erection of the building. In reply, the defendant applied for the quantities, and submitted a tender for £7,205 on a form

supplied by the plaintiff. This being the lowest tender, it was accepted. Thereafter Gilbert and the defendant represented to the plaintiff that Gilbert was unable to make certain financial arrangements, and that he had thereupon determined to abandon the erection of the building. Gilbert paid to the plaintiff 2½ per cent. on the plan and specifications, viz., the sum of £180. Thereafter the plaintiff discovered that the defendant had been employed by Gilbert, as builder in the erection of the building which was now being proceeded with by the defendant, and the plaintiff claimed in consequence that he was entitled to receive from the defendant 2½ per cent. on his tender (£180 2s.) and £20 10s. 6d. for disbursements, to cover typewriting, advertising, etc. He claimed that the building was being erected on the same plans and specifications as were prepared by the plaintiff.

The defendant in his plea, admitted the allegations in paragraphs 1 and 2. He put the plaintiff to proof of the allegations in paragraph 3 as to the arrangements made by Mr. Gilbert. He admitted that he sent in a tender to the plaintiff to the amount of £7,205. He denied that he applied for or received or made use of the bills of quantities, and denied that Gilbert notified his intention to accept or did accept his (the defendant's) tender. Otherwise, he said he had no knowledge of the contents of the paragraph. He had no knowledge as to the abandonment of the building. He said that he was being employed by Messrs. Gilbert and Sheriff to erect the building, but not upon his original tender.

Mr. Searle, K.C. (with him Mr. M. de Villiers) for the plaintiff. Mr. Benjamin (with him Mr. Gardiner) for the defendant.

Henry Rowe Rowe, architect and quantity surveyor, practising at Burmeister's Buildings, Cape Town, said he prepared plans for the erection of a building near the railway station at Wynberg. The plans were submitted to the Municipality. He also prepared bills of quantities. The usual thing was for architects to prepare the quantities or direct them to be prepared by quantity surveyors. In the quantities a clause appeared to this effect: "Include the sum of £20 10s. 6d. for typewriting and advertising, and 2½ per cent. for quantities to be paid out of the first instalment." The charge was in the first instance, paid by the builder, but was subsequently repaid by the owner of the buildings. He inserted an advertisement in the "Cape Times" calling for tenders. Fisher called upon him several times for a copy of the quantities. A copy was handed by witness to the defendant on the 12th June. A number of builders applied for copies, and some eight or nine sent in tenders. Defendant's tender was the lowest, £7,205. Fisher also asked for the plans and speci-

fications, and was supplied with them. He had the plans for one day, and the specifications for one day. The defendant could not, from the plan and specifications, in that time have prepared an approximate estimate. Defendant did not return the quantities to witness. Witness's brother also tendered, his estimate being the next lowest. He afterwards saw Gilbert, who, he believed, opened all the tenders. Mr. Gilbert approved the tender of the defendant, and said that he intended to accept it, and he applied to the Colonial Orphan Chamber for a loan. Gilbert did not actually accept the tender, though he notified his intention of doing so. He saw Gilbert when the answer from the Orphan Chamber had been received about the 30th July. Gilbert said he could not get the money from the Orphan Chamber, but he was going to apply to one Bishop. Fisher afterwards called upon him on or about the 29th July and informed him that he had come for Mr. Gilbert to say that, being unable to raise a loan, he had decided to abandon the building, and he wanted witness's account. Witness made out an account for 2½ per cent., on the plans and specifications, and Gilbert called and paid. About a week or so afterwards, from information he received, witness went to Wynberg and found that the building was being proceeded with. He was informed that John Fisher was erecting the building. He subsequently saw the defendant, who asked him about the boundary of the property. In further conversation defendant said that he was erecting the building on commission. Witness was objecting to receive instructions from Gilbert to superintend the work. He made a remark to that effect to the defendant who replied that he (the defendant) was using his own money, and the arrangement was that there should be no architect to superintend. Witness later on sent in an account to the defendant for commission on the quantities, and sundry disbursements. One of the letters that he received was endorsed: "See Gilbert; otherwise pay what you owe." He did not know what that meant. The building was erected substantially in accordance with his plans. The only difference was in regard to a little decorative work to reduce cost; everything else, windows, doors, and piers, was strictly in accordance with the plans.

Cross-examined by Mr. Gardiner: He premised a commission to Fisher, who was at that time a broker, if he introduced witness to Gilbert. He agreed to give Fisher a third as broker, but in case Fisher was the successful tenderer he should pay no commission. He paid £30 as an instalment towards the £60 that Fisher would have been entitled to if the building had been abandoned. He had decided not to apply for a refund for that £30, but to fight Fisher on the present issue alone. If buildings were not pro-

ceeded with, he had to run the risk of not getting any pay for his bills of quantities. It was not possible to prepare a reliable estimate of the cost from the plans. Witness did not take any steps to help Gilbert to raise the money that he would have required. He should be surprised to hear that the building had cost £6,000, because he understood that they had raised £7,500 upon it. It was customary to charge 2½ per cent. for quantities on the tender, and also to make a charge for disbursements. He was positive that Mr. Fisher received a copy of the quantities.

Re-examined: He told Mr. Gilbert that if the building had a mansard roof the cost would be about £7,500.

Jas. Collins Tully, architect, Cape Town, said that the practice in the Colony was for architects to supply their own quantities. He had never heard of a builder in this colony engaging his own quantity surveyor. Quantities were always taken out for large contracts. In case the building was not proceeded with nothing was paid for quantities. It was the usual condition that the 2½ per cent. and the amount of disbursements should be paid out of the first instalment. He did not consider that it would be safe to estimate for such a large building from the plans and specifications. An estimate could be prepared on the basis of the cubical contents of the building.

Edwin Austin Cooke, architect, Cape Town, also gave evidence as to professional custom.

Thomas Howard, of the firm of Howard and Scott, contractors, Cape Town, said that the clause as to percentage and disbursements was a usual one. The amount for the quantities was added to the first certificate. As to the cubing system of tendering, the only thing he could say about it was that it would be an excellent way of landing them into the Bankruptcy Court. That system was not adopted, as a rule, on jobs over £2,000.

Cross-examined by Mr. Gardiner: Many men had been landed in the Bankruptcy Court through "cubing."

Re-examined by Mr. Searle: He had never seen a contract containing a clause relating to the charges for the quantities.

Thomas Sherwood, quantity surveyor, Cape Town, said that the clause in the quantities as to 2½ per cent. was the usual one. The disbursements claimed by the plaintiff were the usual disbursements of architects. Witness produced a standard book on architects' charges, which gave a form of summary. The builder, he said, was always liable to the architect for the bills of quantities. The 2½ per cent. was the fixed charge of the Architects and Surveyors' Association in London. There was no association of that kind in this country, though, he believed, an Architects' Association was in process of formation.

Cross-examined by Mr. Benjamin: It was customary to put in the bills of quantities a clause as to the charges for quantities and disbursements. The builder would understand that the quantities were to be free, if no clause appeared in the quantities with regard to the charges.

By the Court: There were cases in which the owner of the building paid for the quantities by special arrangement with the architect or quantity surveyor. Quantities were not always prepared by the architect; witness often prepared quantities for the profession.

John Laing, Municipal Building Inspector, Wynberg, produced the plans of the building as approved by the Wynberg Council. He said that he had had the buildings under his supervision since they were commenced. In the main, the building had been carried out in accordance with the plans and specifications approved by the Council. He was not aware that any of the walls had been altered inside. There was a little less decorative work than was shown in the plan; an imported brick of better class was used, and the front was pointed, instead of being plastered.

Cross-examined by Mr. Benjamin: Certain modifications that were in accord with the Council's bye-laws might have been made with the sanction of the Municipal Engineer and without witness's knowledge. The building had to be set back at one end.

Jacob Hendrick Hablitzel, auctioneer, Cape Town, said that he had made a valuation of the property at the request of Mr. Fisher about six weeks or two months ago, just before the property was completed. Fisher did not tell him how much the building had cost.

George Rowe, brother of the plaintiff, said that he was a builder and contractor, and arrived in Cape Town from England last May. He remembered the defendant calling at his brother's office and asking for quantities. The quantities were not then ready. Defendant called again about a week later, and was supplied with the quantities by witness's brother.

Cross-examined by Mr. Benjamin: He should contradict the defendant if he (defendant) said that he saw the bills of quantities in witness's hands after he had sent in his tender.

William Ernest Lyall Thompson, an architect in the plaintiff's office, said he lent the plans to the defendant on the 28th May. Defendant brought back the plans on that day or the following one. On the 12th June, Fisher called for a copy of the quantities, and witness saw him come out of Mr. Rowe's room with a set. About a couple of days before the tenders were due, the defendant came for the specifications, but they were not put in defendant's hands until the following

day. The defendant said he wanted to look more fully into the matter before he sent in his tender.

Cross-examined by Mr. Benjamin: Mr. Fisher repeatedly called for the quantities, and witness was absolutely confident that he was supplied with a copy on the 12th June.

Lucien Adrien Lobinski, architectural draughtsman, formerly in the plaintiff's service, spoke to visits paid to the plaintiff's office by the defendant for the plans, specifications, and quantities. Fisher applied for the quantities several times. He remembered Thompson sending the defendant into the plaintiff's private office, when he called for the quantities after they had been prepared.

Cross-examined by Mr. Benjamin: He thought it would be very risky for any man to send in a tender on the "cubing" system for a contract over £1,500 or £2,000.

Mr. Benjamin (to witness): But it would be possible?

Witness: Oh, yes.

Mr. Justice Hopley: There is no limit to folly, of course.

Hubert Willis Cox, builder, Cape Town, said that the charge made by the plaintiff for the quantities was quite a customary one in the building trade. It was usual for the builder to be supplied with bills of quantities in all large contracts.

Cross-examined by Mr. Benjamin: He had not heard of many cases of tendering on the "cubing" system. He should not like to tender on that basis.

This concluded the evidence for the plaintiff.

The defendant, John Fisher, was then called. After describing the early history of his association with the work, he said that he was a broker for three months. Then he became a builder again. He saw the plan prior to the advertisement from Saturday to Monday. He was assisted by his foreman bricklayer, a joiner, in getting out an estimate. He did not see a copy of the quantities until after he had sealed his tender. He was asked to send in a tender, and, though he sent in an estimate, he had no serious intention of doing the job if it were offered to him. He prepared the tender on the basis of cube measurements. He had a good idea of the work that was to be done, and he obtained his dimensions from the plans lent to him by the plaintiff. He understood that if the tender were accepted he should have to pay 2½ per cent. for the quantities to the plaintiff. He did not know of the existence of the quantities until the very day when he handed in his estimate. His estimate was not accepted. He had nothing whatever to do with the efforts of Gilbert to finance the building at that time. He was requested by Gilbert to ask Mr. Rowe to

send in his bill for preparing the plans and specifications. Subsequently witness had a conversation with Gilbert as to the building scheme. A contract was entered into on the 16th August, under which it was provided that witness should erect the buildings as per plan prepared by the architect, Mr. H. Rowe Rowe, and the defendant undertook to commence the building on the 15th August and complete it on the 15th February. Witness was to supply under the contract the materials at cost price, as well as all the labour and wages and out of pocket expenses. The owner was to pay him full cost of the materials, and the full amount of his disbursements for labour, and he was to pay on that account £1,500 on the 15th October, if so much had been spent, and provide the balance on completion of the building. Witness was to have the cost of materials and labour repaid to him, and, in addition to that, he was to receive first of all 10 per cent. on the gross or total cost of the buildings as remuneration, and 3 per cent. on the gross or total cost of the building, after deducting the sum of £1,500, on account of witness finding the balance of the money. Witness had guaranteed the balance of the cost over and above the £1,500 that Gilbert was able to raise. He had to pay 8 per cent. to the bank on his overdraft. He was to receive £5 a week for out of pocket expenses. The building was now complete, and the actual cost, roughly speaking, was inside £5,500, exclusive of the 10 per cent. witness was to receive. There were two accounts still outstanding of £205 and £145. Witness had provided £4,000 towards the cost of the building, £2,000 of which he had raised from the bank.

Cross-examined by Mr. Searle: He had only done two contract jobs in this country. He saw the quantities at the plaintiff's office, but he did not read them. His tender was sent in on the 20th June. He did not use the quantities, because, he believed, they were not in order. He had heard that the quantities were put up in order to keep other people out. One of the clerks in the plaintiff's office told him while they were having a drink Rowe's brother put in the next lowest tender. He believed that the man who told him about the quantities being too high was Thompson. He had not seen the specifications when he prepared his tender. He tendered for the work merely on the plans. He knew from what Rowe had told him that the front was to be of teak.

By the Court: He had had conversation with the owner from time to time, and he based his estimate on this and on his examination of the plan.

Cross-examination continued: He denied that he went to the office of the plaintiff time after time to ask for quantities. He asked for the plans

several times. He was a speculative builder; not a contractor.

By the Court: He made out his tender on a form given to him by the plaintiff the day before the tender was sent in. He gave to other builders three forms handed to him by the plaintiff.

Cross-examination continued: When he sent in his tender for £7,205 he expected to make about £1,000 profit in case he got the contract.

Robert Gilbert, retired hotel keeper, said that he was proprietor along with Mr. Sheriff of certain land at Wynberg. He instructed Mr. Rowe to prepare plans for a building, to cost about £5,000. He could not raise the necessary money after the tenders had come in. He never saw any bills of quantities.

Cross-examined by Mr. Searle: He should have accepted defendant's tender and gone on with the building if he had been able to raise necessary money. The defendant afterwards agreed to finance witness.

This concluded the evidence.

Counsel having been heard in argument, on the facts,

Buchanan, J.: The plaintiff in this action, an architect, claims from the defendant, a builder, a certain sum of money, as being the cost of taking out certain bills of quantities in respect of a certain building erected for one Gilbert. The declaration alleges that in the month of June last the plaintiff, as architect for Gilbert, prepared the plans and specifications for the building proposed to be erected, and also prepared certain bills of quantities in respect of the said buildings, at the request of the said Robert Gilbert. It goes on to allege that upon these bills of quantities tenders were called for, that the defendant was the lowest tenderer, and Gilbert expressed an intention to accept the defendant's tender; but that, owing to his being unable to make financial arrangements, the tender was not accepted. As the matter stood, therefore, up to that time Gilbert had employed the architect to draw plans and specifications, and the declaration says that he also employed him to take out these bills of quantities. On this point the evidence does not support the declaration. There was no request on the part of Gilbert to take out bills of quantities, but it seems to be the custom of some architects here, when they are preparing plans, also to take out bills of quantities as a speculation, and if a tender is accepted on their bills of quantities, they put into the contract the fact that the builder must pay them, the architects, out of the first instalment he receives from the owner of the property the 2½ per cent. for taking out these quantities. But the plaintiff himself admits that if there is no tender accepted, there is no payment made by anybody for these quantities. It is a speculation on his

part, dependent on the tender being accepted and a contract being entered into, on which the builder will pay him 2½ per cent. But the declaration says that though no tender was accepted, the plaintiff discovered that the defendant (the builder) had been employed by Gilbert in the erection of the building which is now being proceeded with, and because the defendant was building this building for Gilbert, he further alleges that he is entitled to the 2½ per cent. Then counsel for the plaintiff puts this claim under this section of the declaration as being one for a *quantum meruit*, that is, a payment for work done beneficial to the defendant. But there is no allegation in the declaration, and it is not proved, that in the work subsequently done the taking out of quantities was any use to, or necessary, or used by the defendant in any way. When we look at the contract entered into between the defendant and Gilbert, we find that what was then done was that Gilbert and his co-partner, Sheriff, agreed with the defendant to erect the building according to the plans and specifications prepared by the architect for the owners of the property. The reason why the bills of quantities are taken out is to enable the contractor to ascertain with accuracy what amount of materials may be required, and to frame a tender on the materials so required. Under this contract, however, it was utterly immaterial to the builder what amount of materials was used. The contractor, it is true, was to have control of the erection of the buildings, but the owners were to decide as to the quality of the materials, and they agreed to pay for materials at cost price, as well as the cost of labour. The remuneration to be paid to the builder was to be a sum equal to 10 per cent. on the gross total of the cost of the building. There are one or two other stipulations in the contract, but these are the main points. After Gilbert had found that he could not have this building completed by tender, he then undertook to have the building erected himself, and engaged the defendant as builder under him. The declaration does not allege that the plaintiff was aware of the fact that the bills of quantities were used by the defendant in any way in connection with the building. True, the plans and specifications were used, and Gilbert was liable for these plans and specifications, but before he entered into any contract at all he paid the plaintiff the fee which is usual to be paid for drawing plans and specifications. That being so, and having acquired the plans and specifications, he was entitled to use them without any further remuneration to the plaintiff. If Gilbert has used the bills of quantities also which would be payable by the builder, it is quite possible that Gilbert may have to pay for them, and, if the

allegation in the declaration had only been proved, that these bills of quantities had been prepared at the request of Gilbert, then a very strong case might have been made out as against Gilbert, but the evidence so far does not support any such claim, even as regards Gilbert. If there had been a colour of suspicion that this second contract was simply a variation with the object or intention of evading the architect's commission, I think the Court would not look favourably upon any such contract, and it would not be too anxious to find an excuse for the builder, but would rather be inclined to compel him to pay for the work done, and of which he had the benefit. But in this case I fail to see how the plaintiff's work has been used by the defendant (the builder) in any case, and if that is so the dictum which has been cited from Chief Justice Monahan supports the plea that the architect is not entitled to any payment. No doubt, where there is a contract, and where the bills of quantities are drawn as they are drawn in this case, and this clause is included as to payment to the architect, the builder is the person who has to pay for them, and not the owner of the property, at least not directly. The builder pays the architect, and charges it in his account, and the owner has to pay eventually no doubt. But in this case there has been no such contract; there has been no tender accepted, and there is nothing to reduce what was the architect's stipulation into a contract which he may recover from the defendant. Simply because, as the builder, he has used the plans and specifications prepared by the plaintiff, I cannot find any legal ground for saying that he must pay for the bills of quantities which were prepared for a totally different object, which he did not need, and which he did not use in carrying out the building. On the evidence, I cannot find that the defendant in this case has used the bills of quantities or been benefited by them in any way. Under these circumstances, though it is with some regret that I come to this conclusion, and I think the plaintiff has been rather hardly dealt with, still I cannot find legal grounds for finding in his favour, and I think the Court is bound to give judgment for the defendant with costs.

Hopley, J., concurred.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Van Zyl and Buiesinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Honourable Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

TRIAL CAUSES.

LORENTZ V. LORENTZ. { 1904.
{ Feb. 17th.

In this case, the plaintiff, the wife, sued for a decree of restitution of conjugal rights, failing which, divorce. The parties were married at Arnheim, Holland, in 1890, and there were two children, both minors. The defendant is at present domiciled at Paardekraal, Beaufort West, and the plaintiff is at Arnheim. The defendant deserted plaintiff in Paris, and had not returned to her. She required money to enable her to come out to him.

Mr. Russell for plaintiff; defendant in default.

The evidence had been taken on commission in Holland, from which it appeared that the plaintiff is 39 years of age, and that the parties first came to South Africa in 1893. They returned to the Netherlands in 1900, and visited the South of France. Then, in Paris, with the approval of defendant, plaintiff returned to Holland, to which country the defendant was to return, and they were to await the time until they could return to South Africa and Pretoria. However, he left for South Africa.

The Court ordered defendant to return to plaintiff on or before April 15, failing which to show cause on June 1 why a decree of divorce should not be granted.

WENTZEL V. STEPHAN.

This was an action to recover £47 12s. 6d. for work done. In his declaration the plaintiff alleged that he entered into a verbal contract with the defendant to lay out the defendant's garden at Observatory for £70. £23 had been paid, and there was still due a sum of £47, together with incidental items amounting to 12s. 6d., which defendant had refused to pay.

In his plea the defendant alleged that plaintiff was indebted to him in a sum of £35 in connection with a previous contract, which plaintiff had failed to complete, and to complete which defendant had had to spend this sum of money. He also alleged that plaintiff had been paid £50 on account of the present contract, and that he had taken £2 10s. worth of gravel from the garden. He claimed, therefore, that he was not indebted to plaintiff in any sum.

Mr. McGregor for plaintiff; defendant in default.

Plaintiff gave evidence bearing out the allegations made in the declaration. He said that on one occasion Stephan promised to give him a cheque at his (Stephan's) house, but on witness going there Stephan got into a temper, and said he would not pay a halfpenny. Witness was still owed £47 12s. 6d.

Robert Templeman, florist, said that in his opinion the work was properly done, and £70 was a reasonable amount to charge.

Judgment was granted as prayed for £47 12s. 6d., with interest *a tempore morae* and costs.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

{ 1904.
{ Feb. 18th.

Mr. D. Buchanan moved for the admission of Cecil Charles Wilson as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Port Elizabeth.

Mr. Benjamin moved for the admission of Hermann Hirschberg as an attorney, notary, and conveyancer.

Application granted and oath administered.

Mr. W. P. Buchanan moved for the admission of William Michael Mostert as an attorney-at-law, notary public, and conveyancer.

Application granted and oath administered.

PROVISIONAL ROLL.

HOFFMANN V. SOEKER.

Mr. W. P. Buchanan moved for provisional sentence for £85, less £65 paid on account since the issue of summons. Counsel asked for judgment against one of the defendants, Allie Soeker, under the Act 19 of 1893.

Order granted.

JACOBSON V. PRETORIUS.

Mr. Benjamin moved for the final order for the adjudication of the defendant's estate as insolvent.

Final order granted.

WRENSCH V. CRAFTFORD.

Sale and purchase—Principal and agent—Promissory note—Consideration.

Mr. Benjamin moved for provisional sentence on a promissory note, put in at a previous hearing (when the case was ordered to stand over) with interest and costs. Counsel now put in an affidavit showing that Mr. Ibbetson approved of the action taken on his behalf by Mr. Wrensch, who sued.

Mr. J. E. R. de Villiers (for the defendant) urged that the plaintiff had made a misrepresentation as to certain tiles, perhaps under a mistake.

[De Villiers, C.J.: But did she give the promissory note after she found the tiles to be defective?]

Mr. De Villiers: That is so. Counsel said that after the misrepresentation by the plaintiff that she was liable for the defective tiles, she signed the note, but it was only because she was led to believe that she was liable for the tiles. Defendant desired to cancel the sale, but she was told by the plaintiff or his agent that she could not do any such thing. Counsel quoted *Leak on Contracts*.

Mr. Benjamin submitted that the plaintiff had full authority to act on behalf of Ibbetson. Mr. Ibbetson had confirmed Wrensch's authority to take the note in his name. As to the consideration for which this note was given, he contended that there was ample consideration.

Mr. De Villiers contended that there was no reasonable ground for a valid claim against the defendant of £250, and that the only valid claim against her was one of £100 as to sheriff's charges and so forth.

De Villiers, C.J.: If this action had been brought by Ibbetson, there would have been no difficulty in the case, because, as between Ibbetson and the defendant (Mrs. Craftford), there was a good and sufficient consideration. The defendant knew at the time when she signed the promissory note that there had been what she considers a misrepresentation on the part of Wrensch in regard to the property. Notwithstanding her knowledge, she signed the promissory note as a compromise of her dispute with Ibbetson. The difficulty, to my mind, has been that Ibbetson is not the plaintiff, and that it is Wrensch who sues, and the promissory note is made by her in favour of Wrensch. The difficulty, then, is this: What consideration is there for this promissory note as between Wrensch and Craftford? That difficulty has been partly removed by the affidavit, which Ibbetson has now made, stating that whatever Wrensch has done he has done on his behalf, and in all the circumstances the Court is inclined now to give provisional sentence, but the

question of costs is to stand over, and the Court gives no intimation as to whether in the principal case Wrensch will be entitled to succeed or whether it should be Ibbetson who should become the plaintiff in the principal case. At present we grant provisional sentence, but no order as to costs, the question of costs to stand over to abide the result in the principal case. It will then be competent for the defendant to enter appearance and raise any objections which she thinks should be raised as against Wrensch suing.

Mr. De Villiers applied for stay of execution for three months.

De Villiers, C.J.: Certainly, she is entitled to stay of execution for three months, the question of costs to stand over.

[Plaintiff's Attorney: W. Wrench; Defendant's Attorneys: Sauer and Standen.]

BARKER V. FOUNTAIN.

Mr. C. W. de Villiers moved for provisional sentence on a mortgage bond for £750, with interest and costs, and for the property specially hypothecated to be declared executable, the bond having become due by reason of non-payment of interest.

Order granted.

NORDEN V. VINK.

Mr. Gardiner moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

PEROLD V. BAILEY.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £300, with interest and costs, the bond having become due by reason of the non-payment of interest.

Order granted.

DREYER V. SAMSODIEN.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £450, less £11 5s. paid on account, with interest and costs, and for the property to be declared executable, the bond having become due by reason of the non-payment of interest.

Order granted.

VAN DER BYL AND CO. V. MERRY.

Mr. Struben moved for provisional sentence on a judgment of the Resident Magistrate of Cape Town for the purchase price of goods sold and delivered, £21 10s., and taxed costs, £1

19s. 7d., and for certain property transferred to the defendant on the 19th October to be declared executable. Return of *nulla bona* was put in.

Order granted.

ESTATE GRAHAM AND SMITH V GRAHAM.

Mr. Schreiner, K.C., moved for confirmation of a writ of arrest issued against the defendant, and executed on the previous day. The plaintiff was the trustee in the insolvent estate of Graham and Smith, of which the defendant was a member, and the latter was indebted to the plaintiff in the sum of £40 3s., taxed bill of costs. Defendant was about to leave for Australia by the Oowestry Grange, and had booked his passage when he was arrested.

Defendant said he admitted the debt. Judgment given as prayed.

De Villiers, C.J. (to defendant): You can go now; you may leave the Court, but I don't say you may leave the Colony.

ILLIQUID ROLL.

CAPE TOWN TOWN COUNCIL { 1904
V. BOYCE. { Feb. 18th.

Mr. Struben moved for judgment, under Rule 329d, for £27 15s. 5d. rates, and £15 15s. for water supplied, and costs.

Order granted.

GORDON MITCHELL AND CO. V. KAPLAN

Mr. Russell moved for judgment, under Rule 329d, for £280, goods sold and delivered, and costs.

Order granted.

REYNOLDS V. GOODMANSON.

Mr. J. E. R. de Villiers moved for judgment on the plaintiff's interdict for £100, with interest *a tempore morae* and costs, plaintiff tendering transfer of certain land, and also for £400 for money lent and advanced.

Order granted.

TOERIN V. DIETERIE.

Mr. Benjamin moved for judgment, under Rule 319, on a declaration calling on the defendant to hand over a certain promissory note, which was to be given by him in payment for certain sheep purchased by defendant. The promissory note was to be made payable on the 10th January. The plaintiff

prayed for an order calling upon the defendant to hand over the promissory note as described, endorsed by his wife, to be drawn on the 10th January, or in the alternative, for judgment for £180 19s. 6d. Counsel moved for judgment in terms of the alternative plea.

Defendant appeared, and stated that he had had no benefit out of the transaction. He was unable to pay at present, and had offered to give the plaintiff back the sheep on the sale being cancelled, or, in the alternative, to pay £10 a month until the sheep could be slaughtered. He was a butcher carrying on business at Robertson. The sheep were not at present in a fit condition to be slaughtered, but might be so in eight months. If he were ordered to pay forthwith he would be forced to apply for sequestration.

Judgment was given for plaintiff for £180 0s. 6d., with costs, a stay of execution being granted pending payment of £10 a month until the debts and costs are paid, the first payment to be made on the 2nd March, with leave, failing which, to the plaintiff to apply to the Court for an immediate execution.

[Before the Chief Justice and Sir JOHN BUCHANAN.]

REX V. SANGO. } 1904.
} Feb. 18th.

Master and servant—Act 18 of 1873.

A journeyman mason is not a servant in terms of Act 18 of 1873.

Buchanan, J.: As the judge of the week, the case has come before me for review of *Rex v. Sango*, who was charged with having contravened section 4, clause 6. of the Master and Servants' Act (Act 18 of 1873), in that he unlawfully departed from the service of his master, a contractor. There are two objections to the conviction. One arises from the question as to whether or not the accused comes under the Master and Servants' Acts, and the second refers to the indefinite nature of the engagement. Accused was a mason's assistant, engaged to assist during building, and the master says that there was no time fixed for the engagement, but that accused could leave at any time without notice when the building was finished. But the more important question is, does a mason come under the definition of a servant under the Act? The Act says that a "servant" shall be construed and understood to comprise any person employed for hire, wages or

remuneration to perform any handicraft or other bodily labour in agriculture or manufactures or in domestic service, such as a porter, etc. The matter has been referred to the Attorney-General; he is not prepared to support the conviction, and I think the Act was not intended to do and does not include a person like a mason at work on a building. Under these circumstances, as the prisoner does not come under the Master and Servants' Act, this conviction must be quashed.

GENERAL MOTIONS.

WILLIAMS V. JUPP. } 1904.
} Feb. 18th.

Mr. M. Bisset moved for an order declaring the defendant of unsound mind, and appointing the applicant, Robert Williams, who is the defendant's son-in-law, as curator of her person and property.

Dr. Dods, medical superintendent of the Valkenberg Asylum, said that the defendant had been under his care for some years. The case was one of extreme melancholia. The respondent's mind was practically unchanged since she first came under his care. The respondent had once been allowed out on probation, but came back in a few days.

Mr. J. E. R. de Villiers (the *curator ad litem*) did not oppose.

An order was granted as prayed, costs to come out of the estate.

BEYERS V. GROENEWALD.

Mr. Searle, K.C., mentioned this matter, which was an application for an order for the removal of the respondent from executorship. Both parties had, he said, been in Court as requested, but he understood that the respondent had now gone away again.

De Villiers, C.J., said that the respondent had now given an undertaking that he would act in harmony with the applicant, and, after the Court's expression of opinion, there might be no further difficulty. There would be no order upon the present application, and the costs would come out of the estate, but leave would be reserved to the applicant to apply again in case the respondent failed to do his duty to the estate.

WILLIAMSON AND ANOTHER V. SHEPSTONE, WYLIE AND OTHERS.

Mr. Schreiner, K.C., moved for an order for the release of certain theatrical scenery, effects, and property now at Port Elizabeth, from attachment under an order granted *ad fundam-*

dam jurisdictionem. Counsel read an affidavit sworn by George H. Smith of the firm of B. and F. Wheeler, theatrical proprietors, in support of the application. The property, it appeared, had been in use by the Australian Opera Company, and it was believed that it was the intention of the respondents to remove the same to Perth, Western Australia. Part of the property belonged to Williamson, the applicant, who was now in America, and whose agent was the deponent, G. H. Smith. Certain effects also belonged to the deponent's firm.

A rule was granted calling upon Tom Pollard and W. O'Sullivan to show cause in terms of the notice why the property of the applicant should not be handed over to C. A. Brewster, rule to operate as an interdict in the meantime, restraining the respondents from removing or parting with the property, the rule to be served by telegram, and to be returnable on Thursday next.

TRIAL CAUSES.

ALLIE V. HARDIE.

Mr. Nightingale (for the plaintiff) said that the plaintiff in this case was in court with his witnesses, and it was desirable that the Court should take the case as at early a date as possible. The plaintiff had a good many witnesses, and it would be difficult for him to keep them together if the case were not heard this term. He was an Indian of considerable standing, and he desired to proceed to Mecca.

Mr. Close, for the defendant, said that he had not yet had his brief delivered to him. The attorneys had been under the impression that the case would not come on for a few days, as it stood a good way down the list.

De Villiers, C.J., said that the case was in the list for that day, and it must now stand over until next term, as the defendant was not ready, and leave would be given, as asked, for the plaintiff's evidence to be taken on commission. Counsel would be given leave to mention the matter again.

REX V. LOUW.

{ 1904.
{ Feb. 18th.

Treason — Rebellion — Acts of regular warfare.

The appellant was tried before a jury for five distinct assaults, with intent to do grievous bodily harm. The evidence showed that the accused, who was a British subject, com-

mitted the assaults while engaged in rebellion, that the assaulted persons were severely beaten, and in some cases kicked without previous trial, and that the accused himself had not been tried for treason or rebellion. There was no evidence that the accused had been recognised by the British authorities as a belligerent, or that the acts complained of were acts of regular warfare, and the best evidence was not produced that he had been commanded by his superior officers to commit the acts complained of. The judge, at the trial, charged the jury that such evidence would constitute no defence to the indictment.

Held, that even if the charge was not correct in law, the judgment should be confirmed in the absence of proof that the acts complained of were regular acts of warfare.

This was an argument on a point reserved for the decision of the Supreme Court. The accused, Abraham Gert Willem Louw, a farmer, residing in the Calvinia district, was charged on five counts at the Criminal Sessions last November, before Sir John Buchanan and a jury, with assault with intent to do grievous bodily harm. He was found guilty, and sentenced to five months' imprisonment, and a point of law was raised by his counsel, which was reserved by the judge in the following terms: "That there was a misdirection on the part of the presiding judge in charging the jury that orders received by the prisoner from superior military officers of the Republic—the enemy—if any such were given, constituted no defence in law to the charge laid in the indictment, prisoner being a rebel in arms, and, therefore, not entitled to take advantage of his own wrong, he not having been convicted or acquitted or high treason."

Mr. McGregor appeared on behalf of the accused; Mr. Howel Jones (with him Mr. Nightingale) for the Crown.

Mr. McGregor said that the accused Louw was an ex-rebel and commandant in the forces of the late Republics. After the war he left the Colony, but subsequently returned and surrendered himself to the authorities. He was charged with two sets of offences. On one indictment

he was charged at the Criminal Sessions of the Supreme Court, held in November last, with assault on five counts; but the other indictment, charging him with high treason, was not presented to the Court. The jury brought in a verdict of guilty, and thereupon the accused's counsel asked leave to reserve the point which now came up for decision. Accused had since been liberated on bail.

The then presiding judge had made the following report: The accused was charged on an indictment, containing five counts, with having committed the crime of assault with intent to do grievous bodily harm. He pleaded not guilty. The prisoner was defended by Mr. Advocate McGregor, who, in going to the jury, while admitting the assault, claimed an acquittal on the ground that the prisoner, though a rebel, was acting under the orders of the Free State Generals, and was consequently entitled to the privileges of a belligerent enemy. This, as a proposition of law, appeared to me utterly without foundation, and I charged the jury accordingly. After verdict, and before sentence, prisoner's counsel applied to have a point reserved for the consideration of the Court of Appeal in criminal cases, which point was entered as follows: "That there was a misdirection on the part of the learned presiding judge in charging the jury that orders received by prisoner from superior military officers of the Republic—the enemy—if any such were given, constitute no defence in law to the charge laid in the indictment, prisoner being a rebel in arms, and therefore not entitled to take advantage of his own wrong, he not having been convicted or acquitted of high treason." In this case the point reserved has but an academic importance. It refers to a part only of the directions given to the jury, and I had grave doubts whether I ought to grant the application made by prisoner's counsel. I pointed out this difficulty at the time, but counsel urged that the question was one of great public importance. Moreover, the evidence does not establish the line of defence set up. The other directions to the jury were not questioned. As to the verdict, the prosecutor had stated to the jury that the prisoner had surrendered under His Excellency the Governor's Proclamation of the 11th June, 1902, which intimated that, upon complying with its provisions, certain rebels surrendering themselves before a date fixed therein would not suffer the punishment of death, fine, or imprisonment, provided they had not been guilty of murder or other acts contrary to the usages of civilised warfare. I pointed out that this Proclamation had never been embodied in any Statute, and was, therefore, only an indication of executive intention, and was not binding as a legislative enactment. As, how-

ever, the Crown sought to have the test of the proviso in the Proclamation applied to prisoner's acts, I left it to the jury to convict or to acquit, according as they found whether or not the prisoner's conduct stood the test. The evidence given by the accused himself shows that the jury were amply justified in finding against the prisoner. There was no specific command given to prisoner to inflict the floggings; the persons assaulted were not formally charged or tried in any way. Though a commandant, the prisoner had personally assaulted the different persons named in the indictment, causing them most severe injuries, compared with which, according to the medical evidence, the effect of lashes inflicted as a judicial punishment in gaol by cat-o'-nine-tails was merciful. The "usages of civilised warfare" is a very indefinite term, but I agree with the jury's view that prisoner's acts could not be justified under such a designation.

Mr. McGregor urged that in time of war an occurrence of this sort should not be regarded as it would in time of peace, the criminality not being present in a condition of war. He submitted that what he termed the "war ægis" was not only extended to belligerents, but to one's own subjects in respect to the criminality of their acts, otherwise than from the point of view of treason. The *mens rea* was the important point, and on this point he would refer the Court to the case of *Rez v. Smith* (12 C.T.R. 907). *Louw*, he contended, was acting for the enemy then in military occupation; he was acting as an instrument, and, while it might be that he was wrong in inflicting this punishment, and that his superior officers were wrong in their line of conduct, the question had to be considered whether, under the circumstances, his act was not absolved from criminality. Counsel went on to refer to the evidence of the witnesses with regard to the orders given by the Boers. He said that one of the most important witnesses, Daniel Anthoniessen, who said he saw Boer proclamations, which told people to remain quiet, and if they did not do this they were threatened with a fine or flogging. Jacobus Adrien Anthoniessen also gave similar evidence. He said: "I saw some of the proclamations, which threatened people with fine and flogging if they did not stop on their farms." So much for the evidence for the Crown. Then there was the evidence for the defence. There was the witness called Nel

Mr. Howel Jones (interposing) said that objection was taken at the trial to that evidence, and it was ruled inadmissible.

Mr. McGregor said that all the same the evidence appeared in the record. He proceeded to allude to the case of

Watson v. Bradley (13 C.T.R. 596), and also to the case of *Maritz*, heard at Mafeking, and quoted at some length from the judgment of Justice Solomon as reported in the "Mafeking Mail" of the 8th November, 1901.

Buchanan, J., said that he had often thought about that judgment and he was totally unable to follow the reasoning.

Mr. McGregor went on to argue that there might be occasions when it would be good business, if one might use such a term, not to adopt too strict a view of a matter of this kind.

Buchanan, J., said that that was a matter rather for the Executive than for a Court of Law. There was the case of "Colonel" Lynch heard in England. He was sentenced, and then after he had been imprisoned for a short time he was released, but that was a matter of policy for the Executive.

Mr. McGregor called attention to the case of *Goldenhuis*, heard at the Criminal Sessions, Cape Town, in January, 1903, and also to the case of *Rex v. Burns* (12 C.T.R. 882).

De Villiers, C.J., said that if he remembered rightly in the latter case the accused was sent by a superior officer to take field-glasses, and instead of that he took a watch, and, moreover, he converted it to his own use. The judgment in that case proceeded on the ground that there was no evidence that the taking of the property of a private person for private purposes was an act of regular warfare.

Mr. McGregor said that on that point it was difficult for him to cite authority. In the first place, there was no evidence as to what were acts of regular warfare. In the second place, acts of regular military warfare were largely what the military force found to be necessary at the time to effect its end.

[De Villiers, C.J.: Suppose a British military officer had flogged a man and had been tried and found guilty by a jury, would this Court interfere with the verdict of the jury?]

Yes, my lord, if there were a general order from Lord Roberts, or any responsible military officer that it was the duty of that officer to do this.

[De Villiers, C.J.: Which would have to be proved.]

Yes, there would have to be such evidence as would satisfy the jury.

[De Villiers, C.J.: The onus would be on the prisoner to prove, if the act was contrary to civilised warfare, he had authority to do it.]

Mr. McGregor said that in cases he had quoted the men who actually gave the order were not called.

[De Villiers, C.J.: If there were evidence to show that the act was authorised or that the act was according to the ordinary rules of civilised warfare, possibly the Court might say: "We order that the prisoner be released"; but if

there is no such evidence how can the Court order the release of the prisoner?]

Mr. McGregor said that in this case there was the fact that there were witnesses on the part of the Crown, who said in cross-examination that they had seen a proclamation which said that people who disobeyed orders should be flogged or fined.

[De Villiers, C.J.: Is that evidence, if the proclamation could be obtained? Is it evidence to say, "I saw a proclamation," if that proclamation can be obtained? If you could not obtain the proclamation you should have proved that in evidence, and you could then have produced secondary evidence. Because I am not satisfied that there was such a proclamation. I am not satisfied that either General Hertzog or General Smuts gave that general order to flog people. We have not heard either Smuts or Hertzog. I cannot assume these people gave the orders.]

Mr. McGregor cited *Hall, on International Law* (3rd edition, page 113), *Whetton, on International Law* (page 439, section 346b), and said that, of course, he must admit that if it were held that a rebel could not claim any belligerent rights or status, then his argument must fall away. Counsel also referred to the case of *Rex v. Burns*, and said that in regard to the proclamation there was evidence on record in the present case that General Smuts had made a speech in which he gave the order to commandants to flog all people who would not keep quiet. Counsel again referred to the case of *Smith*, and said that Captain Cox, who gave the order to Smith to shoot the native in that instance, had not tried the man before giving the order.

[De Villiers, C.J.: If Cox had been tried in the Supreme Court he would probably have been found guilty and punished, but the military took care he shouldn't come here; they kept him out of the jurisdiction. The Attorney General intended to prosecute him, and afterwards I think the military allowed him to come to give evidence here on condition that he was not to be prosecuted.]

Without calling upon counsel for the Crown,

De Villiers, C.J.: The accused is a British subject. He was tried in the Supreme Court on an indictment charging him with five distinct acts of assault with intent to do grievous bodily harm. A plea to the effect that the accused had been recognised as a belligerent, and that the acts complained of were ordinary acts of warfare would, according to the decisions of Solomon, J., in *Maritz's* case, be a good plea, but the onus of proving that they were ordinary acts of warfare would lie on the accused. The judgment of Mr. Justice Solomon, which was a well-considered, well-reasoned judgment, commends itself to me as containing the law of the country. That

judgment was followed by my brother Hopley in the case of Goldenhuis. It was acted upon in that case, and its correctness was recognised also by this Court in the case of *Watson v. Bradley*. (13 C.T.R. 596). No such defence, as I have stated, was taken, no such plea was raised, but there was evidence given which would have been evidence in support of such a plea. And the only question which to my mind really arises is whether that evidence was sufficient to prove the defence which I have just stated. The accused may be taken to have been a belligerent, but the question is: Has he proved—because the onus clearly lay upon him to show—that the acts were acts of regular warfare? There were five distinct acts of assault. In one case he was charged with striking a man with a sjambok, and a whip; in another case with striking a man with a ring of leather; in another case with striking a man on the chest, and kicking him on the side of the body, and with a sjambok, and a whip striking and beating him on the buttocks, legs, and body; in another case with striking and beating a man with a sjambok and a whip, giving him divers injuries and hurts; and in the last case, where a hawk was assaulted, with a sjambok or whip striking this hawk upon the head, shoulders, and buttocks. Now the acts do not strike one as being ordinary acts of warfare, and I think if they had been, the defendant should have adduced evidence to the effect that all these acts were acts of regular warfare; but there is no evidence to that effect. But, then, it is said that even if they are not regular acts of warfare, they were authorised, if not commanded, to be committed by a superior officer of the accused. Upon this point also the evidence is wholly inconclusive. It is true several witnesses state that they have seen proclamations in which General Smuts and General Hertzog had authorised acts of this kind to be committed, but the proclamations were not produced, and until I see such proclamations, I am not inclined to believe that any orders of this kind were issued by these officers. It is possible that there were such proclamations, but it is not alleged that these proclamations have been destroyed, or that it would have been impossible to produce them. These proclamations would have been the best evidence as to the nature of the commands given by the superior officers of the accused, but there is a total dearth of conclusive evidence as to such commands being given. There was ample evidence before the jury to justify them in arriving at the conclusion at which they did arrive. There was no proof that the act was an act of regular warfare, and if I understand the report of my learned brother Buchanan correctly, the point was placed before

the jury. I will read the concluding portion of his report. He says: "The 'usages of civilised warfare' is a very indefinite term, but I agree with the jury's view that prisoner's acts could not be justified under such a designation." Then, in another portion of his report, the learned judge says: "As, however, the Crown, sought to have the test of the proviso in the Proclamation applied to prisoner's acts, I left it to the jury to convict or acquit according as they found whether or not the prisoner's conduct stood the test." The Proclamation to which I refer now is the Proclamation of the 11th June, 1902, which intimated that, upon complying with its provisions, certain rebels surrendering themselves before a date fixed therein would not suffer the punishment of death, fine, or imprisonment, provided they had not been guilty of murder or other acts contrary to the usages of civilised warfare. But that Proclamation is not now before the Court, and my decision does not proceed upon that. For the reasons already stated, I am of opinion that the judgment appealed against must be confirmed.

Hopley, J.: I concur entirely in the view expressed by the Chief Justice, and for the reasons given by him.

Buchanan, J.: The applicant in this case was recently tried before me at the Cape Town Criminal Sessions on an indictment charging the crime of assault with intent to do grievous bodily harm. He pleaded not guilty, but the defence set up was that, though he had flogged the several complainants, in so doing he was acting under the orders of superior officers in the enemy's forces, and consequently, though a rebel in arms against his own Government, he was entitled to acquittal. I charged the jury that, even if proved, these facts would not constitute a defence in law. After verdict, at the request of counsel, I reserved for the consideration of this Court the point stated, which questions the validity of my direction to the jury on one point of the case. I have again gone over the authorities cited at the trial. These have been cited again today, and there has not been any new light thrown on the case. Their lordships have decided that the conviction must be sustained, though expressing a dissent from the ruling on the point raised. There is no doubt the verdict of the jury can be justified on other grounds, which I have briefly referred to in my report, and I will not now go into them. Those grounds so strong against the prisoner are what I alluded to in remarking on the academical nature of this argument. I wish now to confine my remarks to the special matter under review. In the Court below, and again here, prisoner's counsel relied mainly on the case of *Watson v. Bradley*, heard in the Supreme Court last June, quoting from a news-

paper cutting, as the case has not yet appeared in the law reports. That was an appeal from a Magistrate's decision in a civil action, giving damages against a rebel for appropriating a mare belonging to the plaintiff. The magistrate had founded his judgment on the earlier case of *Steenkamp v. Kyd* (15, S.C. Reports, p. 221), also an appeal from a Magistrate's decision, holding rebels liable in damages for an assault committed upon the plaintiff, even although the defendants were not all present when the assault had been committed. There the Supreme Court unanimously upheld the Magistrate's decision on the ground that citizens who had gone into rebellion with a common purpose were severally and individually liable for the consequences of acts done in carrying out such common purpose. The learned Chief Justice said in that case: "It is nowhere laid down in express terms that a person who conspires with others to wage war against the Queen, and joins them in appointing a leader to conduct the war, is responsible for damage done to individuals by the orders of such leader, if such orders might reasonably have been contemplated as a consequence of the conspiracy. But such a rule may be fairly deduced from the cases relating to the law of agency. And if, in future cases, the rule is construed by the light of the facts of the particular case in which it is judicially laid down, no danger can arise from its being somewhat too broadly or too narrowly stated." And again, further on: "If an attack on the plaintiff might reasonably have been anticipated as a consequence of the rebellion, the defendants must be held liable in damages for the injuries inflicted upon him." In *Watson v. Bradley* the force which took the plaintiff's mare, and which force the defendant had joined, did not consist solely of rebels, but was a commando of a belligerent enemy. The mare was taken by orders of an official of the enemy, and, the defendant stated, by a Free State burgher, not by himself. The ground for distinguishing this case from that of *Steenkamp v. Kyd* is thus put by the learned Chief Justice: "The question in this case is, whether a British subject who joined a commando of Orange Free State burghers after they had invaded the Colony, and had been recognised as belligerents, is civilly liable in damages for any act of regular warfare committed by such commando in this colony, even if he has neither personally committed such act, nor derived any benefit from it." Stress was in argument laid on his lordship's use of the words "recognised as belligerents," and it was sought to apply them to the rebel joining the commando, but this is evidently not the interpretation to be put on them. His lordship was allowing to the enemy's forces as being recognised belligerents as opposed to the force

of rebels who, in the case of *Steenkamp v. Kyd*, had banded themselves together and who were then referred to as being an "unlawful assembly." That these words are not intended to assign protection to the rebel is clear from a subsequent remark in his lordship's judgment to the effect that he was not prepared to say that a British subject joining a belligerent enemy stood on exactly the same footing in regard to civil liability as the enemy himself. I fully concur in a remark made by his lordship during the argument in the case of *White v. Barnard* (13 C.T.R. 160): "The rights of war would apply to the enemy, but not to the citizens of this country." These cases, however, were all civil actions and do not necessarily conclude the proposition when set up in a criminal trial. Leaving the question of civil liability aside, there were certain remarks made by the learned Chief Justice in the case of *Watson v. Bradley*, which prisoner's counsel quoted as indicating his lordship's opinion as to the criminal liability of rebels. His lordship had said: "If the plaintiff's contention is correct, the defendant would be equally liable to a criminal prosecution for the theft of the horse, and if a single person was killed by the commando after he joined it, he would have been guilty of murder. As I have already remarked, he was certainly guilty of high treason in joining the commando at all, but it does not follow that every act of regular warfare rendered him liable to criminal prosecution for such act." These words must be read in conjunction with the facts of the case under consideration. I take them to mean that the defendant was not necessarily involved in collective responsibility for all the acts of the enemy, whose commando he had joined, not that a subject joining the enemy, thereby received a special protection for any acts committed by himself while in rebellion. Counsel also strongly relied on the succeeding sentences of his lordship's judgment, viz.: "This question appears to have been carefully considered in the case of *Maritz*, who was tried for murder before the Treason Court at Mafeking on the 7th November, 1901. 'It has been urged,' said Solomon, J., delivering judgment on behalf of the full Court, that this carrying out of orders of his superior officer would not be a defence on the part of the prisoner *Maritz*, as he was a rebel, and cannot cover himself under the order of Snyman. True, he was an insurgent, and had joined the Republican forces, and therefore every single act he performed with them was an act of treason; but to say that, because he was a rebel, he is not entitled to a belligerent's ordinary rights, would be going too far. If we did so, we should have to say that every shot fired by rebels is the crime of attempted murder, but no such charge has been brought before us, although there were some hun-

dreds so engaged. The insurgents who joined the burghers must be placed on the same footing as those burghers fighting against us." Now, if this was intended to be a statement of our common law, I can only say that I cannot find any authority in support thereof. It may have been intended to be laid down as a rule to be followed by the Special Court in carrying out the special duties entrusted to it by a very exceptional Act of Parliament, an Act which created the tribunal in question to deal only with crimes of a political character, and required them to discriminate between what were called "principal offenders" and the rank and file, and which directed that the latter, though guilty of high treason, should suffer only certain political disabilities. That Court was guided in its decisions by questions of policy as well as by principles of law. I do not find that the learned Chief Justice endorsed the bald proposition contained in the last sentence cited, though it was stated it had been followed by other judges in the trial of criminal charges, and it is significant that, after making this quotation, his lordship made the remark before referred to, that, in regard to civil liability, he was not prepared to say that a subject joining the enemy stood in exactly the same position as the enemy himself. The Special Court judgment admits that the rebel may be punished for his treason, but to assert that such a rebel can only be punished as a traitor, and is exempt from trial on other criminal charges because he is a rebel, even though he should not have been charged with treason, appears to me, beyond doubt, an assumption utterly without legal foundation. A defence might possibly be set up to a charge founded on some specific act of the rebel, where the accused had been tried generally for high treason, on the ground that the major crime covered the minor offence, but the mere statement of the converse case, that a rebel cannot be convicted of an assault because he had committed the crime of high treason, shows how untenable is the position taken up in this case. High treason is the most serious crime that can be committed in any State, and it is with us, theoretically at least, punishable with death. If a death sentence was inflicted upon conviction for high treason, it would be a work of supererogation to consider the liability of a rebel to punishment for minor acts committed by him. But it is quite a different matter where there has been no attempt to punish for the grave offence, to hold that because he has committed the more serious crime, therefore there can be no punishment inflicted for any acts committed by a rebel which may amount to some lesser crime. The contention relied on for the accused is that the rebel must be excused because he

was acting under orders. Orders from whom? From a public enemy, under whose command the rebel, contrary to his allegiance and his duty, had voluntarily placed himself. The acceptance and acting on orders so given was in itself an offence, not a privilege conferring any immunity. If the accused took the field at all, his duty was to his own country, and to repel the invader, not to attempt to destroy his countrymen who remained loyal. To excuse a rebel under such circumstances would be in effect to say that the more serious the act of rebellion, and the more the treason was evidenced by overt acts, and the greater the lengths to which disloyalty was carried, the more complete the protection to which the rebel was entitled. I have already shown that the proposition that citizens who have joined the enemy must be placed on the same footing as the enemy's burghers, is not supported by the Supreme Court cases cited, as far as civil liability at any rate is concerned, and I do not see any principle upon which it should be applied to criminal cases. I find no solid reason for granting to a person guilty of high treason exemption from liability for his other crimes simply because he was a rebel when he committed them, and at the same time holding that such exemption would not extend to a person guilty of any other serious crime besides treason. I must say it caused me some surprise to hear it seriously argued in a Court of Law that a person could take advantage of his own misconduct, and set up as a defence for his commission of one crime the fact that he had also at the same time committed another, and much more serious offence. The fact that there was a state of war between two countries does not excuse the misconduct of a subject towards his own Sovereign. Belligerents may as between themselves adopt certain rules for the conduct of the war, which after all is a contest by force between nations, just as duellists may have their code of honour. But law abhors the settlement of questions by the strong hand of armed men. Restrictions imposed by international comity are outside the law of a country dealing with its own subjects. I have not heard anything urged during the arguments to raise any doubt in my mind as to the correctness of the direction given to the jury. It may be a question of policy how far the sentence of the law, after it has been pronounced, should be carried into effect, but that is not a matter for the consideration of the Court. The proper and only safeguard to take is to be guided by legal principles, and not to infringe upon the functions of the Executive. If this distinction between law and policy had always been kept clearly in view, I believe no conflict of decision could have arisen. Though I may differ from the individual opinion of my brother judges, I must, of

course, consider myself bound by a decision of this Court, which is that of a Court of Appeal.

[Applicant's Attorney: V. A. Vander Byl.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

MALCOMMESS AND CO. V. { 1904.
FARMERS' CO-OPERATIVE CO. { Feb 19th.

Purchase and sale—"More or less"—Estimate—Guarantee.

The plaintiffs bought from the defendant company 18,000 bags—more or less—of good sound potatoes, at 11s. per 100 lbs., the broker's note adding that a large quantity of the potatoes were still in the ground, that the number of bags was mentioned as a fair estimate, and that if the number should be less, the sellers should only deliver "all they have purchased and all they have rights over."

Held, that there was no guarantee that the number of bags would be near 18,000.

Held further, that the company, which had branches in the adjoining divisions of Queenstown and Cathcart, was bound to deliver all the potatoes it had purchased or had rights over in both divisions, and was liable in damages in respect of potatoes which it had purchased or over which it had rights in one of those divisions and afterwards sold to other purchasers.

This was an action brought by Malcommess and Co., carrying on business as merchants at East London, Cathcart, and elsewhere, against the Farmers' Co-operative Company, whose

head offices are at East London, to recover £1,000 damages for breach of contract upon a broker's note for the sale of potatoes.

The plaintiffs' declaration set forth that the plaintiffs carried on business in partnership at East London, Cathcart, and elsewhere, under the style or firm of Malcommess and Co. The defendants were the Farmers' Co-operative Company, Ltd. On the 19th July, 1902, the parties entered into an agreement whereby the defendant undertook to deliver to the plaintiffs, at 11s. per 100 lb., about 18,000 bags of potatoes, more or less, in good, sound, and merchantable order, such potatoes being guaranteed good, sound eating potatoes, delivery to be completed by the end of August, 1902, and payment to be made as each parcel was delivered. The defendant specially undertook that the quantity to be delivered should be very close to 18,000 bags, and should include all such potatoes which the defendants had purchased, and all which they had rights over. The plaintiffs were ready and willing to receive the said potatoes, but the defendants committed a breach of the contract, in that they only delivered to the plaintiffs before the end of August 3,000 bags, and failed and neglected to deliver to the plaintiffs all such potatoes as they had purchased and had rights over. Plaintiffs claimed £1,000 as damages for breach of contract. The broker's note referred to by the plaintiffs in their declaration was dated the 19th July, 1902, and was in the following terms: "Bought on account of Messrs. Malcommess and Co., Cathcart, of the Farmers' Co-operative Co., Ltd., in good, sound, and merchantable order, about 18,000 bags (more or less), guaranteed good, sound eating potatoes, at 11s. per 100 lb. net, potatoes to be delivered at stations between Thomas River and Queen's Town. Trucks to be supplied by buyers, delivery to be completed by August, payment as each parcel is delivered at station. The sellers will render assistance in securing trucks as far as lies in their power, and will load potatoes if trucks are supplied. Seller to pay brokerage and stamps—(Signed) F. Coutts and Co., Brokers, East London."

In their plea, the defendants stated that it was specially stipulated, inasmuch as large quantities of the potatoes referred to were still in the ground, that, if the amount received by the defendant was less than 18,000 bags, the company was only bound to deliver all that they had purchased and had rights over. At the date of the broker's note, the defendant company had purchased 8,050, and had offers of 5,200 more, but the sellers only delivered 3,176 bags out of the 8,050, and none of the 5,200 offered were delivered. The 3,176 bags were offered to the plaintiffs, but

only 2,986 were accepted by them. The defendant company had not received the balance of the bags sold to them as aforesaid, by reason of the plaintiffs inducing the sellers to the defendant company to enter into fresh contracts with them (the plaintiffs) to sell and to deliver to them, and they also induced the persons who had offered to sell to the defendant company to sell and deliver to them (the plaintiffs) instead, in consequence of which the defendant company did not receive the bags sold them and offered for sale to them. The defendant company, when this came to their notice, protested against the course followed by the plaintiffs. The defendant company contended that if there was any failure (which they did not admit) on their part to carry out the contract set forth in the broker's note, the same was occasioned by the action of the plaintiffs in inducing the aforesaid sellers, and the persons who had offered to sell to them, to break their contracts, and that the plaintiff could not, therefore, now take advantage of any lesser number of bags being delivered to them.

As a claim in reconvention, the defendants (plaintiffs in reconvention) said that, of the 2,986 bags accepted by Malcomess and Co., they had paid for 2,951 only, leaving a sum of £34 10s. 9d. due to the company. They, therefore, claimed this sum.

In their replication to the claim in reconvention, the plaintiffs (defendants in reconvention) admitted that the sum of £34 10s. 9d. was due, and tendered the same. They joined issue on the plea to the claim in convention.

Mr. Schreiner, K.C. (with him Mr. Benjamin), for the plaintiff. Mr. Searle, K.C. (with him Mr. Upington) for the defendant.

Charles Anthony Dormer, manager at Cathcart, for the plaintiffs, said that he was from their side the person who had dealt with the contract. Mr. Turner negotiated the broker's note. The contract was signed 19th July, 1902. Of the total amount to be delivered, the amount delivered was 2,986. That included as many as were taken after a quantity had been sorted from an unsatisfactory lot. The defendants tendered 3,176 bags. The difference was rejected as not being "good, sound-eating potatoes." The potatoes were delivered at the stores at Cathcart. It was a rising market, and the plaintiffs had large orders for Johannesburg, Bulawayo, and other places. Potatoes of the best class rose as high as 14s. between July and October. Potatoes of good average quality were sold at 12s. 6d. or 13s. The plaintiffs had large contracts with the Repatriation Department for the supply of the very best potatoes. Plaintiffs had an agent in the country buying potatoes, and witness was also buying. Not to his knowledge did they set themselves to

break their contracts with the defendants. It was possible that they might have bought potatoes which the defendants intended to buy. They paid about 10s. 6d. to 10s. 8d. a bag, weighing about 180 to 185 lb. No protest or remonstrance was made to witness by the defendants with regard to the plaintiffs buying against them. The only remark made by any representative of the defendants was an observation by Mr. Stephen, who said that the farmers seemed to sell first to one and then to another. A fair figure for damage due to loss of market through non-delivery would be 1s. 6d. per 100 lb. They had a market for all the potatoes they could have got.

Cross-examined by Mr. Searle: The bags sent to Johannesburg, Bulawayo, and Kimberley consisted of about 150 lb., but a bag about Queen's Town, Tarkastad, and that district was always understood to contain about 180 to 185 lb. They sold to Mr. Lawrence, of Kimberley, at 11s. 6d. to 12s. That was about the commencement of the season. Later on, about October, they sold to Mr. Lawrence at 12s. 6d. to 13s. He remembered Mr. Stephen coming to him and saying that the plaintiffs were buying potatoes from Wiggall, which the defendant company had bought for this order. He remembered Stephen warning him in July that if the plaintiffs went on buying the company would not be able to carry out their contract. Witness took the warning in a friendly way. After the conversation he bought further potatoes from Wiggall. Practically speaking, there were no large buyers on the spot except plaintiffs' and defendants' representatives. A certain number of people, however, were sending up orders from the coast. He believed the plaintiffs had bought some potatoes from the farmers which the latter had sold to the company. He knew that some of the people from whom he was buying were the same as those from whom the defendants were buying. He did not remember Mr. Stephen selling 2,000 bags of potatoes to him which the defendants had bought. They rejected 190 bags from Hart's supply. The good potatoes were sorted out. Between August and September plaintiffs purchased about 9,900 bags. In the Cathcart district the potatoes were delivered by the farmers in their wagons. They afterwards bought 127 bags from Hart at 9s. 6d. per bag. Out of the 16 people from whom the company had bought the plaintiffs had bought from twelve. The plaintiffs purchased from these people 2,017 bags. In one or two cases the farmers brought in wagons of potatoes to the order of the defendant company, but they did not deliver them, because the defendant company were not paying cash. He did not sell 8,000 or 9,000 bags to the De Beers Company at 9s. a bag, or any other price. He might have sold so large a quantity to a Port Elizabeth firm at 12s. 6d. a bag.

Re-examined by Mr. Schreiner: The parties from whom the plaintiffs bought when the defendants would not pay cash were Mr. Wiggall and Mr. C. F. Miller. The potatoes from Hart's supply they rejected, and subsequently they bought them from Hart at 9s. 6d. a bag, and sorted out the unmarketable ones. He did not know whether all the members of the defendant company were farmers; he knew that a number of farmers were members. The plaintiffs did not bind themselves under their contract not to buy from anyone.

John H. Bailey, chief goods clerk in the C.G.R., at Queen's Town, said he produced consignment notes of potatoes sent during August, September, and October by the defendant company from the Queen's Town Station to Johannesburg, Mafeking, and Aliwal North.

Mr. Schreiner closed his case.

Wm. Temple Noorse, managing director of the defendant company, residing at East London, said that the company was registered. In 1902, when the contract was entered into, they had no branch at Cathcart. A branch had since been opened, and Mr. Stephen, a director of the company, negotiated the contract for the company. Mr. Stephen acted for the Cathcart district. Certain potatoes were purchased by the company for the farmers. Memoranda were forwarded by Mr. Stephen to the company, giving details of his purchase. The documents showed that 8,050 bags had been purchased. Witness purchased 400 bags; the rest were all purchased by Mr. Stephen. Mr. Stephen also obtained offers from other persons amounting to 5,200 bags. Witness believed those persons were all shareholders in the company. The farmers' bags averaged about 190 or 200 lb., and they varied a good deal. In transactions between dealers the bags were usually about 150 lb. When the brokers' note was entered into all the crops were in the ground. A rainy season followed after the contract had been entered into, the crops were late, and they were not so large. The defendant company had delivered to the plaintiffs all the potatoes they had received, or had rights over. Not one of the farmers from whom they had options delivered any potatoes to the company. The options were all verbal. As to the Queen's Town consignments, those referred to transactions from the Queen's Town branch, and had nothing to do with the Cathcart contract. Witness did not know anything definite with regard to these consignments. It was possible that those consignments might have been sent by the company on behalf of some of the shareholders. The company did not sell to anyone but the plaintiffs; he could not speak as to the operations of the branches. They did everything they possibly could in order to fulfil the contract.

Cross-examined by Mr. Schreiner: Witness identified the signature of G. P. Noorse on letters sent from Queen's Town to Johannesburg as that of his brother, who was a director of the company. The letters referred to two consignments, each of over 100 bags, sent by the company to Johannesburg. They delivered to the plaintiffs all the potatoes they could; that was as far as the head office was concerned. They did not send any bags under the contract from East London. The Queen's Town branch was under separate management, and could enter into separate contracts. They had not instituted any actions for damages against farmers who had not kept to their contracts. Certain of the contracts between the company and the farmers had been destroyed in the fire. Three contracts were produced; in only one of these was any quantity stated.

Thomas Alfred Stephen, director of the defendant company, said he was commissioned by the company to buy up during May and June all the potatoes in the Cathcart district. After entering into the transactions, he made certain memoranda (produced), showing the results of negotiations with the farmers. At the time they purchased only 400 bags were out of the ground. The memoranda showed the farmers' estimate of what there was going to be. All the potatoes except the 400 bags sold by Warden, were negotiated by witness. In August, 1902, witness had a conversation with Dormer about Wiggall's potatoes, and Dormer told him he was aware of the fact that three loads of potatoes he had received from Wiggall had meanwhile been sold to the company. Witness told him that this was not the only case in which potatoes belonging to the company had been supplied to him, and he warned Dormer not to enter into large contracts on the strength of getting 18,000 bags from the company. Witness made every endeavour to get potatoes to fulfil the contract, and even paid for potatoes a price which left no margin of profit. The season was a bad one, the yield being very bad indeed.

By Mr. Schreiner: When witness spoke to Dormer, what he meant to convey was that if Dormer bought from the farmers he could not expect to receive the potatoes from witness's company. Witness paid up to 10s. 6d. in order to fulfil this contract. He had offered this price to Mr. Francis in August, and to E. Gibbons and Sons. The latter was one of the firms who had given an option. No price was agreed upon when the option was given.

Norman Mackenzie McDonald, secretary of the defendant company, produced a return of the options arranged by Mr. Stephen and of the purchases from farmers made by the plaintiffs that the defendants had previously secured. He said that a fire took place in the com-

pany's premises, and a large number of documents were destroyed. He could not say whether there were documents burned under which potatoes were sold to the company.

By the Court: He did not know anything with regard to the Queen's Town consignments.

Counsel were heard in argument.

Mr. Schreiner first addressed himself to the broker's note. He said that the broker's note said "about 18,000 bags." Latitude, of course, should be allowed, but it could never be contended that one-sixth of the quantity was "about." Counsel quoted Benjamin on sales. He said that the contract must be read as stipulating that the quantity which the defendants would deliver would be close to 18,000, or reasonably within the neighbourhood thereof.

[De Villiers, C.J., put it whether the 18,000 was merely an estimate.]

Mr. Schreiner said that the broker's note stipulated somewhere in the neighbourhood of or close to 18,000 bags.

[De Villiers, C.J., said that the question was whether the sale was bona fide. The defendants could not deliver more bags than they got.]

Mr. Schreiner said that the note said "the quantity should be very close to that." He contended that they must construe the document as a whole. The primary stipulation was to sell "18,000 bags more or less." The plaintiffs, because this was a large contract representing over two million pounds of potatoes, said they would give 6d. more per bag than the prices they were paying. He had come into court prepared to say perhaps 20 per cent. shortage would be a reasonable margin, but when the defendants' shortage was something like 85 per cent. then were they to be heard when they said that they had not committed a breach of contract? He submitted that the measure of damages should be the difference between the quantity supplied and the quantity stipulated, giving a reasonable and fair and even liberal deduction from the 18,000 bags that the defendants should deliver. He contended that the evidence given for the defendants did not justify them in claiming that they had entered into the contract in good faith. The method upon which the defendants had proceeded might be smart business, but it was not good faith in law. The defendants had undertakings for 8,050 bags, and the rest they said they had options for. As a matter of fact, the defendants complete breach was something like 8,000 bags, which would work out at £600, and, taking the profit at 1s. per bag, or £900 taking the profit at 1s. 6d. per bag. He urged that the plaintiffs were entitled to a substantial measure of damages.

Mr. Searle said that this was not an action founded upon false, reckless, or

gross misrepresentation. The action was for breach of contract in failing to supply the quantity of potatoes set out in the note. The potatoes were in the ground at the time. He submitted that the only person who had anything to do with the matter, so far as the company was concerned, was Mr. Stephen, except for the small amount of 400 bags. He contended that they had endeavoured to carry out the contract. The defendants thought they had rights of option over certain farmers, which, as a matter of fact, they found they could not enforce. The contract was really a Cathcart contract. He could not give any opinion in regard to the transaction of the Queen's Town branch. The matter was dealt with bona fide by the defendant on the basis of Stephen's purchase. The contract said that the potatoes should be delivered at stations between Thomas River and Queen's Town. As a matter of fact, the deliveries were made at the stores of Messrs. Malcomess. He submitted that the plaintiffs must have known they were buying from the defendants' own people, and, as a matter of fact, they purchased 4,647 bags from people who had entered into contracts or had promised options to the defendants. The plaintiffs were not entitled to take advantage of their own wrong. With regard to the contracts that the defendants had with the farmers for the supply of 8,000 bags, the defendants actually supplied to the plaintiffs 3,000 bags; the plaintiffs purchased 2,000 bags from people who were under contract with the defendants; and the remaining 3,000 bags were short through failure of the crop. With regard to the Cathcart contract and Mr. Stephen's purchases, the company had handed over to the plaintiffs everything they had received. If the defendants had committed a breach of contract, then 1s. on each bag would be a fair balance, and, as to the number of bags to be taken as the basis of damages, he contended that a fair method would be to take the difference between the quantity actually received by the defendants and the quantity they delivered to the plaintiffs.

Mr. Schreiner having been heard in reply.

De Villiers, C.J.: The terms of the contract are in writing. A broker's note was executed by which the plaintiffs bought from the Farmers' Co-operative Company, Ltd., in good, sound, and mercantile condition, about 18,000 bags (say 18,000 bags, more or less), guaranteed to be sound eating potatoes, at 11s. (say 11s. sterling) per 100 pounds potatoes, to be delivered at stations between Thomas River and Queen's Town, trucks to be supplied by buyers, delivery to be completed by the end of August prox., payment as each parcel is delivered at the station. As a large quantity of the potatoes are still in the ground (ready for digging), it is difficult

to tell the exact quantities, but, in stating 18,000 bags, a fair estimate has been made, and the amounts should be very close to that." If the contract had stood here there would have been force in the argument that the number of bags was only mentioned as a fair estimate, and not by way of guarantee that anything approaching that number would be delivered. But the contract continues: "It is, however, understood that if there are more, the buyers shall have the option of accepting surplus, and if less, the sellers are only bound to deliver all they have purchased, and all they have rights over." In point of fact, the quantity was less. The sellers are, therefore, bound to deliver all they have purchased; all they have rights over. The defendants have satisfied the Court that so far as Cathcart branch is concerned the sellers have delivered all they had purchased, and all they had rights over, but it appears that the company also has a branch at Queen's Town, and at Queen's Town they have undoubtedly made sales after the 19th July, and the presumption is that any potatoes so sold by them after that date were potatoes which they had purchased or potatoes in respect of which they had rights. It is said, however, that this agreement could not be extended to Queen's Town, and it was said, supposing there had been potatoes from George, would such potatoes also have been included? Of course, a provision of this kind must be reasonably interpreted. We know that Cathcart and Queen's Town are in the immediate neighbourhood of each other. The defendant company carried on business at both places, and at all events, that would be a reasonable area within which the parties must be understood to have included the potatoes which the defendants might purchase or have rights over. The onus lay upon the defendants to prove that they have delivered all they purchased, and all they had rights over. In regard to Cathcart, they have discharged that onus, but not in regard to Queen's Town. The presumption appears to be that all these potatoes which were sold at Queen's Town after the 19th July were such potatoes as they had purchased, and they had rights over. The evidence was not complete on this point. The information on this point came to the Court by way of telegram, and if the defendants had insisted on further evidence, the Court could not very well have acted on that telegram. But I think the defendant's counsel has been well advised in not incurring any further costs, because it seems to me only reasonable to suppose that even if the whole of that quantity had been purchased—a considerable quantity had probably been purchased—the difference in damages would be very small. As to such potatoes sold at Queen's Town. I am of opinion clearly that there was a breach of contract.

It was the duty of the defendant company, when this broker's note was completed, of which they had full knowledge, to have advised their different branches of the sale, to have advised the branch at Queen's Town not to sell any further potatoes to anyone else on behalf of the company, but to keep them in store on behalf of the plaintiffs, so that the defendants might be enabled to complete their contract to deliver up to 18,000 bags of "good, sound, eating potatoes." To that extent, I am of opinion that the defendants are bound to pay damages. As to the measure of damages, it would seem to me that 1s. per 100 lb. would be a fair estimate of damages. That seems to me, upon a fair consideration of the whole of the evidence, to be the difference between the market price and the purchase price of these potatoes. The total amount, therefore, would be £54 10s., for which amount there should be judgment for the plaintiffs. As to the claim in reconvention, the plaintiffs admit that they owed £34, but they did not tender that amount, because no claim was made. In any case, there is a balance in favour of the plaintiffs, and therefore the plaintiffs, in my opinion, are entitled to the costs of this action. Judgment will be for the plaintiffs for £54 10s. on the claim in convention, and for the defendant for £34 10s. on the claim in reconvention, defendant to pay the costs, except costs of postponement from last term, which will be paid by the plaintiffs.

Hopley, J., concurred.

[Plaintiffs' Attorneys: Innes and Hut-ton; Defendants' Attorneys: Walker and Jacobsohn.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

DREWFS V. DREWFS. { 1904.
Feb. 19th.

This was an action for restitution of conjugal rights, instituted by the husband.

Mr. Upington appeared for the plaintiff; defendant was in default.

Counsel stated that the residence of the defendant was unknown, and she had been served by edict, in accordance with the order of the Court, which directed that, failing personal service, service should be effected by publication in the "Government Gazette" and in a Johannesburg newspaper. He now produced an affidavit as to the service.

Fritz Heindrik Julius Drewfs, the plaintiff, said he was a barman, re-

siding at Carnarvon. In April, 1894, he was married to defendant at Hamburg, Germany. They came to this colony in November, 1897, and went to reside at Carnarvon, finally coming to Cape Town in 1901, and starting a boarding-house in Tree-street. There had been quarrels between them. Six weeks after coming to Cape Town, defendant left him without his consent, and went, witness believed, to Stellenbosch. Witness sent her a letter asking her to come back. She said she would never return to him. There were no children of the marriage. The marriage was in community. There was no property.

By the Court: Witness believed his wife was now in Johannesburg. She went to Stellenbosch to work as a dress-maker.

Defendant was ordered to return to plaintiff on the 1st April, failing which, to show cause on the 15th April why a decree of divorce should not be granted.

Postea (April 15th). The rule was made absolute.

HALL V. HALL.

This was an action for divorce, instituted by the wife on the ground of her husband's alleged adultery.

Mr. De Waal appeared for the plaintiff.

Helen Hall, the plaintiff, said she was married to defendant in community of property on the 8th April, 1902, at Sea Point. Two months after marriage defendant went away with the Army Service Corps on duty. He was a draughtsman at the Post-office when witness married him. There was no quarrel between them before he went away. There were no children of the marriage.

Charles Wm. Hy. Smith, clerk in charge of the marriage register, produced the record of the marriage.

Henry Ford Carey gave evidence in support of the charge of adultery.

A decree of divorce was granted, with costs.

VON WEILLIGH V. VON WEILLIGH.

In this case, the plaintiff, the husband, sued for an order for restitution of conjugal rights, failing which, for a decree of divorce.

Mr. De Waal appeared for the plaintiff; defendant was in default.

Charles William Henry Smith, clerk in charge of the marriage register, produced the register of the marriage of the parties.

Gideon Retief von Weilligh, the plaintiff said he was a land surveyor. He married defendant at the Paarl on the 12th May, 1885. He was now living at Claremont. In 1899 witness left defen-

dant at Stellenbosch to go to the Transvaal as Surveyor-General. During the war he remained in the Transvaal. Afterwards he came to Cape Town, and went into the hospital to receive treatment for his eyes. He sent four telegrams asking his wife to come to him. On the 18th day she came, and she told him she did not care for married life. Defendant was a sickly woman, and had lately undergone an operation. He was willing to receive his wife, but she had refused to come back. He did not want the custody of the children. He had offered to hire a house at Stellenbosch, where they could live together. There were three sons and one daughter issue of the marriage, all being minors.

An order for restitution was granted, defendant to return to the plaintiff on or before the 1st April, failing which a rule nisi be granted calling on defendant to show cause on the 15th April why a decree of divorce should not be granted.

Postea (April 15th). The rule was made absolute.

ESTATE OF OLIVIER V. VAN ZYL. { 1914. { Feb. 19th.

Insolvency—Undue preference— Contemplation of insolvency.

This was an action to set aside a certain sale on the ground that it constituted a fraudulent and undue preference in insolvency.

The declaration set out that the plaintiff was an attorney residing at Barkly East, and was suing in his capacity as sole trustee in the insolvent estate of Olivier. This estate was sequestrated in January, 1903, and on the 5th March, 1903, the plaintiff was duly confirmed in his position as sole trustee. A year previous the insolvent sold to the defendant certain property for the sum of £500, and transfer of the property was passed by Olivier to the defendant. Plaintiff said that at the time of the said transfer Olivier contemplated the sequestration of his estate, and that the said transfer was undue preference, the result of collusion between the parties. Alternatively, the plaintiff said that the defendant was surety upon a bill for the insolvent for £100, with interest at the rate of 6 per cent., and that the discharge of the bill was undue preference, and the plaintiff was entitled to recover from the defendant, and also a forfeiture by the defendant of any claim on the estate. Plaintiff said that at the time of the sale the calculated liabilities fairly equalled the calculated assets of the insolvent estate, and, the said sale not being made *bona fide*, he prayed that the sale might be cancelled and declared null and void, and that the defendant should be ordered to restore the property to the plaintiff, or to pay £600, the value thereof.

The plea admitted the sale of the property, but defendant denied he was a

creditor of the said Olivier at the time, and denied that the value of the property was £600. The sale took place in the ordinary course of business.

Mr. M. de Villiers (with him Mr. J. E. R. de Villiers) for plaintiff. Sir H. Juta, K.C. (with him Mr. Gardiner) for defendant.

Mr. De Villiers called

Hendrik Adriaan Meintjes, trustee in the insolvent estate of Olivier, who said that in October, 1902, certain claims were handed to him against Olivier. He had a conversation with Cramer, and, as a consequence, he saw the insolvent, who told him that he had sold the farm. Witness sued the insolvent in October on a promissory note, and the proceedings were precipitated in order to prevent transfer. Witness recovered £128. By the time the return had been made transfer had been carried out. When the estate was sequestrated the liabilities amounted to some five or six hundred pounds, and the assets nil. The farm would be valued at £600.

Cross-examined by Mr. Gardiner: The Divisional Council valued the farm in 1902 at £330, but he valued it now at £600. There was only one dissatisfied creditor.

Julius Cornelias said that the insolvent owed him £228 12s. 4d., according to a note, dated 2nd April, 1901. The insolvent never intimated that he had sold the farm to Van Zyl. In February, 1902, the insolvent brought him some wool, and informed witness that all the stock in his possession was his own. In May the insolvent promised to pay witness £80, but he failed to do so.

Cross-examined by Mr. Gardiner: The insolvent was indebted to his firm to the amount of £278 in February, 1902, and, with other accounts, it was over £300. When he bought the wool he did not know that the insolvent was in a bad way.

The insolvent Olivier stated that in May, 1901, he borrowed £100, and gave a promissory note to pay in nine months. Some time before the bill fell due he saw Mr. Van Zyl, who told him it would be unnecessary to meet the bill in the stipulated time. The farm was on a lease, and witness got £50 a year for it. £500, he thought, was a fair price to put on the farm.

Mr. De Villiers closed his case.

Mr. Gardiner did not call any evidence, and Mr. M. de Villiers having been heard in argument on the facts.

Buchanan, J.: The plaintiff's declaration in this case complains of the alienation of certain landed property to the creditor at the time sequestration was in contemplation by the debtor, with an intention to prefer the creditor. It turns out, however, that the defendant was not at that time a creditor of the insolvent, and therefore an alternative clause has been introduced into the declaration, representing that

the defendant was surety on a promissory note for the sum of £100, and that the alienation was made with intention to prefer the defendant in the matter of his suretyship. It has been laid down in the Privy Council's decisions that the person bringing the action must prove the contemplation of sequestration and the intention to prefer. No doubt as has been stated, this question must be gathered from all the circumstances of the case, and that the denial by the insolvent himself is not necessarily conclusive. It is, however, one of the elements to be taken into consideration. In consequence of the very great difficulty found to exist in proving these facts, the Act of 1884 was passed, by which Act the onus of proving contemplation and intention was shifted from the person bringing the action upon the person who received the benefit, provided, however, that the transaction took place within six months of the sequestration of the estate. Here, unfortunately for the plaintiff, the transaction which is questioned took place over a year before the sequestration. Consequently, the Act of 1884 does not apply in this instance, and this case must be tried like one of the old cases before that Act. The learned counsel has admitted that there is great difficulty in proving these requirements, and urges the Court to assume that they existed mainly from the fact that the property alienated was the chief asset in the estate. But under the circumstances, is this fact sufficient? In the first place, let us take the value of the property when it was sold at the beginning of 1902. The insolvent states, and he is not contradicted, that he had offered his farm for sale before he treated with defendant, and that he could not find a purchaser. At that time there was a bond on the farm for £200, and a general bond for £200. He thought both these bonds were charges upon the farm, and that this £400 would have to be taken off the purchase price. He offered the farm to the defendant for the sum of £500. Now, it does not seem to me that the price given by defendant is itself any indication of anything wrong. I think it proved that £500 was a fair sum to pay for the farm under the circumstances. I see by the valuation of the Divisional Council in the year 1902, the farm was valued at £330, and in 1904, at £300 for Divisional Council purposes. It is true the trustee now says that in his estimation it was worth £600, but under the circumstances the price given was not so inadequate as to raise suspicion. The insolvent wished to relieve himself of the two bonds, and also of his debt due to Potgieter. It appears in 1901, the insolvent had borrowed £100 from Potgieter, and gave him a promissory note payable nine months after date, to which the de-

defendant became surety. The insolvent stated that before the note became due he spoke to defendant about getting it, and the defendant said that Potgieter was not in a hurry for the money. The insolvent, however, did not like this debt hanging over him, and agreed that, after payment of the two bonds, the balance of £110 should go in settlement of this debt. A question has been raised: when was the property sold? Now, it is alleged by the insolvent it was sold in February, 1902. It is true in April an agreement was reduced to writing, but I find from the declarations of the purchaser and the seller, that they both give the date as the 10th of February, 1902. These declarations were made long before any question of undue preference had been raised, and they afford corroboration of the other evidence, that there was a sale in February, 1902. The only creditor who is interested in the estate is Seligman, and several times after the sale complained of he himself received money from the insolvent. The farm had been let by the insolvent, and the year's rent was paid to Seligman in April or May. Subsequently he had further transactions with the insolvent, and returned the £50 rent, on condition the insolvent paid him £80 out of his earnings as a transport rider for the military. The insolvent failed to pay this £80. Seligman took action, obtained judgment, and cleared off the whole of the insolvent's movable property, and recovered another £120. Now, under these circumstances, it is difficult to hold that the sale alone is proof of contemplation of sequestration or intention to prefer. There was consideration for the contract, and valuable consideration, in the payment of the debts of the insolvent. There does not seem to be any reason to suggest a collusive arrangement between the parties; the agreement of sale was reduced to writing in the office of an attorney in the town, and everything was done openly. It is true transfer was not given at the time, but it has been satisfactorily proved that the purchase had taken place months before, and the money had gone to pay other creditors. I cannot find on the evidence in this case there was any intention to prefer, or that there was contemplation of sequestration at the time this property was sold. Judgment will, therefore, be absolute from the instance, with costs.

[Plaintiff's Attorney: Van der Byl; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

VAN DER MERWE V. VAN DER MERWE
AND VICE.

Mr. Close, for the defendant, moved as a matter of urgency for the appoint-

ment of commissioners in Bombay and Dublin, to take the evidence of Lieutenant McKenzie and Lieutenant Shaw respectively.

Mr. M. de Villiers, for the plaintiff, consented on behalf of his client.

Order granted, Mr. Edward Cumming, of Dublin, and Mr. Leslie Crawford, of Bombay, being appointed as commissioners.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

STEVENS V. STEVENS. { 1904.
Feb. 22nd.

Restitution of conjugal rights.

The Court granted a decree for restitution of conjugal rights even though the applicant appeared somewhat unwilling to rejoin her husband. The husband was directed to furnish the applicant with means wherewith to defray costs of her journey.

This was an action instituted by Wilhelmina Caroline Stevens, against her husband, Frederick Stevens, now of Tasmania, for restitution of conjugal rights, failing which a decree of divorce, on the ground of his unlawful and malicious desertion.

Mr. J. E. R. de Villiers (who appeared for the plaintiff) said that leave had been granted to sue by edictal citation. The defendant had written saying that it would be impossible for him to be here in February, but he would be here in March.

Charles W. H. Smith, clerk in charge of the Marriage Register at the Colonial Office, produced the entry of marriage in 1890.

Wilhelmina Caroline Stevens, the plaintiff, said that after the marriage she lived with her husband for two years at Woodstock. In July of that year he left her, and said he was going to Australia. He told her that she could go and look

for another fellow. Defendant originally came from Australia. Defendant wrote to her about a year ago, and she received another letter from him about a fortnight ago. One child had been born of the marriage, but it was now dead.

De Villiers, C.J. (after examining the letter of a fortnight ago) said it seemed to be a very affectionate one.

Witness, in answer to the Chief Justice, admitted that she had told the defendant in her letter not to write to her or send for her. She also told him not to come to her. Defendant said that he did not want her to write to him or go to him.

[De Villiers, C.J.: Then why do you ask him to come back to you now?]

Witness did not reply.

[De Villiers, C.J.: This does not appear to be a *bona fide* action.]

Witness, replying to further questions, said that if the defendant returned to her she was willing to receive him. Defendant had not contributed towards her support, and he had not offered her a home. He would not work here unless he could get £3 a day. He was a jeweller.

[De Villiers, C.J.: If the defendant sends you £50 are you prepared to go to him in Australia?]

Witness: I suppose I shall have to go.

De Villiers, C.J.: A decree of restitution will be granted, defendant to return to or receive the plaintiff on or before the 15th July, provided that it will be a sufficient compliance with this order, if the defendant sends to the plaintiff's attorneys the sum of £50 to enable her to return to him, and to pay her necessary expenses. Failing compliance with this order, a rule will be granted calling on the defendant to show cause on the 1st August why a decree of divorce should not be granted, with costs. The only ground on which the Court grants a decree of restitution at all is that it was the duty of the defendant on leaving this country if he wished his wife to follow him to provide her with means to follow him, and she apparently has not had them. It is now for him to show that he is prepared to receive her back if he provides the means, and it is clearly understood that if the means are provided she will not be entitled to a decree of divorce. We consider that £50 will be a fair amount to pay her passage money and other expenses, as well as any costs which the plaintiff has already incurred in respect to this action. Upon payment of that amount it is to be considered a settlement in full, and the money will not be handed over to her, but to her attorneys, and will be expended by them on her behalf, and in seeing that the passage money is obtained out of that money.

Postea (August 1st).—The rule was made absolute.

BYDIEN V. ESTATE RAMOA.

In this action, which was for the setting aside of a certain transfer, no appearance was entered for the plaintiff.

Mr. Searle, K.C., said he appeared, along with his learned friend, Mr. Alexander, for the defendant.

De Villiers, C.J.: As no evidence is offered, we must give absolution from the instance, with costs.

Mr. Searle said that the defendant was in the position of executor, and he wished to administer the estate, and it would be more satisfactory to him if he got judgment.

De Villiers, C.J.: said that after this there might be no further difficulty in the case. There would be judgment of absolution from the instance, with costs, including costs of the previous application for a rule.

DUNN V. ESTATE DUNN.

Will—Ordinance 15 of 1845.

The Court set aside a will, the testatrix having neither signed it nor acknowledged her signature in the presence of one of the witnesses.

This was an action brought by James Dunn to have set aside a document, dated June 11, 1897, purporting to be the last will and testament of his sister, Mary Emma Dunn, a spinster, the defendant being Morris Greenwall (executor under the said will).

The declaration set out that the plaintiff was the brother of Mary Emma Dunn, who died a spinster, without surviving parents, on the 5th September, 1903, in the district of Swellendam. Plaintiff was by law entitled to succeed to her property. The defendant took out letters of administration as the executor appointed under the will. The document purporting to be the last will and testament of the said Mary Emma Dunn was not legal, because, although it purported to have been signed in the presence of two witnesses, it was only signed in the presence of one of the signatories, one James Joubert, while the other signatory, one Dunoon (not Dunn, as originally stated) did not witness her signature. The document did not purport to appoint any heirs, but bequeathed the whole of the property, movable and immovable, for the purpose of erecting and supporting a destitute home at Ilfracombe, in Devonshire, England. The declaration further alleged that the testatrix was not capable of executing a will at the time of the document, and that she was not of sound mind. Plaintiff prayed for an order declaring the will null and void.

The defendant, in his plea, said that the document was signed by one Joubert and one Dunoon, and that the testator was of sound mind when she executed the document in question. Defendant did not admit that the will was null and void, and he said that he acted *bona fide* as executor aforesaid. Save as above, he submitted to judgment, and prayed that he should be held harmless as to costs.

Mr. Schreiner, K.C. (with him Mr. J. E. R. De Villiers) for plaintiff.

Mr. Searle, K.C. (with him Mr. Russell) for defendant.

Mr. Schreiner said that the plaintiff depended upon the first part of the allegations, namely, as to non-execution. He also admitted that, as alleged in the plea, there were children living of other brothers—one brother of the whole blood and two other brothers of the half blood. The plaintiff prayed that the will should be declared null and void. The plaintiff's share, counsel added, would work out at about three-eighths of the estate.

Rene Dubois Steyn, record clerk in the Master's office, produced the document in question.

George Dunoon, now of Pretoria, said he was formerly a member of the Cape Civil Service, and in 1897 he was the Resident Magistrate's Clerk at Swellendam. Mr. James Joubert, Civil Commissioner's clerk, came into witness's room, and asked him to sign the document produced as a witness. Witness attached his signature. Miss Dunn was not present. He had only been in the Civil Service for a few months, and did not know the state of the law in regard to wills at that time. As a matter of fact, he was temporary clerk, and had not passed his examination. He had never spoken to Miss Dunn, and had not been in her presence, though he had seen her.

Jacobus Gerhardus Tobias Joubert said he was formerly Civil Commissioner's clerk at Swellendam, and now occupied a similar position at Bedford. He was known as James Joubert. He spoke as to the testator calling at his office, and bringing the document, and afterwards calling again, at his request, and bringing the original and a copy. Witness was usually very particular about the witnessing of documents. Miss Dunn acknowledged her signature in the presence of Mr. Dunoon. He either took her to Mr. Dunoon or Mr. Dunoon came into his room. He took the document, he believed, into Mr. Dunoon's room, and told him which was Miss Dunn's signature.

Mr. Schreiner (to witness): I want you to be very careful, because your evidence, you see, is inconsistent with Mr. Dunoon's. Is it possible that you took the document to Mr. Dunoon's room, and that Miss Dunn was not present when he signed?

Witness: Yes. Replying to further questions, witness said that he had recently had an accident, and had sustained an injury to his head. As a consequence,

he had been very much shaken, and his memory was not clear.

Cross-examined by Mr. Searle: He thought that Miss Dunn was present when Mr. Dunoon signed. As far as he could see, Miss Dunn was in a fit state of mind to make a will. Mr. Dunoon had only been at Swellendam a short time. He thought it was probable that Mr. Dunoon was mistaken when he said he signed in his room without anyone else being present.

Re-examined: He could not say that he had previously witnessed a will. He thought Mr. Dunoon was correct in what he had said. He felt so discomposed in his memory that he did not like to commit himself as to anything that happened.

By the Court: He should not like to pit his money against Mr. Dunoon's.

James Dunn, the plaintiff, was called, but was not examined.

This concluded the evidence for plaintiff.

Morris Greenwall, the executor, said he drew the will upon the instructions of the deceased. He thought the deceased was of sound mind. He did not know anything about witnesses not being present when the will was signed. Miss Dunn died in September, 1903. The estate consisted of fixed property, and cash in the bank. The land was sold by public auction, and realised £400. He administered the estate fully. The money was still in his possession. He corresponded with the Master, and, at his suggestion, he opened communications with the Mayor of Ilfracombe. The deceased told him that she had lived in Ilfracombe in her youth. The estate realised £1,250, and after payment of succession duty, and other out-goings, £1,199 remained. The Ilfracombe people said they would make provision to accept the bequest.

Mr. Searle said that after the clear evidence of Mr. Dunoon he could not support the will, but he was quite prepared to support it on the other questions than as to the witnessing.

De Villiers, C.J.: It is quite clear, after what Mr. Dunoon has said, that the will cannot be sustained. He states that the will was brought into the room by Mr. Joubert, and signed by him (Mr. Dunoon) in the absence of Miss Dunn, and that there was no subsequent acknowledgment by her of her signature. Under these circumstances, the Ordinance clearly has not been complied with. It is true Mr. Joubert has expressed the view in one part of his evidence that this was not correct, and that Miss Dunn was present, but, on being pressed, he said he would not set his evidence against that of Mr. Dunoon, who was positive that he was not present when the testator signed. The defendant, I think, was quite justified in defending this action, because he had been appointed executor, and it is his duty to protect the will until it is set aside. The Court will order that the will be set

aside, and that the costs of this action, including the defendant's expenses as witness, be paid out of the estate. As to the commission of the defendant, I think he is entitled to part, if not the whole. He has performed the duties of executor when he had no reason to believe that the will was not valid. He has performed duties of which the estate will have the benefit. The Court will further order that an executor dative be appointed to the estate, and that such executor dative be authorised to pay to the defendant Greenwall such commission for his administration as the Master of the Supreme Court shall approve. The costs of this action will include the plaintiff's and defendant's witness's expenses.

[Plaintiff's Attorneys: Herold and Gie. Defendant's Attorneys: Berrange and Son.]

HADIE V. HADIE.

This was an action brought by Abdol Hadie, of Cape Town, against his wife, Gadeja Hadie, for divorce, on the ground of her adultery with one Hadje Gamja.

The declaration set out that the parties were married in community of property on the 12th August, 1901, and that there was no issue. On divers dates in August, September, and October, 1903, and more particularly the 10th October, the defendant committed adultery with Gamja. Plaintiff claimed a decree of divorce, and an order declaring the defendant to have forfeited the benefits of marriage in community.

The defendant, in her plea, denied the allegations of adultery. She claimed in reconviction that on divers dates since between the date of the said marriage and November, 1903, plaintiff had been guilty of ill-treatment and cruelty towards her. Owing to the said ill-treatment and cruelty, it was dangerous and intolerable for her to live with the plaintiff. She claimed a decree of judicial separation and division of the joint estate.

The plaintiff, in his replication, denied the alleged ill-treatment.

Mr. McGregor for plaintiff. Mr. Alexander for defendant.

Harry Willis Lynch, private detective, said that he received instructions from Abdol Hadie to make inquiries in regard to his wife. That was in the latter part of last year. He found that Gadeja, the plaintiff's wife was in the habit of going to the house, 189, Loop-st., which was occupied by several Malay tailors. He saw a man named Hadje Gamja there, and he employed him to do certain repairs. On the second occasion when he went, a Saturday, he looked into a room occupied by Gamja as a bedroom and workshop, and saw the defendant and Gamja in a compromising position.

By the Court: This was on the 10th October, 1903. It was before the plaintiff had been convicted.

Cross-examined by Mr. Alexander: He knew Gamja when he was sent to the place on the second occasion. He had never seen Gamja's wife. He was informed that Gamja was a married man. He had been to the place three times.

The Court (to Mr. Alexander): What was the conviction?

Mr. Alexander: The plaintiff was convicted of attempting to poison a man and his family, and sentenced to ten years' imprisonment.

By the Court: Witness's fees were a guinea a day, irrespective of whether he succeeded or not.

Hadje Gamja said he was a tailor, carrying on business at 189, Loop-street. He knew the plaintiff and his wife. He admitted committing adultery with the respondent on the 10th October last, and on several other occasions. He had paid the defendant sums of money. He admitted seeing the detective look in the room.

By the Court: There had been no arrangement between the detective and himself.

Cross-examined by Mr. Alexander: He was married according to Mohammedan rights. His wife had previously been married. He denied having authorised a letter to be written to Gadeja to the effect that he had received an offer from Abdol Hadie, of £65, if he would give evidence compromising Abdol's wife. He could not write, and he had not authorised the letter to be written. He did not know whether Abdol Hadie was a rich man. He had heard that Abdol owned property. Abdol had not offered money to him. Witness had been summoned to attend the Court.

Mr. McGregor closed his case.

Gadeja Hadie, the defendant, said that her husband went to Mecca in June, 1902, and he was away until June, 1903. He left her with Shiek Alie. Witness and her husband lived together in Hanover-street until the end of June. She afterwards proceeded against him in the Police Court for assaulting her with a belt and with threatening her.

Mr. Alexander said that for assaults on his wife the plaintiff was in July fined £5, or in default committed for one month, and in August he was committed for 14 days.

Witness (continuing) said that the plaintiff had been ordered to pay her £1 a week. She denied the alleged adultery with Gamja. She admitted that she saw the detective on the 10th October. She received the letter produced, which was signed by Gamja.

By the Court: Abdol was an Arab. She believed he had other women, but he was not married to them.

Cross-examined by Mr. McGregor: When the detective called she was sitting on a chair in Gamja's room. She remembered Lynch looking in the room. She had never been in Hadje Gamja's

house on any other occasion than the 10th October.

By the Court: Gamja was a good friend of the plaintiff's.

Cross-examination continued: She called at the invitation of Gamja's wife. Witness had not previously spoken to Gamja. Gamja's wife went out of the room for a little time to make some tea. There had been trouble over a promissory note. Plaintiff had also accused her of adultery with Shiek Alie.

Re-examined: The plaintiff was found guilty of trying to poison Shiek Alie.

Jacobus C. Faure, clerk in the office of the R.M., produced the records of the two cases in the Magistrate's Court.

Shiek Alie said that the plaintiff left his wife in charge of witness and Abdol Casin when he went to Mecca. There was no complaint as to her conduct.

Mr. McGregor having been heard in argument on the facts, without calling on Mr. Alexander the Court gave judgment for the defendant.

De Villiers, C.J.: I am by no means satisfied in this case that the adultery charged has been proved. The whole story seems to me an extremely improbable one—that this defendant, a married woman, should have called at the house of the man Gamja and should there, with the door open and in broad daylight, have committed adultery, and that this adultery should have been committed at a time when both parties to the act knew that there was a stranger in the house calling out their names. The evidence of the detective is that he spoke loud enough for the people themselves to hear, and, notwithstanding that, afterwards, when he put his head into the room, he saw these two people in the act of committing adultery. The whole story seems to be extremely improbable. But, then, if it were true, it seems to me extremely probable that the defendant must have been led into a trap by the detective and Gamja acting in concert. I do not say that this was done, but I do say that if the defendant was tempted into committing adultery by an agent employed by her husband, the plaintiff, the latter is not entitled to a decree of divorce. As to the defendant's claim in re-convention, the marriage was in community of property, the plaintiff has been cruel to her, and he has been twice convicted of assaults upon his wife, one of these assaults being of a somewhat serious nature. In addition to that, the plaintiff is at the present time undergoing a term of ten years' imprisonment. That circumstance, taken in conjunction with the cases in the Police Court, is quite sufficient to entitle the defendant to a decree of judicial separation. The claim of the plaintiff will, therefore, be dismissed, and judgment will be given for the defendant. Upon the claim in re-convention, she will be given judgment for a

decree of judicial separation. There will be a division of the joint estate, and the Court appoints Mr. Roos (secretary of the Board of Executors) as receiver, to divide the property between the parties, after payment of the costs of the action out of the joint estate. Considering that the whole of the estate comes from the plaintiff, I think it is only right now that the costs should come out of the joint estate.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon., Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ANDERSON V. CALEDON { 1901.
BATHS, LIMITED. } Feb. 23rd.

Mr. Close, as a matter of urgency, moved for the appointment of a commission to take the evidence of Dr. John S. Nairns, who was about to leave by steamer.

Application granted, Mr. M. de Villiers being appointed as commissioner.

STARK V. BROOMBERG. { 1904.
 } Feb. 23rd.

Encroachment on neighbouring land—Removal of building—Measure of damages.

Where a building which encroaches on neighbouring land has been erected without protest from the owner of the land encroached upon and has stood for a year or more without the owner of such land demanding its removal, it is not the practice of the Court to order it to be removed, but to award damages to the person damaged. In estimating such damages, the Court will not look merely to the value of the land occupied by the encroachment, but will be guided by the loss which such encroachment has caused the owner of the land.

This was an action brought by James Stark, builder and contractor, Observa-

tory-road, against Joseph Broomberg, of Cape Town, for an order for the removal of a certain encroachment, or alternatively, for the payment of £250 damages.

The declaration set out that the plaintiff was the registered owner, by transfer, passed to him on the 19th February, 1903, by one Hoffman, of a plot of ground on the Rochester Estate and situate in Cooke-street, Observatory-road, being lot No. 3. The defendant was also the registered owner of an adjoining lot. The plaintiff had discovered and notified to the defendant that certain of the walls of the building erected on the defendant's land encroached upon portion of lot 3, and that the eaves of the said building further overhung the said land. Therefore, that portion of lot 3 was a loss to the plaintiff, and he had demanded damages in the sum of £250. Plaintiff had called upon defendant to pay him compensation in the sum of £250 by way of damages or otherwise, in which case the plaintiff was willing to transfer to the defendant that portion of lot 3, which was encroached upon by the said wall and eaves. Defendant had not paid the said compensation, and he unlawfully continued the encroachment. The plaintiff prayed for an order for the removal of the said encroaching walls and eaves, or alternatively, for the plaintiff to be ordered to pay him compensation in the sum of £250, in which case he tendered transfer of the portion encroached upon.

The defendant in his plea, said that the building encroaching on the plaintiff's land was not erected by him, but by his (defendant's) predecessors in title upwards of ten years ago. He tendered to pay to the plaintiff £25, as purchase price of the land encroached upon.

The replication of the plaintiff, said that he admitted the tender, but that it was insufficient.

Mr. W. P. Buchanan for the plaintiff. Mr. Benjamin for the defendant.

Mr. Buchanan said he thought it would be admitted by his learned friend (Mr. Benjamin) that the encroachment came to about 2 ft.

[De Villiers. C. J.: It is really a question then of the value of the land?]

Mr. Buchanan: But it is more than that. We say it is not a question merely of the value of the land, but also of damage to the remaining portion of the lot by the taking away of this strip.

[De Villiers. C. J.: Are you prepared to remove the encroachment?]

Mr. Benjamin: I don't think it can very well be removed, because the alleged encroachment consists of the wall and eaves. We purchased the land quite ignorant of the fact that it was an encroachment.

Mr. Buchanan: We offered to make this a party wall if defendant would pay the costs.

Mr. Benjamin said that at the time the offer was made defendant had provi-

sionally arranged for the sale of the land and buildings.

It was agreed that one of the defendant's witnesses, who desired to go away, should be heard first.

Jacob Heindrich Hablutzel, of the firm of J. J. Hofmeyr and Son, auctioneers, said that he was asked his opinion of the value of the land about October last. The estimated value was £15. He still considered that amount to be a fair value. The whole lot was about 80 ft. by 90 ft. The present value was between £400 and £500, perhaps about £450. About 1897 he sold lots on the opposite side of the road. Lot No. 3 at that time would be of the value of about £300 at the outside. The strip in dispute would be worth about £7 or £8, about 7 or 8 years ago. He sold the buildings thereon by instructions of the Sheriff in the early part of last year.

Cross-examined: When he sold the buildings, he was informed that there was an encroachment, but he said that had nothing to do with him. Mr. Courtis, the purchaser, would no doubt know about the alleged encroachment. He considered that £15 was a good value for the strip in dispute. His valuation of the whole of lot 3 was £450, as things were at the present moment. It was true that things were very quiet just now. There had been a great increase in land values since 1897.

Mr. Buchanan then called evidence.

James Stark, the plaintiff, said he bought Lot 3 in February of last year for building purposes. He figured out the plot, which was 90 feet by 80 feet, and he calculated that he should be able to erect upon it five cottages and a shop. He had had plans prepared. He discovered the encroachment about two or three months after the sale, when he was looking for the pegs. He had afterwards had the ground surveyed. He was present when the adjoining land was sold by auction by order of the Supreme Court. He told Courtis, who purchased the ground, about the encroachment. The buildings on the defendant's land had been erected about six years.

By the Court: Witness could only erect four cottages on the ground in stead of five, in consequence of the encroachment. He could only erect five by reducing the size of the rooms, but that would mean great difficulty in letting, and the rentals would be £3 or £4 a month less. There would be also a considerable waste of materials in building smaller rooms.

Mr. Buchanan put in the correspondence, which showed that the defendant had tendered £25, with costs to date in full settlement of the plaintiff's claim. This offer was refused. The plaintiff subsequently offered to settle the matter if the encroaching wall were made a party wall, and costs were paid by the

defendant. The defendant did not reply.

Cross-examined: His plans were for the erection of five cottages fronting to Cooke-street. The buildings on the defendant's land had been erected about six years.

George Heywood, builder and contractor, said he had inspected the land encroached on. The drain pipes of defendant's building sloped down towards the plaintiff's ground. He should say at the very least the plaintiff had lost £100 in consequence—that was by the taking away of the strip and the extra cost that would be incurred in building. It would cost about £30 or £40 to remove the eaves, and make a larger gutter. The roof would have to be altered.

Cross-examined: He had not formed an estimate of the value of the plaintiff's lot. He knew that Mr. Stark had had an offer of £550.

John Wm. Goodman, builder, said that he made the plaintiff an offer of £550 for the ground. He did not think he should give much more than £400 now as long as the land had this encroachment. If he had known of the encroachment at the time he made the offer he should have bid about £60 or £70 less.

By the Court: It would not be possible to take the difference off one cottage only, because it would involve an infringement of the Council's regulations. The rooms shown on the plaintiff's plans were practically as small as the Council's byelaws would allow.

Mr. Buchanan closed his case.

Joseph Broomberg, the defendant, said he bought the property in July last. He did not know at the time that there was an encroachment. He instructed Mr. Hablutzel to make an estimate of the value of the strip. The value was estimated to be £15. Witness thought that £25 was a fair offer. The proposal as to a party wall came too late for witness to entertain it. He had an option for the purchase of the property, to be exercised on the 1st March. He did not think the contract would be taken up, and in that case he should be willing to let the plaintiff have the wall as a party wall.

Cross-examined: He knew that there was a dispute as to the encroachment at the time he entered into the contract. He did not know of the encroachment when he purchased the land from Courtis. The plaintiff demanded £650 for the whole of his land, or £250 for the strip, or the removal of the wall.

By the Court: If he removed the wall, he should have to take it away from the whole terrace. It was a passage wall. The cost would be considerable. He had suggested to the plaintiff that he should wait till after the 1st March.

Mr. Benjamin said he believed the buildings were erected by a lady who was now dead.

Mr. Buchanan said that the plaintiff did not know anything before as to this proposal of the defendant to give the plaintiff party rights over the wall after the 1st March.

Mr. Buchanan: The defendant takes up the position that he is bound only to pay for the actual piece of land on which he admits he has encroached; but the value of the whole property has been decreased by this encroachment. We do not ask that the defendant should be ordered to pull down this wall, but we do ask that he should meet us liberally in the matter of damages. It is true that the encroachment occupies only a strip of land some two feet broad, but the whole frontage is only 90 feet, and this encroachment prevents the plaintiff from deriving from his property the benefit which, but for it, he would have derived.

Mr. Benjamin: The defendant is bound to pay only the value of the land actually encroached upon. *Grotius* (2-5); *Myburg v. Jamieson* (4, Searle 5). This building has now stood six years and the Court will not order it to be destroyed, but will only grant damages. As to the value of the land encroached upon, we must look to the time when the encroachment was made. The plaintiff's predecessor in title could only give the plaintiff rights which he himself possessed. Two feet is a very small amount out of a frontage of 90 feet, and the tender of £25 is liberal even looking to the present value of the ground. *Ford* (8-4-6) is speaking only of certain local customs. I submit that the defendant's tender is ample.

Mr. Buchanan (in reply): Whatever is built on a man's ground is his property subject to certain rights of the builder to compensation. *Institt.* (2-1-30); *Dig.* (41-1-7-10). Should the Court hold that the wall cannot be taken down it will award compensation on a liberal scale.

De Villiers, C.J.: It is very much to be regretted in this case that the parties did not come to terms. The plaintiff first of all claimed damages, and the defendant admitted his liability to damages by tendering £25. It is clear that there was an encroachment upon the plaintiff's land. The encroachment was effected by the predecessors in title of the defendant's land; but still the plaintiff is the owner of the land, and we must take it that as the owner, he is *prima facie* entitled to claim that an encroachment made upon land belonging to him as the registered owner shall be removed. It has not, however, been the practice of the Court to order such removal where for any length of time, where for a year the house has been standing without any objection being raised on the part of the owner of the

land, more especially where the building has been completed without anything in the nature of a protest on the part of the owner of the land. But, in estimating the damage, the Court is not in the habit of looking merely at the value of the strip of land encroached upon, but must regard all the circumstances of the case. It is quite clear in the present case that it is a great inconvenience to the plaintiff that this encroachment should have taken place. The land was very limited in extent, and he is restricted from building the number of cottages which he would otherwise build, and the damage sustained appears to me to be more than the amount tendered. Moreover, the offer made by the plaintiff to withdraw his claim for damages if the defendant would allow the wall to become a party wall and would pay the costs to date, appears to me to have been a very reasonable one. The plaintiff was entitled to treat a wall thus encroaching on his property as a party wall, and the least the defendant could do was to pay the costs incurred by the plaintiff in asserting his rights. The plaintiff has elected to claim compensation which I assess at £40, and for this amount judgment must be given with costs, but it will still be open to the parties to agree upon the wall being accepted as a party wall, in which case the compensation would fall to the ground.

[Plaintiff's Attorney: G. Trollip;
Defendant's Attorney: Friedlander
and Du Toit.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN
and a Jury.]

DU PLESSIS V. BLUMBERG.

Slander.

This was an action brought by Gert Jacobus du Plessis, of Petrusville, against Israel Jacob Blumberg, of the same place, to recover £1,000 damages for alleged slander uttered on the 28th November, 1903.

The declaration was as follows:

(1) The plaintiff is and was at the time of the occurrences hereinafter set out a law agent and auctioneer, carrying on business at Petrusville in the division of Colesberg, of the Colony of the Cape of Good Hope. (2) The defendant is and was on the occasion hereinafter set forth a member of the firm of Muller and Blumberg, carrying on business at Petrusville. (3) On or about the evening of the 28th day of November, 1903, and in the house of one S. P. Naude, at Petrus-

ville, the defendant in the presence of the said Naude, one T. J. E. Tiech, and others, falsely and maliciously spoke and published of and concerning the plaintiff in the Dutch language, the words following or to the same substance and effect that is to say: "Ik zal mij nie van you laat mij verneuk Gertje du Plessis," which said words being translated into the English language, have and were intended and understood to have the meaning and effect following, that is to say: "I shall not let you swindle me, Gertje du Plessis," meaning that the plaintiff was a cheat and a swindler. (b) "You verdomde loofer en dronkloper, ik zal mij nie van you laat verneuk," which words being translated into the English language, have and were intended and understood to have the meaning and effect following, that is to say: "You damned loafer and drunkard, I shall not let you swindle me," meaning that the plaintiff was a man of bad character, of vagrant and intemperate habits, and a cheat and swindler. (4) By reason of the premises the plaintiff has been greatly injured in his character, credit, and reputation, and in his said business. Wherefore the plaintiff claims: (a) £1,000 damages; (b) Alternative relief; (c) Costs of suit.

For a plea to the plaintiff's declaration the defendant said: (1) He admits paragraphs 1 and 2. (2) He denies that he spoke or published of or concerning the defendant the words set forth in paragraph 3, but he admits that he on or about the time and at the place set forth in the said paragraph, and in the presence of the said Naude and certain others, spoke to and concerning the plaintiff the following words in the Dutch language: "Ja, ik is een gemeene man omdat ik mij nie wil van jou verneuk met Barend van der Linde's bewijs voor £350; jij is dronk, en Barend is nie goed genoeg voor de geld nie," which words translated into English mean: "Yes, I am a mean man, because I will not allow myself to be humbugged by you with Barend van der Linde's promissory note for £350. You are drunk, and Barend is not good enough for the money. (3) The words in the preceding paragraph set forth were used by the defendant under the influence of great anger, provoked by the plaintiff who previous to the use by the defendant of the said words, approached the defendant, and prepared to strike him, and spoke of and concerning the defendant the following words in the Dutch language: "Het is omtrent tijd dat gij uit de huis gaan want jij is de gemeenste man dat ik in mij lev-gezien het," which words, translated into English mean: "It is about time that you go out of the house, because you are the meanest man that I have ever saw during my life," and in divers other ways provoked the defendant. (4) The defendant further says that the words set

forth in paragraph 2 hereof, were used by him without malice, and without any intention of injuring the plaintiff, and that the said words did not injure the plaintiff. (5) He denies the allegations in paragraph 4 of the said declaration. Wherefore he prays that the plaintiff's claim may be dismissed with costs.

Plaintiff's replication was as follows: (1) The plaintiff denies that the defendant spoke and published of and concerning the plaintiff the words set out in paragraph 2 of the defendant's plea, or words to the same substance and effect as alleged by the defendant. (2) The plaintiff denies that the defendant received the provocation alleged or any provocation at all. (3) The plaintiff denies each and every allegation contained in paragraph 4 of the defendant's plea. (4) Save as aforesaid and save in so far as it consists of admissions the plaintiff joins issue with the defendant on his plea, and prays for judgment, with costs.

Mr. Searle, K.C. (with him Mr. Sutton) for plaintiff; Mr. Gardiner (with him Mr. Bisset) for defendant.

G. J. du Plessis, the plaintiff, stated that there had been certain unsatisfactory transactions with regard to a promissory note. The libel had been spoken at the house of Mr. Naude. Plaintiff said to defendant, "What do you know of waterworks?" The defendant then uttered the libel complained of.

By Mr. Gardiner: He could not swear that his business had suffered. He had a good reputation, and was neither a swindler nor a drunkard.

S. P. Naude said he was present when the conversation took place. Blumberg said he would give a picnic when the waterworks were finished. Du Plessis said what do you know about waterworks, and he thought he said it in a joke. Blumberg said he knew too much to be swindled by Du Plessis. After a slight disturbance, Blumberg said he would not be swindled by a loafer and a drunkard, and added that he would prove it in court. Witness said to Du Plessis, "You have driven one of my boarders away." You must clear your character. He did not hear Du Plessis say to Blumberg, "You are the meanest man I ever met."

Cross-examined by Mr. Gardiner: He did not think that he had stated to a Mr. Lewis that he was busy, and did not take particular notice of what took place. Frederick J. Tyke stated that he heard Blumberg say he would not allow Du Plessis to swindle him. Blumberg also pointed his stick at Du Plessis, and said, "You damned loafer and drunkard. I won't allow you to swindle me." Blumberg asked for his account, as he would never again sit down with Du Plessis. Du Plessis said, "You have said quite enough," and Blumberg replied that he would prove what he had said in court.

Mr. Searle closed his case.

I. J. Blumberg, the defendant, said that in November, 1903, Du Plessis asked him to advance money on a bill, but witness said he would not discount the bill. He told Du Plessis that if a bond was given he would do it, but otherwise the man was not good enough. Du Plessis said, "You are the meanest man that I have seen in the world." When the conversation turned on waterworks, Du Plessis said, "What do you know about waterworks?" "You are the meanest man on earth." Witness said, "You are drunk. I take no notice of you." He was so angry that he did not know what he said.

By Buchanan, J.: He might have said the plaintiff was a loafer and a scoundrel.

Cross-examined by Mr. Searle: He told Du Plessis, if the bank was willing to discount the bill, he would do it. When a telegram was received from the bank, witness took the bill from Du Plessis, but he never promised to give the latter a cheque. It was a kind of "bet" that he was making when he said: "If the waterworks were ever completed, he would give a picnic." He said: "Is it because I did not allow you to swindle me over that bill?" in reply to the plaintiff's accusation of the "meanest man." He could not repeat exactly what he did say, but he did remember saying to Naude to make up his account and he would leave at once.

John R. Frame said he heard Blumberg say that if the waterworks were completed he would give a picnic. Du Plessis then told Blumberg that he was the meanest man he had ever seen. Du Plessis was in a fighting aspect, and witness then walked out. He did not think anything less of Du Plessis from what he heard. They were both angry.

Cross-examined by Mr. Searle: He did not hear the remark which the defendant admitted having made about being swindled over a promissory note.

This closed the evidence, and counsel having been heard in argument on the facts,

Buchanan, J., summed up, and after explaining the law of defamation, said that he was struck by the evidence of the teacher as a fair indication of what took place. He heard nothing about swindling, and it was significant that in the letter Du Plessis wrote three days after the affair there was no mention of being called a swindler. The jury would have to consider all the circumstances of the case, and the relation between the parties, to see whether there had been malicious defamation.

The jury retired, and after a few minutes returned with a verdict for the defendant.

Judgment was entered for the defendant, with costs.

{Plaintiff's Attorney : G. Trollip;
Defendant's Attorneys : Fairbridge,
Arderne, and Lawton.}

SUPREME COURT

FIRST DIVISION.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), and the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

ESTATE OF GREEN V. SOUTH AFRICAN MUTUAL INSURANCE SOCIETY. { 1904.
Feb. 24th.

Insolvent Ordinance—Undue preference—Usual and ordinary course of business.

Within six months of his insolvency, G., who was the agent in a country district of the defendant Insurance Society, paid to the Society the amounts of premiums which he had received on behalf of the Society during the preceding six days. The payment was made in presence by an inspector of the Society and by means of cheques given to G. by third parties.

Held, that the fact that the identical money received by G. from insured persons had not been paid over by him to the inspector did not constitute the payment an undue preference.

Held further, that the payment was protected as having been made in the usual and ordinary course of business.

This was an action brought by Robert Radcliffe Lindsay Sands, as sole trustee in the insolvent estate of Alma Green, of Cradock, against the South African Mutual Insurance Society, to have certain

payments made by the insolvent in favour of the society, declared to have been preferent and to be forfeit.

The declaration set out that the plaintiff was the sole trustee in the insolvent estate. The defendant was the South African Mutual Life Assurance Society, whose head offices were at Cape Town. Within six months before the sequestration of the estate the insolvent made certain payments to the defendant society, being heavily indebted to the society. The following payments had been made by the insolvent in favour of the society: 7th July, £204 14s. 2d.; 15th July, £293 7s.; 6th August, £57 9s. 10d.; 6th August, £64 18s. 5d. The payments were made by insolvent when he was contemplating insolvency. The plaintiff prayed for an order declaring the forfeiture of the aforesaid sums and for judgment accordingly.

The defendants, in their plea, admitted the formal allegations, and went on to say that Green was appointed district agent at Cradock in 1898, his duties being to obtain insurance business for the society, to collect renewal premiums upon policies, and to pay into the bank moneys which he had so received. He had no authority to receive interest on bonds belonging to the society. He was dismissed from the said agency about the beginning of August, 1903, owing to its then being discovered that he had embezzled certain premiums belonging to the society. Thereafter he was prosecuted for embezzlement and convicted. On the 10th July, 20th July, and 3rd August the insolvent paid over to the society the following sums, respectively, £290 14s. 2d., £293 7s., and £57 9s. 10d. These were monies paid over by insolvent as agent of the mortgagors. Green received no payment or commission from the society in respect to such money. The company denied preference. The remaining sum of £64 18s. 5d. represented premiums collected between the 1st and 4th August, on behalf of the society by the insolvent, and which it was the duty of Green to place in the bank day by day, to the society's credit. The said amount was paid to the society's inspector on the 4th August. The said payments were made in the usual and ordinary course of business, and were protected by the 86th paragraph of the Insolvent Ordinance, even if Green did contemplate sequestration, which the company denied. The defendant society specially denied that any collusive arrangement existed between themselves and Green. They prayed for the claim to be dismissed with costs.

The replication was general.

The records of insolvency were put in.

Mr. Schreiner, K.C. (with him Mr. (Close) for the plaintiff; Mr. Searle, K.C. (with him, Mr. Gardiner) for the defendant.

Robert Radcliffe Lindsay Sands, the trustee in the estate, said that the sched-

ules were drawn up on the 12th September. The Mutual Society proved against the estate for £1,140 9s. 3d., which referred to interest or loans and capital repaid on loans. One of the items, £48 15s., was also proved by Mr. Michau against the estate, and the society had evidently paid this sum. The society had also proved against the estate for the Rev. Reinecke and Coetzee, which items were the subject of the charge of embezzlement. According to the schedules, the insolvent estimated his liabilities at £2,327 5s. 11d., and he valued his assets at £565 14s. The actual proved debts, outside the Mutual Society's claims, were £1,217 15s. 7d. This amount included £48 15s., which the Mutual subsequently paid to Mr. Michau. In July, 1903, the only assets he could trace which he was unable to trace afterwards, were a pair of horses. These horses would form the subject of an action between witness and the Union-Castle Steamship Company. The assets actually realised £179. This did not include two life policies of £200 each upon which the insolvent had, according to his books, raised a loan on the 29th July. Mr. Green had two accounts at the Standard Bank—one called "A. Green, Mutual account," and the other "A. Green, private account." Witness produced cheques drawn by Green upon this private account in favour of the Mutual: 7th July, £290 14s. 2d.; 15th July, £293 7s.; 6th August, £57 9s. 10d. On the 6th August the insolvent had been suspended from his duties. Witness produced copies of paid-in slips from the bank, showing that the insolvent paid in on the 29th July, £59 6s. 4d. (loan from the society) and £4 (rent received as agent). On the 31st July the credit standing to the insolvent's private account at the bank was £62 3s. 1d. There was an item of £64 18s. 5d. paid over to Mr. Smuts, who went up from the society's headquarters, by way of cheque and cash. This payment was made on the 6th August. The society said that it was made on the 4th August. Witness arrived at the conclusion that the 6th August was the correct date, because part of the payment was in the form of a cheque for £55 7s. from Michau and Hofmeyr, in favour of the insolvent. The society, he believed, claimed that this money was collected between the 1st and the 4th August. Witness found that between the 1st and 19th August all the moneys paid in to Green's credit had nothing to do with the Mutual Society, but referred to payments received for the Union-Castle Steamship Co. and his salary as secretary to the hospital. On the 27th May witness took action on behalf of one Du Plessis against the insolvent, in respect of a promissory note for upwards of £500. Green called and saw witness and another member of his firm. Green then said—

Mr. Searle objected that they could

not have evidence of what Green had said without calling Green.

Mr. Schreiner said that it was agreed between them that Green's health was such that it was impossible for him to give evidence.

The Court ruled that the evidence was admissible.

Witness (continuing) said that Green stated that if he were pressed by creditors, he should have to surrender his estate. His only assets consisted of his furniture and cart, and a few other things, and insolvent said that, if pressed, he would have to surrender. He added that he was willing to give his wife's endorsement to the bill. Witness advised Du Plessis not to accept this, but his advice was disregarded. The idea was that Mrs. Green was a woman of means; as a matter of fact, she was absolutely without means. Debts actually proved against the estate were not debts incurred after July.

Cross-examined by Mr. Searle: Of the debts proved, amounting to £1,217, all except an item of £48 15s. were personal debts, incurred by Green in connection with his own business. This item of £48 15s. referred to interest on a loan paid by Michau to the insolvent for the Mutual, and unaccounted for by Green. He was agent, not only to the Mutual, but also to the Union-Castle Company. Green also carried on a discounting business. He believed that Green was suspended on the 3rd or the 5th August.

By the Court: He believed that at the trial of Green the insolvent said that he did not regard the two accounts—the Mutual and private—as distinct; but that he used either as he thought fit.

S. Alexander Hofmeyr, of the firm of Michau and Hofmeyr, attorneys, Cradock, said that he took action on behalf of a client against Green for one A'Bertyn, the claim being about £60. A compromise was arranged, under which Green had to pay £7 a month. Green made three payments. On the 6th August Green came to see witness with three promissory notes, two of them being from Van Heerden and one from Myburg. Green discounted these promissory notes with witness's firm. The cheque for £55 7s., given to Green, was in witness's handwriting. The face value of the promissory notes was £64 10s., thus showing a difference of £9 3s. The difference consisted of £1 13s. interest, and £7 10s., payment for the month.

Mr. Schreiner closed his case.

John Robb, secretary of the defendant society, said he knew the insolvent, who was appointed agent for the Cradock district in March, 1898. The letter specified that Green should secure new business in the town and district of Cradock, collect renewal premiums,

and issue receipts and bank the money received in the name of the society from day to day. The first appointment was on the 4th March, and related to Kimberley; but later on in the same month Green was appointed to Cradock, to succeed Mr. Gie. The first three cheques—£290, £293, and £57 odd—were all of the same class, and were in payment of interest due on mortgage bonds of the society or loans on policies. These payments had nothing whatever to do with premiums. Green had regularly remitted amounts of this class half-yearly, in accordance with clause 16 of the Instructions to Agents. The interest came to the society both direct to the head office and through the insolvent. On receipt of the amounts, the society issued a receipt from the head office. Green's account would not be credited in any way with these amounts. Green might give a temporary receipt of his own when payments of this class were made, until the receipt was sent from the head office. Coming to the fourth payment in question, witness said that premiums had been received by Green as the Society's agent, and it was his duty to bank them as received in the Standard Bank. At the head office they calculated the premiums that were due, and they issued receipts during the previous month for collection. Green had to collect the premiums due, and to countersign the receipts. At the close of the month he had to make up an account, sending to the head office a remittance in settlement of all the premiums he had collected. After the expiration of the grace days, to which the insured was entitled, Green returned to the head office the unpaid receipts which should balance his account for that period. Witness produced counterfoils of receipts. Premiums payable on the 1st August were collected by the insolvent between the 1st and 4th, amounting to about £240. The inspector took charge of £178 lying in the bank in insolvent's name, and Green made up the difference of £64 18s. 5d., in cash. The inspector went up to Cradock about the end of July or beginning of August in consequence of some suspicion of irregularity on the part of Green. Green was enabled to commit the fraud by giving temporary receipts, and not notifying the head office of payments he received for the society. There were a large number of premiums every month unpaid. The insolvent received payments both for loans and premiums, for which he failed to account to the society.

Cross-examined by Mr. Schreiner: He did not apply to have the proceedings withdrawn, and he was unaware of the application made to that effect at the preparatory examination. Mr. Garlick represented the society when he made that application. He had satisfied himself

that all the items appearing in Green's letters as "interest items" did not include "premium items." If Mr. Green made application for loans on policies the forms might be sent to him and the loan effected through him. Mr. Green was called to Cape Town in order to make certain inquiries about his failure to bring in new business. After the trial, generally speaking, they recognised all the payments made by the persons appearing in the indictment. He did not realise that Green's book, which was at Cradock, was necessary to the case. The correspondence from Mr. Smuts, he thought, had no bearing on the case, otherwise it would have been produced. He had no idea that Green was in difficulties in July. When he got the letter from Cradock, asking for a receipt for a premium paid to Green, he did not become suspicious. He followed Green up with the inspector on receipt of a confidential letter from a friend in Cradock that a clerk of Green's had embezzled some £51.

After the adjournment witness produced the confidential letter, which was examined by the Court, and then handed over to Mr. Schreiner for his inspection, the Chief Justice remarking that he did not think the writer's name should be disclosed.

Further cross-examined: Witness went on to say that it was in consequence of this letter which was dated July 29, that the society suspected there was something wrong. About two months previously a letter had been written to Green requesting him to come to Cape Town. He admitted that the endorsement as to paying interest and principal on the pledge forms at the head office in Cape Town was a subsequent endorsement. Witness also produced a letter addressed to Green dated 27th April, in which the society complained that Green was not doing a sufficient amount of business, and suggested his removal to another district. On the 27th August they wired to Smuts stating that the Board would be willing to withdraw prosecution, if possible. They saw the Attorney-General, who said that he could not interfere in any way with the Magistrate's discretion. They then wired to Smuts to this effect, and asked him not to unduly press the case. Green had, in the meantime, thrown himself on the Society's mercy.

Charles Fischer Smuts, inspector of the defendant society, said he reached Cradock on the 3rd August. He checked the insolvent's July account and passed it. Witness asked him if he had seen the Rev. Reinecke in regard to Mr. Robb's letter. Green said it was not his business to go and see him. Witness saw Reinecke. Witness checked Green's account for August, and discovered a deficiency of £70 odd. He compared the amount in the bank and the receipts issued. He

saw that Green had issued premium receipts for £70, but that he had not paid over the money. Witness afterwards received a letter from Mr. Reinecke, and suspended Green from his duties. On the 4th he asked Green to pay in the premiums that were short. On the 5th or 6th Green presented bills in payment of the shortage. Witness declined to accept it, and Green went and discounted the bills, and handed witness a cheque for £55 7s., bearing the signature of Hofmeyr and Michau. Witness also received Mr. Reinecke's cheque for £8 17s. 6d., made payable to the secretary, and the balance of 13s. odd was sundry cash. To the best of his knowledge all the money had been collected on behalf of the society by Green between the 1st and the 4th August.

Mr. Searle read a letter sent by Green to the Board in Cape Town, stating that his clerk had absconded with a sum of £51 15s. 3d. He (Green) had also borrowed from policy-holders sums to the amount of £923, which he had intended to repay during that year.

Cross-examined by Mr. Schreiner: Mr. Garlick told witness that an action had been brought against Green in the Eastern District Courts for £600. Witness also inquired from the gentleman who wrote the confidential letter. He ascertained this on the 4th August. He did not know at that time that Green was in an insolvent position. On the 5th or 6th he learned that Green owed money to the storekeepers. It was true that on the 7th he wrote to his Board in Cape Town, saying that Green was "hopelessly involved," and that he had been living far beyond his means. He discovered on the 5th or 6th that Mr. Erasmus had a claim. After the 4th he heard that Mr. Green's wife possessed nothing. He found that Green was in debt all over the town, and that he had been borrowing sums of money from policy-holders. He did not bring pressure to bear upon Green to make a statement. He admitted, however, writing to the head office to the effect, "it was with great difficulty that he prevailed upon Green to make a clean breast of it."

This closed the evidence.

Counsel having been heard in argument.

De Villiers, C.J.: For the purposes of this case, I may assume that the insolvent was a creditor. I may assume also that the insolvent was agent of the society, and that he did not pay the moneys which are set out as the agent of the different other creditors of the society. I am clearly of opinion that, with regard to the payments, which are impeached up to the 20th July, there is no proof whatever of any intention on the part of the insolvent to prefer the society to his other creditors. The only payments in regard to which any question can possibly arise are the payments made early in August, namely, on the 6th Au-

gust. A payment was made in respect of premiums which had been received by the insolvent. It was the clear duty of the insolvent as the agent of the society immediately upon receipt of these premiums either to deposit them in the bank to a separate account, the account of the society, or to forward the amount to the society itself. Counsel for the plaintiff admits that if either of these courses had been adopted, the society would not have been liable, that if the money which was actually received by the insolvent had been paid over to the society, or if the money had been deposited in a bank to a separate account, and a cheque drawn upon the bank, on that separate account, the payment would have been in order. But he contends that because the payment was of a different nature, because the property had become vested in the insolvent, it became an undue preference when he paid over the amount, whether by means of a cheque of his own or by means of cheques of other persons. In my opinion, the payment which was made was made in the ordinary course of business; but it does not, in my opinion, affect the case in the least, whether the identical moneys were paid which he received, or whether he paid by means of his own cheque or by means of a cheque of another. It was the bounden duty of the insolvent immediately upon receipt of this money to pay it over to his principal, and it makes no difference what his mode of payment is, provided he does the duty of paying over to his principal. Certainly, I cannot see how the mode of payment can in any way affect the question as to whether it is in the usual and ordinary course of business. There is no proof whatever in the present case that the insolvent did not still possess the identical moneys which he received for the different premiums. It is quite consistent with the evidence that he might still have had the identical moneys in his possession. The fact that he gave the cheques of other persons does not affect the case in the least. The payment had to be made, and it is made in the ordinary and usual course of business. He happened to have a cheque in his possession which had been signed by others, but it made no difference whether that was his own cheque or whether it was the cheque of others. That cheque could be converted into money in the same way as the money itself which he had in his possession. The 86th section of the Insolvent Ordinance protects payments made under such circumstances, for it enacts "that every alienation, transfer, cession, delivery, mortgage or pledge as aforesaid, and every payment made by any insolvent to any creditor in the usual and ordinary course of trade or business, shall *prima facie* be held and taken to have been made or given bona

fide, and without intention to give to such creditor any preference, although such insolvent may at the time have contemplated the sequestration of his estate as insolvent, and in every case it shall be necessary for the trustee or trustees seeking to set the same aside to show the existence of some collusive arrangement, mutual understanding, or common consent between the insolvent and the creditor, the one to give and the other to get the preference over the other creditors of the insolvent under colour of a transaction in the usual and ordinary course of trade or business." In my opinion, there is no proof whatever in the present case of the existence of any such collusive arrangement, mutual understanding, or common consent, and in the absence of such evidence, I am of opinion that this payment is protected as a payment made in the ordinary course of business, and that the payment is consequently valid. The judgment of the Court must, therefore, be for the defendant, with costs.

Hopley, J., concurred.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

CUNNINGHAM AND CORTESE (1904.
V. RUTHERFORD. (Feb. 24th.

Sale and purchase—(Conditional purchase.

This was an action brought to recover the sum of £49 18s. 6d., being the balance of account for work and labour done, and material supplied.

The declaration set out upon divers dates between August and September, 1902, certain work was performed, and there was still a balance on account of £49 18s. 6d. in respect of the sale of an engine, and its erection on the mountain at the Wynberg Waterworks. The defendant refused to pay the balance.

The plea admitted the accuracy of the account, except the item of August 31. "sale of 6 h.-p. second-hand oil engine, £80," which the defendant disputed under circumstances detailed hereafter. He denied the sum of £49 18s. 6d. was owing, and said there was a balance in his favour of £40. In reconvention, the defendant claimed as follows: On or about August 19, plaintiff agreed to supply a 10 h.-p. oil engine, and erect it on Table Mountain for £95. It was part of the agreement that if the engine did not work satisfactorily up to the h.-p. mentioned, plaintiffs should repay the cost of the en-

gine and all expenses. The engine was erected, but did not work satisfactorily, and the defendant returned it, and also asked for the price and the expenses. Plaintiff refused to pay the £20 for taking the engine up the mountain and back again, also the other expenses incurred in making a concrete bed, £15, and other expenses, amounting in all to £50. Defendant says after deduction of the £90 there would be £40 1s. 6d. due to him.

Plaintiffs in their replication stated that the engine in question was a 6 h.-p. engine, and the price and additional £5 was charged for erecting. Plaintiffs denied the paragraphs as to the erection, and the other expenses incurred.

Mr. Burton for the plaintiffs; Mr. Upton (with him Mr. C. W. de Villiers) for the defendant.

Lyon Cortese, plaintiff, said that in August, 1902, Mr. Rutherford came to witness's workshop, and explained he had some aerial gear, and thought he would require a 10 h.-p. engine to drive it. Witness went up the mountain, and saw the gear which had been erected in connection with the Wynberg Waterworks. Witness told him he did not think a 10 h.-p. engine was required, and that he could supply him with a 6 h.-p. engine from Shepperd Bros., Stellenbosch, and would let him know the price in a few days. Rutherford said he would take the engine, which was ultimately sent up. The price arranged was £90 for the engine and £5 for fixing it. Rutherford wrote on the 19th August confirming the purchase, it being stipulated witness was to keep the engine in repair for six months. It was also agreed in the event of its not being suitable it was to be taken back, and the purchase money to be returned. This letter was brought by a Mr. Roberts, and as witness was not willing to agree to these terms, he told Mr. Roberts to take it back. Later on he found the letter in his order-book. Two fitters went up to fix up the engine, and they were occupied for about a fortnight. Rutherford had had another engine up the mountain, which was repaired by witness's men. Witness erected his own engine to work with the other, which was an 8 h.-p. one, and they worked satisfactorily. Payments were received in September and November, the last payment being on November 15. About the end of November, the defendant refused to pay any more. Defendant said he was dissatisfied with the engines, and asked witness to receipt the balance of £40, and he would return the engine, and later he asked witness to try and sell it.

Cross-examined by Mr. Upton: Witness was going to pay Shepperd the £90, if he got it. He had paid Shepperd £30 or £40 in respect of the purchase price of this oil engine. Rutherford came down on several occasions and saw the engine, and finally he agreed to buy it. Subsequently the bookkeeper brought a letter, the terms of which

witness did not like. Hence he crumpled the letter up, and told the man to take it back. The engine was afterwards taken up the mountain, and erected by witness's men. Witness did not know that the engine was barely strong enough to work an empty stone crusher, and that it would not stand any strain. There were not continual complaints about the engine. The expense of taking the engine up and down the mountain would be about £10.

By the Court: For a new engine, £20 or £25 would be charged for every horse-power. Half-price was charged for second-hand engines.

Fred Traves, engine-fitter in plaintiff's employ, said he went with another fitter to fix up the six horse-power engine on the mountain. They worked for a fortnight. The other engine was an eight-horse break. The engines worked in conjunction. Witness fixed up the engine in working order, and saw it working a couple of days before he came down. Afterwards witness went up to repair the other engine, which Rutherford said had been broken, owing to the carelessness of one of his own men. The cylinder had been broken, and this threw more work on Cortese's engine. The latter worked while the other was being repaired. It was driving the crusher satisfactorily. He could not say exactly what horse-power the engine was working to at the finish, but he was certain it would go over five horse-power. He had not seen the engine work the crusher when it was full of stone. It was not because they could not get the new engine to work that they coupled it to the other.

Robt. Jas. Meadwell, engine-fitter, formerly in the employ of the plaintiff, said he went with the last witness to erect the engine on the mountain. He was there driving the small engine for a fortnight, and the two together for a month. He could tell the small engine was working at about six horse-power. It was working very satisfactorily, and no one complained to him about it. When he left the engines were working well, and doing the work required of them. When he left, a man was put to work the engine who knew nothing about it.

Cross-examined by Mr. Upington: The six horse-power engine was old and worn, and was working at about five horse-power. After the cylinder and the valve had been put in, the engine worked all right for the six weeks witness was there.

John Robertson, formerly in the employ of defendant, said he remembered taking a letter from defendant to plaintiff. Witness read the letter to him. Cortese shook his head, and, so far as witness remembered, he intimated that he could not agree to the

terms of the letter. Witness did not remember Cortese saying anything about the ten horse-power engine. Witness returned to defendant, and told him Cortese did not agree to the terms of the letter.

Mr. Burton closed his case.

For the defence,

John Gibbs, engineer, said he made an inspection of the engine after it was brought down in October last. Two horse-power might have been got out of it, but it would hardly do more than work itself.

Charles Rutherford, the defendant, said in July, 1902, he had a contract to construct the masonry of the dam on top of the mountain. He had need of an engine to assist the one he already had up there. He saw the plaintiff, who had previously done other work for him. Witness asked him if he had an engine about eight horse-power, and plaintiff said he knew of one at Stellenbosch. Witness told him he had better come up the mountain and see the work the engine was wanted for. He went up with witness, and he (witness) explained that he wanted the engine to work the crusher. Plaintiff said the engine he had would run away with it, being 12 h.p. Witness went to see the engine, and remarked that it did not look to be like a 12-h.p. engine. Plaintiff said he would guarantee that it was 10 h.p. He described the work it had done for Shepherd, and witness was convinced that it was 10 h.p. Witness sent the letter on the 19th August by Robertson, who returned, and told him Cortese did not like the idea of undertaking to keep the engine in repair for six months. Witness saw Cortese next day, and the latter told him he did not like the stipulation about repairing the engine, saying witness might have an accident, and might expect him to do the repair, resulting therefrom. Witness told him the letter safeguarded him in this respect. Nothing was said about the power. Witness said he would not take it if he thought it would require repairs, and Cortese then agreed to the stipulation. The engine was taken up to the mountain, where it never worked satisfactorily. It failed to drive the empty crusher. He sent the engine down because it would not work, and he had to buy another engine of 13 h.p. in its place. The money witness had paid to plaintiff was not on account of the purchase price of the engine, but on the whole account between them. Witness paid £20 to get the engine up and down, and also put a concrete bed for the engine, at a cost of £3 15s. per yard. The bed was 9 feet by 4.

Cross-examined by Mr. Burton: The two engines when working together were not powerful enough to do all the

complained to Cortese about the work, to his knowledge. Witness had gone. Witness did not make a claim against Cortese before the latter brought action against him. He did not do so because he did not want to come into court.

F. D. Woodroff, superintendent of the new reservoir at Newlands, said that in August and September he was inspector for the Wynberg Municipality, and had to inspect all the work done by the defendant. He did not consider the engine ever worked in a satisfactory manner.

Cross-examined by Mr. Burton: He had had considerable experience in machinery and with mechanical appliances. He repeatedly complained of the engine being unable to do the work. As soon as they tried to put regular feeding into the crusher, the engine stopped.

Solomon Leyden, brickmaker, said that last year he wanted an oil engine, and he spoke to Mr. Humphrey. Subsequently he saw Mr. Cortese, who spoke of the engine that was with Mr. Rutherford.

This closed the evidence, and counsel having been heard in argument on the facts,

Buchanan, J.: The plaintiffs sue on an account for work and labour done, and for the price of a certain oil engine, which they describe in their account, as "our own make." The total account amounts to £154 18s. 6d. The items of the account for work and labour done are all admitted, and the only question in dispute is with regard to the engine, for which £90 is charged. On this account the defendant has paid from time to time certain sums amounting to £95, and there is also certain iron supplied by him to the defendant to be allowed for, leaving a balance of £49 18s. 6d. The defendant denies purchase of the engine charged in the account, but says that the contract was for an engine of a different kind, and he claims the right to have the engine supplied to him returned to the plaintiff, and the purchase price taken out the account. The whole question in dispute, therefore, is as to this engine. Some facts are common between the parties. The defendant had work on Table Mountain, for which he required certain engine power. The power was required in the first place for working an aerial tramway, and secondly to drive a stone crushing machine. The evidence showed that the engine of 8 h.p., which he then had on the mountain was not sufficient to do both these things at the same time, but that it would only do one or the other. Rutherford called on the plaintiffs, and asked them if they had an engine of 8 h.p., to supplement the other engine. He told the plaintiffs what he wanted this engine for. The plaintiff Cortese said he could not give his opinion as to the power of the engine re-

quired until he had seen the works. Cortese then went up the mountain and inspected the machinery for which the power was needed. Here we have a conflict of evidence as to what took place on the mountain. According to the defendant, Cortese said: "We have an engine which can run away with the work. We have an engine which can do work up to 12 h.p." Cortese, however, says he represented he had an engine which could do work up to 6 h.p., that this engine was at Stellenbosch, and belonged to Shepherd Bros., and that he would write to Stellenbosch and get the engine down, and sell it to the defendant. It was agreed that that engine should be sent for to Stellenbosch. It was sent for, and on its arrival it was erected in plaintiffs' workshop. Plaintiffs put the engine in order, and attached it to his own machinery to run it. The defendant, Rutherford, seeing the engine, said he did not think it was a 12 h.p. engine. In the course of conversation, Cortese is stated to have said he would guarantee it to run at least 10 h.p. Now this engine was designed and manufactured in Cortese's workshop, therefore Cortese must have known what its capacity was, and what work it could do. Cortese declared that he sold this engine as a 6 h.p. engine.

The defendant says he represented it as being of 10 h.p., and he agreed to take it as such. The engine was taken up the mountain, and when applied to the work, after a number of breakdowns and repairs, it is clear that it had not sufficient power to do what the defendants required it for. Cortese several times visited the mountain. After it had been put up, first the lining of the cylinder proved defective, and then some of the valves went out of order, and had to be repaired. After this occurred Mr. Woodroff, who has been called for the defendant, says that the engine was hardly of sufficient power to work the stone crusher when running "light," or, as he afterwards explained, when empty. It certainly would not crush the stone, and was therefore of no use to the defendant for the purposes for which he required it. The engine was taken up in August, and in September defendant took it down and removed it to his own yard in Chiappini-street. Cortese came there, and set up the engine, and it is common cause that it was resolved that the engine should be sold. Cortese says it was agreed that both he and the defendant should try to sell it to settle the account. The defendant, however, says it was for Cortese to sell it. In the direct conflict of testimony we have in this case it would be difficult for the Court to decide which of the accounts is correct, but we have written documents which very materially assist the Court in determining the issue. On the very day the bargain was concluded a letter was

written to Cortese by the defendant in which he confirmed the purchase, on condition that the plaintiffs maintained the engine in proper repair for six months, and guaranteed it to work up to the full power, namely, 10-brake horse power. Cortese says that when this letter was brought to him, he did not accept it as containing the true contract. He says that he threw it away, but he afterwards found the letter, and is able to produce it to-day. There was no repudiation of this letter, here is no reply to it; but after the receipt of that letter the engine was sent to the defendant. Rutherford says that the day after he wrote and while the engine was still with the plaintiff, he went to see Cortese. Some conversation took place between them, and defendant says Cortese agreed to the terms of the letter. Now here is a written statement of the terms of the contract made before any dispute arose, on the very day the agreement took place, which distinctly states that this was to be a 10-brake horse-power engine. This is not denied in writing at the time, and I am convinced that there must have been a representation made by Cortese to the defendant that this engine was of 10-brake horse power. I am sure, had the representation been made to the defendants that the power would only be 5 horse-power, as it is shown to be, in reality by the evidence, he would never have taken it, but that he took it relying on the representation that it was of 10-brake horse-power. On this fact, I must find against Cortese in this case. When the engine was brought down and erected in Rutherford's yard by Cortese, there were evidently attempts made by Cortese to sell it. Several people were communicated with, and there is a significant letter written by Cortese, in which he says, "It is now out of the question that we take the oil engine back from you. You have been asked three or four times to send it back, because we had a sale for it. Now, you had better keep it for good." This letter is altogether inconsistent with the idea of an out and out purchase, and quite consistent with the agreement to take the engine back if it were found not to be equal to the wants of the defendants. On these grounds I am of opinion that the defendant must succeed in this action. Deducting the amounts of the payments made, now the engine is declared the property of the plaintiff, there is a balance due to the defendant of £40 1s. 6d., and for this the Court will now give judgment. Some stress has been laid on the fact that payment had been made on account of the contract, instead of it being repudiated. But there were other items due by the defendant to the plaintiff, and the defendant made payment on the account generally. It was in September that the engine was taken down, and from that time to the present the defendant has not paid anything on ac-

count which would have the effect of ratifying the contract. The defendant claims, in reconvention, damages to cover his expenditure in taking the engine up the mountain and bringing it down, and in making a concrete bed, and he alleges that he has suffered £50 general damages in consequence of the breach of contract. No general damages have, however, been proved. But there has been a breach of contract, and the plaintiffs ought to pay the expenses which the defendant has incurred in taking the engine up the mountain and bringing it back. Cortese himself is willing to allow £10 as a fair charge for taking the engine up and down, and £3 for laying the concrete bed. I think £12 10s. will be a fair amount to give as damages, and this amount will be added to the £40 1s. 6d., making £52 11s. 6d., for which judgment will be given for defendant (plaintiff in reconvention), with costs. Plaintiff will be entitled to the engine on payment of the judgment and costs.

[Plaintiffs' Attorney: W. G. Coulton; Defendant's Attorneys: Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. } 1904.
} Feb. 25th.

Mr. Upington moved for the admission of Clemens Gutsche as an advocate.

The application was granted and oath administered.

Mr. Schieiner, K.C., moved for the admission of Charles Richardson Hime as an attorney. Counsel said that the papers seemed to him to be in order, but he observed that the secretary of the Law Society had noted that he was not prepared to certify as to the identity of the applicant. Petitioner, who was now at Butterworth, said that he had been admitted as a solicitor of the Supreme Court of Ireland. Affidavits of identity were put in.

Application granted, oaths to be taken before the R.M. of Butterworth.

Mr. Benjamin moved for the admission of Walter George Chubb as a conveyancer.

Application granted, and oath administered.

PROVISIONAL ROLL.

KRUMM V. BLACK.

Sequestration, compulsory—Petition of creditors—Proof of insolvency.

The petition of creditors for the compulsory sequestration of a debtor's estate must state clearly that the estate is insolvent and that it is to the advantage of the creditors that it should be sequestrated. The facts that considerable debts are due and unpaid and that judgments obtained against the debtor remain unsatisfied are not conclusive proofs of insolvency, but coupled with other circumstances, raise a strong presumption of insolvency.

Mr. Benjamin moved for the provisional order for the sequestration of the defendant's estate to be made final. Petitioners, who carried on business in Germany and England, said that respondent owed them £564, that he had not paid this amount, and that there were several unsatisfied judgments against him.

Mr. W. P. Buchanan, for the defendant, took objection that no specific grounds had been stated for the application. No reason, he said, was given in proof of the assertion in the petition that defendant's assets were less than his liabilities. The allegations were altogether too vague. Counsel proceeded to read an affidavit by the respondent, who stated that he had been caused considerable difficulty by the appointment of Mr. Harry Gibson as curator, on the granting of a provisional order on the petition of Hoffman. Mr. Gibson had locked the door of witness's office, and had refused him admission ever since the order was granted. Deponent was quite willing that the assets of his estate should be thoroughly realised, and that the proceeds should be paid over to some person elected to represent the creditors. He denied that his liabilities, fairly valued, exceeded his assets, fairly valued, and, therefore, that his estate was insolvent. Deponent declared that Mr. Gibson's attitude had been antagonistic to his estate throughout. He annexed two balance-sheets.

Mr. Benjamin read an affidavit by Max Franck, of Cape Town, representing the petitioning creditors. Deponent said that Black had grossly misrepresented facts, and had repeatedly made promises and given undertakings which he had failed to carry out. He had also given deponent a cheque which had been dis-

honoured at the bank. Mr. Benjamin also read an affidavit by Harry Gibson, who had been appointed *curator bonis* on the petition of Hoffman. Mr. Gibson, referring to the balance-sheets put in by the respondent, stated that he found the books to be unsatisfactory, incomplete, and unreliable. Goods were included in which the defendant had no property. Deponent unhesitatingly said that the estate of the respondent was hopelessly insolvent, and that the creditors would be fortunate if they obtained 10s. in the £. His conduct had been most unsatisfactory, and deponent had no hesitation in saying that the respondent was one of the most unreliable men he had ever met. Many of his transactions required thorough investigation. It would be in the interests of the creditors if the estate were declared insolvent and finally sequestrated. Counsel also read affidavits by Osmond Furniss, accountant, and J. E. Close, accountant, speaking as to the unsatisfactory state of the defendant's books. One of the deponents said that there were debts amounting to £800 against the estate, which did not appear in the books. Both stated that it would be in the interests of the creditors if the estate were sequestrated.

Mr. Buchanan said that no details were given on the petition, no specific points were brought forward, and the respondent had no definite allegations to meet. The specific allegations were laid in the answering affidavits put in on behalf of the petitioner, and to these affidavits the respondent had no chance of replying. The petition said that his liabilities exceeded his liabilities. That was not a proper ground; it was simply like saying that the respondent was insolvent because he was insolvent. It was said further that there were outstanding judgments against the respondent. It did not follow, however, because of that fact that the estate was insolvent. Counsel, referring to the affidavit of Mr. Furniss, asked how it was that he managed now to water down a credit balance of £1,000 to a debit balance of £1,192. According to Mr. Furniss's own showing in the balance-sheet, the estate would realise 16s. in the £. He submitted that if Mr. Furniss had proved anything at all he had proved that his own balance-sheets were most unreliable. He asked the Court to say that the petitioners had not proved conclusively, absolutely, and clearly that the respondent's estate was insolvent.

Without calling upon Mr. Benjamin, Buchanan, J.: I quite agree with learned counsel for the defendant that when a debtor has not committed an act of insolvency, any creditor who petitions for the sequestration of the debtor's estate under Act No. 3^d of 1884 must, in his petition, state certain requisites. This view of the law was exemplified in the application for the sequestration of the same debtor's estate

at a recent sitting of the Court. There the petition of the creditor, who was a creditor, for a sufficient amount to justify him in making application under the Act, did not state that the estate of his debtor was insolvent, or that it would be for the benefit of creditors to have the estate sequestrated, nor did he set forth the grounds upon which such statements were based. Affidavits were filed supplementing the petition, but the Court said the petition itself must set forth these requisites, and as that petition did not do so, the Court set aside the provisional order of sequestration. Thereupon other creditors of the defendant immediately took steps to have the estate sequestrated, and in their petition, which was presented in Chambers, they did state that the estate was insolvent, and that it was for the benefit of the creditors that the estate should be sequestrated, and they set forth the grounds on which such statements were based. These grounds were that the debtor owed a sum of £568, which was due and payable, and had not been paid, that there were several unsatisfied judgments against the defendant, and that it was for the benefit of the creditors that the estate should be sequestrated. True, these statements are not conclusive, but they raised a very strong *prima facie* case that the debtor was insolvent, and that it would be for the benefit of the creditors that the estate should be sequestrated. Now, on the return day of the summons issued on the petition, the debtor comes into court, and does not deny either the debt or that there are these unsatisfied judgments standing against him, but he denies that his estate is actually insolvent. It was open to him to do so, and he has attempted to prove by means of balance-sheets that his estate is not insolvent. It appears that the debtor got into difficulties, and had to place his estate under inspectorship, and that, for the purposes of this inspectorship, certain balance-sheets were drawn up. These certainly do show that the debtor's estate is not insolvent, but I need only take one of them to exemplify what reliance should be placed on these balance-sheets. One of these, made by Mr. Furniss, shows a slight balance in favour of the defendant. The defendant says some property was omitted from that balance-sheet. Mr. Furniss says this balance-sheet was drawn up wholly on information supplied to him by the defendant, but that, after looking through the books and accounts, and learning the actual facts, and after taking stock he says that the information supplied to him by the defendant was wholly unreliable. He states the books were not written up, and that there were creditors to the extent of £800 who were not brought up in the original balance-sheet. He says that, from his knowledge

of the estate from the actual state of the accounts, he has come to the conclusion that the estate would not pay more than 10s. in the £. The matter is reduced mainly to the question: Is the defendant insolvent or not? The petition set forth enough to raise a *prima facie* case of insolvency, the allegation of which was fully justified by the further investigation which had taken place.

The defence set up by the defendant in this case cannot be sustained. The provisional order will therefore be made final, and the estate adjudicated insolvent.

Ordered accordingly that defendant's estate be adjudicated insolvent.

[Attorney for Hoffman: F. B. Andrews; Attorneys for Krumm: Messrs. Tredgold, McIntyre and Bisset; Attorney for Black: A. W. Steer.]

HAMMERSLEY-HEENAN V. THOMAS.

Mr. Close moved for provisional sentence on a mortgage bond for £1,000, with interest *a tempore morae* and costs, and payment of £2 8s. 3d., premium of insurance, the bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

STAMPER AND ZOUTENDYK V. HEYNS.

Mr. Alexander moved for provisional sentence on a magistrate's judgment for £68 and costs (£2 odd), and for certain landed property to be declared executable.

Mrs. Heyns said she owed the money, but the debt was contracted by her husband, who was now an invalid. She could not pay at present. She had paid £82 odd of the total debt. She was to pay £7 10s. a month.

Mr. Alexander said that there had been no payment since October last. The original debt was £140.

Defendant said she hoped to be able to resume the instalments shortly. She had had negotiations for the sale of the land.

Order granted, execution to be stayed on payment of £7 10s. per month, the first payment to be made on the 1st March, payments to be continued thereafter on the 1st of each month.

WIENER AND CO. V. RABINOWITZ.

Mr. Struben moved for provisional sentence on a promissory note for £51 12s. 6d., with interest from the 10th February.

Order granted.

STANDARD FLOUR MILLS V. COHEN.

Mr. Gardiner applied for a provisional order for the sequestration of the defendant's estate to be discharged.
Application granted.

LITTMAN, LANDSBERG AND CO. V. FELDMAN.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Defendant said he had no statement to make.

Order granted.

THONON V. BURGER.

Mr. J. E. R. de Villiers moved for provisional sentence on a notarial bond for £150, less £50 paid on account.

Order granted.

SCOTT V. HEESON.

Mr. De Waal moved for a decree of civil imprisonment on a judgment for £8 15s. 5d., and £11 odd costs.

Defendant said that he was willing to pay £3 a month. He was a carpenter. He had no movable property, but he had a house at Plumstead which was mortgaged for £700.

Cross-examined: He did not know what the value of the property was. The house was at present untenanted.

Mr. De Waal said that the total indebtedness of the defendant was now about £30.

Defendant said he could pay £3 on the 1st March, and £10 in April.

Order granted, execution to be stayed pending payment of £3 on the 1st March, £10 on the 1st April, and £3 a month afterwards.

CAVANAGH V. THOMAS.

Mr. Benjamin moved for a decree of civil imprisonment on an unsatisfied judgment of this Court for three months' rent of house, £21.

Defendant said that he was only earning £12 a month. He was employed in the C.G.R. He had a wife and family to support. Witness had thought of letting off part of the house, but had been unfortunate. He was now paying £4 a month to other creditors. He was willing to pay £1 a month. When he had paid off the other £4 a month, he would be willing to increase his payments to plaintiff.

Order granted, execution to be stayed on payment of £1 a month, with leave to the plaintiff to apply for the amount to be increased when the other debt shall have been paid off.

**FLYTOHNER'S WHOLESALE { 1904.
AND OTHERS V. SKUY. { Feb. 25th.**

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Defendant asked for a postponement of the application, because he expected to be able to provide security. He was a shopkeeper and the proprietor of the property, he believed, would stand surety.

Final order granted, not to be enforced for ten days, to enable the defendant to obtain a surety.

ESTATE TILLEY V. GRUNEBERG.

Mr. C. W. de Villiers moved for provisional sentence on a mortgage bond for £5,000, with interest, and for the property specially hypothecated to be declared executable, the bond having become due by reason of notice having been given.

Order granted.

BRAND V. KOTZE.

Mr. M. Bisset moved for provisional sentence for £146, together with interest from the 3rd October and costs, upon an account signed by defendant as correct.

Order granted.

KAISER V. BANKS.

Mr. Close moved for provisional sentence on an unsatisfied judgment of the Magistrate's Court for £50 and costs (£1 19s. 7d.).

Replying to the Court, counsel said he did not know what was the object of this procedure. There would be no extra costs incurred by this application. The plaintiff had also an application to make for judgment, under Rule 319, for the cancellation of a certain lease and an order for ejectment from certain premises by reason of the rent not having been paid for a period of thirty days or more.

Provisional sentence and judgment granted as prayed.

ESTATE BULL V. LE ROUX AND FRANK.

Mr. Gardiner moved for provisional sentence on certain conditions of sale for £1,060, less £130 2s. 6d., paid on account, plaintiff tendering transfer.

Order granted.

HERMANN V. ABDOL KADER.

Mr. Benjamin moved for provisional sentence on certain conditions of sale for £45, due by reason of the defendant hav-

ing fallen in arrear with his instalments, whereby the whole amount had become due and payable.
Order granted.

IMMELMAN AND CO. V. HOFFMANN.

Mr. Van Zyl moved for provisional sentence on a promissory note for £249 10s. 9d.

The Court intimated that a telegram had been handed in from Dr. Steyn, stating that the defendant, who was at Moorreesburg, was unable to appear owing to an attack of influenza.

The matter was ordered to stand over until the 29th inst.

Postea (Feb. 29th). Provisional sentence was granted as prayed.

ILLIQUID ROLL.

VAN WYK V. MARKS, HIGH-^f 1904.
MAN AND CO. { Feb. 25th.

Mr. Alexander moved for judgment, under Rule 329d, for £34 9s. 8d., for services rendered and moneys disbursed, with interest and costs.
Order granted.

HANSON V. KAHN.

Mr. Buchanan moved for judgment, under Rule 319, in default of plea, for payment of the sum of £800, balance of the purchase price of the goodwill of a certain hotel, with interest and costs.

Judgment granted in terms of the declaration.

FARMERS' CO-OPERATIVE COMPANY LTD.
V. LONG.

Mr. Bisset moved for judgment, under Rule 329d, for £12 10s., the price of certain shares bought by defendant.
Order granted.

FARMERS' CO-OPERATIVE COMPANY LTD.
V. QUINN.

Mr. Bisset made similar application in this matter, the amount claimed being £25.

Order granted.

COLONIAL BUILDING CORPORATION (IN LIQUIDATION) V. GOLDSTEIN.

Mr. Schreiner moved for judgment in default of plea for £4,100, with interest and costs.

Order granted.

MCQUIRK V. ABRAHAM.

Mr. Sutton moved for judgment, under Rule 329d, for goods sold and delivered.
Order granted.

MCQUIRK V. BRENNAN.

Mr. Russell moved for judgment, under Rule 329d, for £67 10s., the price of certain horses and mules sold and delivered.
Order granted.

[Before the Hon. Mr. Justice HOPLEY.]

REHABILITATIONS. { 1904.
{ Feb. 25th.

Mr. Benjamin moved for the rehabilitation of John Ward. Counsel said that a similar application was refused in November, leave being then given to apply again in three months.

Granted.

Mr. C. de Villiers applied for the rehabilitation of Jan Gerhardus Joubert, whose estate was sequestered in October, 1898.

Granted.

Mr. Benjamin asked that a similar application on behalf of Max Rabinowitz might be allowed to stand over until the last day of term, in order that certain affidavits could be filed.

The application was ordered to stand over.

Postea (February 29th). The application was ordered to stand over till March 12th.

GENERAL MOTIONS.

Ex parte RIGG.

Mr. McGregor moved to make absolute a rule *nisi* under the Derelict Lands Act.

Mr. Russell appeared for the North End Congregational Church, Port Elizabeth, to oppose.

This was an application to have made absolute a certain rule *nisi* calling upon the Town Council of Port Elizabeth and all other persons concerned to show cause why the applicant should not be registered as the owner of certain land. The matter had on two previous occasions been brought before the Court by the Town Council of Port Elizabeth. (See 13 C.T.R. 210 and 451). There was now no appearance for the Town Council who had intimated by letter to the applicants' attorneys that they left the matter in the hands of the Court specially requesting that the interests of the Congregational Church should be protected.

It appeared from the petition, and the affidavits in support thereof, that the ground in question belonged in 1860 to

one Green, from whom the applicant alleged that the firm of W. and C. Rigg bought it in 1876. They had not, however, been able to obtain transfer, owing to Green having disappeared. Between 1881 and 1886, the firm paid rates on the ground, which was registered in their name on the Divisional and Municipal rolls. Petitioner stated that the property had been sold to him by the firm. The Town Council some time ago asked to have the ground declared to be the property of the Council, but Rigg appeared to oppose, and the rule was discharged. Petitioner prayed that the Court should order the registration of the title to the property in his name, subject to payment being made to the Town Council of Port Elizabeth of the balance of the purchase price not paid to the Council by Green, with interest due thereon, and of the unpaid rates due on the property.

Mr. Russell read an affidavit made by David Walter, Town Clerk of Port Elizabeth, in which deponent stated that the Council had permitted the Church to enter upon the ground when it was vacant, providing the Church indemnified the Council against any claim which Green or his representatives might afterwards make with respect to the lots. The Church had occupied the property *bona fide*, and had considerably improved it, and the Council, therefore, asked that the rights of the Church be protected.

A further affidavit was read, made by the treasurer of the North End Congregational Church. He said a church costing upwards of £2,600 had been erected on the property. The trustees had been under the impression that Green was the only person who had a claim, and as he had disappeared many years previously, it was not expected that there would be any interference with the Church's occupation. Deponent prayed the Court to protect the rights of the Church, as *bona fide* occupants and improvers.

Mr. Russell urged that applicant should be put to prove his claim by way of action.

Buchanan, J.: In giving judgment, said the matter of compensating the Church for any improvements they had made was not now before the Court, and would be a matter for subsequent adjustment. He saw no reason to doubt the *bona fides* of the present applicant, and he thought that the proper order of the Court would be to make the rule absolute, and to order that the petitioner Rigg be registered as the owner of this land, after, of course, he had satisfied the Town Council of Port Elizabeth for whatever sum might be in arrear on the land. Then Rigg became the owner of the land, and the Congregational Church might come to terms with him. If not, then possibly the Church might again come to the Court, who would then have to adjust the matter between them. The present application would be granted, and the rule made absolute. Costs of opposition would

have to be paid by the Congregational Church.

Ex parte WIEHMAN.

Mr. W. P. Buchanan moved for an order directing the Registrar of Deeds to pass and execute transfer of petitioner's seventh share in certain property situate in the Riversdale Division. The petitioner succeeded to the said property owing to the predecease of her father, who was a son of the testators, John Heindrick Wiehman and his spouse. The will bequeathed to "all our children already born or still to be born of this marriage, an equal share of all our landed properties which we may possess at the death of the first dying," and further imposed a condition (set out in Dutch) upon the legatees, which was translated thus: "Shall be able to let, sell, dispose of, or alienate only to each other, but to no stranger whatsoever, not even with the consent of all." Petitioner had sold her share for £100 to some one outside the family. The Registrar declined to register the transfer in view of the restriction. The question was whether the restraint applied merely to the children, or also extended to subsequent grades. Counsel argued that the restraint was only personal to the children.

The matter was ordered to stand over, pending further information as to the precise terms of the will.

CAPE TOWN TOWN COUNCIL V. COLONIAL GOVERNMENT AND HARBOUR BOARD.

Mr. Searle said that this was an application on notice to the Secretary for Agriculture and the Table Bay Harbour Board, calling upon them to show cause why the Government should not be restrained from making any grant or lease of certain land, pending an action to be brought by the applicants. A letter had now been received from Messrs. Reid and Nephew stating that the Government would undertake not to issue a grant to the Table Bay Harbour Board of land at Fort Wynyard, pending the result of an action to be brought by the Town Council next term, costs to be costs in the cause. To this letter the applicants had replied that they did not see their way to withdraw the application on condition that the action of the Town Council should be brought to trial next term, as they were anxious to have the matter settled. Circumstances might prevent them from being able to go to trial next term, as some of the material witnesses might be absent. Mr. Searle said that his clients were quite willing to accept the undertaking of the Government on condition that they (the Council) should make every effort to go to trial next term.

Mr. Howel Jones (for the Government) said that it might perhaps meet the matter if his lordship granted an interdict until the last day of next term, unless the action were previously brought, the applicant to have leave to apply again in case it were impossible then to go to trial.

An interdict was granted, the Government giving an undertaking not to issue a grant pending an action to be brought by the applicant, to be heard, if possible, next term, costs to be costs in the cause.

Ex parte CARSON AND ANOTHER.

Mr. Van Zyl moved for an order on behalf of the executors dative confirming the sale of certain property to the second named petitioner, who was the surviving spouse of the late owner.

Order granted as prayed.

SWARTZ V. FICK AND ANOTHER.

Mr. Gardiner moved for an order empowering the applicant to sell, surrender, or otherwise dispose of a certain policy of insurance effected with the Mutual Life Insurance Company of New York for £400, on the life of Johannes Fick, in favour of the second-named respondent (Maria Fock), his wife, and ceded by her to plaintiff as collateral security for a debt.

Buchanan, J., said that a telegram had been received from the Commissioner of Robben Island stating that the respondents were fever patients, that they had no funds to engage an attorney, but that the first-named respondent desired to defend the action. The matter would stand over until the 12th March.

Ex parte THE SECRETARY FOR AGRICULTURE.

Mr. Howel Jones moved on behalf of the Secretary for Agriculture for an order authorising the re-issue of certain titles. The petition stated that some years ago a grant was made to one Becker of certain erven at Vryburg. Becker had failed to pay the quitrent and the erven had been left derelict. Becker had disappeared, and could not now be found. Government now applied for leave to re-issue the titles. The erven had been sold by Becker to another person named Boyd, and the Government had been paid the arrears of quitrent.

A rule *nisi* was granted, calling on all persons concerned to show cause on the 15th April why the petition should not be granted, rule to be served on the Registrar of Deeds at Vryburg, and to be published once in the "Diamond-fields Advertiser" and in a Vryburg paper.

OHLSSON & CAPE BREWERIES (1904.
V. THOMSON. (Feb. 25th.

This was an application for an interdict restraining the respondent from interfering with certain water pipes belonging to applicants, and from allowing drainage from his premises to run on to the applicants' property. There had been an action between the parties in respect of their rights (see 11 C.T.R. 275), and the judgment of the Court on that occasion was supplemented by a written agreement. Applicants alleged that respondent had committed acts in violation of this agreement.

The respondent did not oppose the granting of the interdict in regard to the drainage, but claimed, so far as the water was concerned, that he should be allowed to attach a rubber pipe to the applicants' tap, to carry the water to his premises, pending the applicants providing a tank or tanks to enable respondent to exercise his dipping rights.

It was stated that the agreement had not been signed, but that it embodied the terms agreed upon by the parties in an interview.

Mr. Schreiner, K.C., for the applicants. Mr. Searle, K.C., for the respondent.

Mr. Searle said respondent was entitled to water, and if he were not allowed to take it as he had been doing through the pipe, he would not be able to get water until the tank was erected by applicants. Counsel suggested that the interdict should be granted, but that a time should be fixed by which applicants should provide a tank, the respondent to take the water through a pipe in the meantime.

Mr. Schreiner said that if the respondent would sign the agreement, applicants would undertake to provide a tank in a fortnight's time, defendant to take the water through the pipe in the meantime.

Mr. Searle contended the matter of the agreement was outside the case, and respondent could not be required to sign the agreement now. The applicants could proceed by action, to compel respondent to sign it.

Buchanan, J., said that an interdict would be granted, with costs, execution to be stayed for a fortnight, with leave to apply again.

Mr. Schreiner asked that it should be entered that it was by consent.

His Lordship: Very well, I can say "by consent of Mr. Schreiner."

Mr. Searle said he did not admit that the other side had any such rights. It should be also stated that the respondent, on his part, consented.

Buchanan, J.: I will enter it "by consent of both parties."

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and Sir JOHN BUCHANAN.]

ESTATESCHEUBLEV. GALPIN. } 1904.
ESTATE LLOYD V. GALPIN. } Feb. 26th.
ESTATE HUTCHONS V. GALPIN. }

Purchase and sale—Prescription.

In 1853, the late L. purchased certain lots of land from the late K., but did not receive transfer or occupation. In 1895, the executors of K. sold by public auction the landed property in the estate, including the interest of the estate in the said untransferred lots, which were purchased by the defendant, and transfer was passed to him. In 1903, the executor of L. instituted an action against the defendant for transfer of the lots by reason of the previous sale to L.

Held, that the claim was barred by prescription.

These consolidated actions came up for the hearing of argument on exceptions.

The issues in these three cases were precisely similar, and the following pleadings in Hutchons's case were in all respects similar to those in the other two cases.

The plaintiff's declaration was as follows:

1. The plaintiff is William Gurney Dixon, of Port Elizabeth, who sues in his capacity of executor dative in the estate of the late William Charles Hutchons, of Port Elizabeth; the defendant is George Luck Galpin, of Port Elizabeth, a medical practitioner.

2. Prior to the year 1853 the late Johanna Cornelia Korsten (born Hoets) and the late Maria Johanna Charlotta Chase (born Korsten) were the registered owners of the farm formerly called Papenkuilsfontein, and now called Cradockstown, or Cradock Place, situate in the district of Port Elizabeth, by deed of transfer, dated April 27, 1841.

3. On or about June 30, 1853, the said Mrs. Korsten and Mrs. Chase sold certain portions of the said farm, in lots, and the said late W. O. Hut-

chons purchased lots 24, 25, 65, 175, 177, and 184; transfer duty was paid on or about December 30, 1853, and the necessary declarations of seller and purchaser were duly made, but transfer was not passed.

4. Thereafter, after the death of the said late Mrs. Korsten, her executor transferred the half of the remaining extent of the said farm, registered in her name, to the estate of the said late Mrs. Chase, who had also died previously; included in the remaining extent transferred as aforesaid were the said lots purchased by the late W. C. Hutchons.

5. Thereafter the said remaining extent was transferred to several persons in succession, and on or about June 5, 1882, was transferred to one Francis Henry Carpenter.

6. After the death of the said Carpenter, to wit, on or about February 26, 1895, his executor sold by public auction certain portions of the said farm Cradock Place, and also "the interest in whatever claim the estate may have in the untransferred Korsterven," and the defendant purchased the said property and also the said interest; "the untransferred Korsterven" above referred to included the lots purchased by the said Hutchons, together with certain lots purchased by a certain J. Scheuble and a certain Lenox Lloyd.

7. The defendant purchased at the said sale with notice and knowledge that there were claimants to the erven or lots aforementioned.

8. The plaintiff has demanded transfer from the defendant of the aforesaid lots purchased by the late W. C. Hutchons, or in the alternative, damages calculated at the sum of £2,400; but the defendant neglects and refuses to pass the said transfer or to pay the aforesaid sum.

The plaintiff claims: (a) That the defendant be ordered forthwith to pass transfer to the plaintiff of the aforesaid lots, Nos. 24, 25, 65, 175, 177, and 184; or, in the alternative, payment of the sum of £2,400 as and for damages. (b) Alternative relief. (c)

The following was the defendant's exception to the declaration. Before pleading, the defendant excepts to the plaintiff's declaration, on the ground that the alleged cause of action arose in the year 1853, and has become barred by prescription, by reason of the lapse of time, and the plaintiff has now no right to sue on the cause of action alleged. Wherefore the defendant prays that plaintiff's claim may be set aside, and quashed, with costs. Should the above exception be overruled, the defendant further excepts to the declaration as insufficient, embarrassing, and bad in law, inasmuch as it alleges neither that plaintiff gave

(or was to give) any consideration in respect of the purchase of the lots in suit, nor what the consideration (if any) was, nor whether nor when it was paid; and, further, inasmuch as the plaintiff makes no tender of payment as against the transfer claimed by him in this action. Wherefore the defendant prays that the plaintiff's declaration may be set aside, and quashed, with costs.

Further, for a plea in abatement, the defendant says:

1. The plaintiff sues on an alleged contract of purchase, to which he does not allege that defendant was privy as a party or otherwise.

2. The plaintiff does not allege that defendant is in law a representative of the alleged seller of the lots named in the declaration, nor does he allege that the defendant is in any other way liable to plaintiff, than by having obtained transfer of the lots as one of a series of successors in title to the said seller.

3. The defendant became registered owner of the lots in 1897, and thereafter (but prior to the present claim having been brought to the notice of defendant), the defendant sold and transferred lots 24, 25, 65, to Mrs. Kerkhoff, who is now the registered owner thereof.

Lots 175, 177, and 184 still remain registered in defendant's favour.

4. The defendant contends that plaintiff in his declaration discloses no causes of action against defendant, and that, by virtue of the premises, the plaintiff is not entitled to the judgment asked for.

Wherefore defendant prays that plaintiff's claim may be set aside and dismissed with costs.

And should the above exception, and plea in abatement be overruled, but not otherwise, the defendant pleads over and says:

1. He admits paragraphs 1, 2, 4, 5, and 6 of the declaration, subject to what is hereinafter stated, more particularly with regard to the alleged purchase by Hutchons, and save that defendant says that the allegations in paragraph 6 as to sale to Lloyd and Scheubele are immaterial in this action.

2. As to paragraph 3 the defendant admits that on or about the date mentioned therein Mrs. Korsten and Mrs. Chase sold portions of the farm in lots, and that no transfer of any of the lots sued for has been passed; but the defendant does not otherwise admit the allegations in the said paragraph, and puts plaintiff to the proof thereof.

3. The defendant further does not admit (if Hutchons did purport to purchase the lots) that Hutchons or anyone on his behalf undertook to pay, or did duly pay, any consideration for the said lots, and the defendant puts plaintiff to the proof in respect thereof.

4. The defendant says that neither Hutchons nor anyone else on his behalf ever occupied any of these lots, but says that Mrs. Korsten and defendant's other predecessors in title, and defendant himself, always as registered owners, retained possession of the lots till defendant sold lots 24, 25, and 65 to Mrs. Kerkhoff.

5. The defendant sold the said lots for £550 (the full market value), in good faith and without knowledge that the plaintiff (who had never made any claim before), alleged any claim to the lots by reason of the sale said to have been effected in 1853.

6. The defendant is, and always has been, ready and willing, on reasonable proof being adduced by plaintiff that Hutchons bought and paid for, and is still entitled to claim the said lots, to pay over to plaintiff the proceeds of the lots sold as aforesaid.

7. The defendant, prior to summons, with a view to paying over such proceeds, asked plaintiff to furnish such reasonable proof, but plaintiff failed, neglected, and refused to do so.

8. The defendant contends that by reason of the fact that Hutchons and the plaintiff have delayed since 1853 in taking occupation or transfer, and in taking any steps in a competent court to obtain transfer, the defendant is justified, after this great lapse of time, in requiring reasonable proof of the plaintiff's right to claim as he now does, and in putting plaintiff to the proof of the allegations hereinbefore referred to, in order to protect himself against legal proceedings, especially at the instance of others who might be better entitled to claim than plaintiff.

9. The defendant says further that he is, and always has been, ready and willing to pass transfer of the lots still registered in his name to plaintiff, on being furnished with reasonable proof as aforesaid.

10. Subject to the above, defendant admits paragraph 8 of the declaration.

11. Should this Honourable Court find that the plaintiff duly bought and paid for lot 18, the defendant contends that he should not be ordered to pass transfer save in respect of the lots still registered in his name, and that he should not, in lieu of passing transfer of the lots sold by him, be ordered to pay to plaintiff more than the amount of the proceeds realised by the sale of the lots aforesaid.

Wherefore, subject to the above, the defendant prays that plaintiff's claim may be dismissed with costs, and that in any case, whatever order the Court may make, the defendant should, by reason of the premises, be held harmless and indemnified in respect of costs.

Plaintiff's replication was as follows: For a replication to the defendant's exceptions the plaintiff says that the same are not well founded in law, and prays that the same may be overruled with costs. And for an exception to the plea in abatement and to the plea of the de-

fendant, the plaintiff says that the said pleas are inconsistent, contradictory, and embarrassing, inasmuch as the first plea alleges that the plaintiff has no claim, and in the second plea the defendant tenders to pass transfer to plaintiff and to pay a certain sum in lieu of damages on proof of certain facts therein referred to. Wherefore, the plaintiff prays that the said pleas or one of them may be expunged, with costs.

And for a replication to the plea in abatement, in case the foregoing should be overruled, but not otherwise, the plaintiff says: He admits that defendant has sold and transferred lots 24, 25, and 65 to Mrs. Kerkhoff, but save as above he denies all the allegations of fact, and conclusions of law in the said plea, and joins issue thereupon and again prays for judgment, with costs of suit. And for a replication to the defendant's plea should the foregoing exception be overruled, but not otherwise, the plaintiff says: He admits that neither he nor the said Hutchons had possession of the said lots, and that the defendant and his predecessors in title had possession thereof, but he says that such possession on the part of defendant was wrongful and unlawful; he admits that the defendant sold and transferred lots 24, 25, and 65 to Mrs. Kerkhoff; he denies that the price mentioned by the defendant as having been obtained by him was the full market value of the property; save as above, and save in so far as the said plea admits any of the allegations in the declaration he denies all and singular the allegations of fact, and conclusions of law in the said plea contained and joins issue thereupon and again prays for judgment, with costs of suit.

Mr. Schreiner, K.C. (with him Mr. Close) for the executor. Mr. Searle, K.C., for the respondent.

Mr. Schreiner, in argument, said that the contract of purchase was alleged to have been entered into in the year 1855. Fifty years had passed, and thirty years were sufficient to kill an action if it be a personal one. The authorities were clear on that point. Whether the original purchaser had knowledge of these contracts or not, the principle remained that if a person did not pursue his claim for thirty years he was barred. Here nothing was done to preserve the title or to interrupt the currency of the prescription of the personal action. Counsel referred to *Van der Linden* (Henry's edition, p. 274) *Cod.* (7-39-3) and *Gronewegen in loc. Bykershoek Quaest. jur. Priv.* (lib. 2, Cap. 15). See also *Voet* (44-3-8) and our Act 7 of 1865, Sec. 106. These authorities show that 30 years' lapse would kill an obligation of a personal character.

[De Villiers, C.J.: Supposing the purchase price had been paid at the time, what do you say would be the position?]

Then it would still be the same; the

lapse of time would extinguish the claim. Counsel submitted that there was a strong legal presumption that there had not been payment, because the purchaser would, in the event that he had paid, have sought possession of the property.

Mr. Searle argued that this was an effective claim for rectification of transfer. The defendant only bought any interest the estate of Carpenter might have in the untransferred property. He submitted that it was clear that there was intended to be a transfer, and that the Court would treat the question of rectification as a matter of equity. He cited the case of *Simon* (Buchanan, 1879, p. 10), and contended that the whole of the facts ought to be put before the Court in order to determine whether in equity the plaintiff was not entitled to transfer.

De Villiers, C.J.: I am of opinion that the exception that the plaintiff's claim has been barred by prescription is a good one. The purchase upon which the executor of the purchaser now relies took place as far back as 1855. No transfer was effected in favour of the purchaser, and he did not obtain occupation of the lots of land. It does not even appear that he ever paid the purchase price. In 1885, the executor of the former owner sold by public auction the landed property in the estate, including "the interest in whatever claim the estate may have in the untransferred lots of land." The defendant purchased the land including the lots, and received transfer thereof. The executor of the original purchaser now claims transfer of the lots from the defendant, and the objection has been raised by exception that the claim has been barred by prescription. In my opinion, the claim falls within the ordinary rules relating to prescription. Even if the 106th section of Act 7 of 1865 does not apply, the period of one-third of a century having elapsed since the cause of action accrued, the claim is barred by prescription, and the exception must be allowed, with costs.

Buchanan, J. concurred.

[Plaintiffs' Attorneys: Walker and Jacobsohn; Defendant's Attorney: G. Trollip.]

GENERAL MOTIONS.

Ex parte THE EXECUTOR { 1904.
OF THE ESTATE OF SAMOA. } Feb. 26th.

Mr. Alexander moved to have an interdict discharged. The interdict was granted pending an action to be brought by one Bydien, but the latter did not appear at the trial, and judgment was given for absolution from the instance. The Court did not, however, specifically

direct that the interdict should be discharged.

The interdict was discharged, costs to come out of the estate.

Ex parte ALLY.

Mr. Pyemont moved for an order authorising the issue of a certified copy of certain mortgage bonds. Counsel stated that the matter had previously been before the Court, and was ordered to stand over for a report from the Registrar. The Registrar now reported, recommending that a rule *nisi* should be issued.

A rule was granted as recommended by the Registrar, to be published once in a Cape Town newspaper.

Ex parte MALAN AND ANOTHER.

Mr. W. P. Buchanan, for the applicants, said that the application was one for an order authorising the registration of certain property. The matter was before the Court some time ago, and was then ordered to stand over pending further information as to whether the sale was a good one and well advertised. He now produced affidavits showing that the sale had been well advertised, and that the amount realised was very satisfactory.

Application granted.

Ex parte WEYERS.

Bequest—Mutual will—Portions payable to daughters.

A husband and wife, by mutual will, bequeathed to their sons certain land, on condition that they should one year after the death of the survivor pay certain portions to their sisters, and that the testators should retain their full rights over the said land during their lives. The testatrix died, and the survivor relinquished his rights under the will. The respondents obtained transfer and claimed the right to alienate the land without first paying or securing the portions of their sisters.

Held, that the sisters were entitled to an interdict, restraining such alienation.

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This was an application made by three sisters, daughters of certain testators, against four

brothers, of whom, however, one did not oppose, for an interdict restraining them from mortgaging or alienating certain farms without securing to them (applicants) the amounts which respondents had to pay to them after the death of the surviving testator, who had renounced his life interest and given the sons transfer of the property. Respondents denied that they had any intention of mortgaging or alienating the property, and claimed that they were not required to make payment of the bequests to the applicants until a year after the death of the surviving testator.

The will bequeathed certain farms to the respondents on condition that the four should pay out to two of the applicants a sum of £150 each, and to the other a sum of £200, which moneys must be paid a year after the death of the survivor, testators reserving to themselves their full rights on and over the properties during their lifetime.

Applicants now asked that the respondents be ordered to pay them the sums stated in the will, or to secure payment to them, and that they be interdicted from selling, mortgaging or encumbering the property until petitioners were satisfactorily secured by them.

Mr. W. P. Buchanan for the applicants; Mr. Cloos for three of the respondents.

After hearing counsel,

De Villiers, C.J.: The bequest to the respondents was a conditional one, the condition being that the sons, that is, the respondents, shall pay to two of their sisters, the present applicants, the sum of £150 each and to another sister the sum of £200 one year after the death of the survivor, together with interest thereon at the rate of 4 per cent.; and that they (the testator and testatrix) shall retain their full rights on and over the said property during their lives. Now, in my opinion it is clear the intention of the testators was that there should be no transfer to the sons until the money was paid to the daughters. It is true the will says that the money shall only be paid after death of the survivor, but it does not say that transfer shall take place in the meantime, and, in strictness, the transfer ought not to have taken place until one year after the death of the survivor unless the sons were willing to pay their sisters the money. It was assumed by the testators that there was to be no transfer until after the death of both, because the testators were to retain their full right on and over the property which they could not retain if there was transfer during the lifetime of the survivor. Now, it appears that the survivor has relinquished his rights under the will. Of course he was at liberty to do so, but he could not, by doing so, deprive

the daughters of the portion which had been secured to them. They remain entitled to the rights they had, viz., that there shall be no transfer to the sons until the money had been paid out to them. The applicants are now entitled to an order restraining the respondents from making any alienation or encumbrance of the land until each respondent has paid the amount owing by him or has found security to the satisfaction of the Resident Magistrate of Aberdeen.

[Applicants' Attorney: Mostert;
Respondents' Attorney: G. Trollip.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

SHUTTE V. HEDLEY BROS. { 1904.
 { Feb. 26th.

Building contract.

This was an action brought by Walter Percy Shutte, law agent, of Prieska, against Hedley Bros., store-keepers, also of Prieska, to recover damages in the sum of £500 for alleged breach of contract in reference to the sale of certain land.

The declaration set out that the plaintiff purchased the erf numbered 120 at Prieska from the defendants in February, 1901, for the sum of £575, which was duly paid. At the time of the said sale, the defendants represented to the plaintiff that they had entered into an agreement with the Colonial Government whereby the Government would lease for the purposes of a Post Office a certain building to be erected by the defendants upon the said erf at a yearly rental of £25 for a period of three years from April, 1901. It was a condition of the said sale, and part of the consideration of the said purchase price, that the defendant should erect upon the said erf the building to be so leased, and it was specially warranted that the said building should satisfy the requirements of the postal authorities, and be passed by them when completed. It was a further condition of the said agreement that there should be payable by the defendants to the plaintiff a further sum of £3 a year for three years. The defendants did not erect and complete the said building until April 30, 1903, and the said building, when completed, did not satisfy the requirements of the postal authorities, who had refused to pass the said building. The defendants had not assigned to plaintiff any right, title, or interest in the Colonial Government. The defendants had wrongfully and unlawfully failed to carry out the said oblige-

tions. The profit of the said agreement had been lost to the plaintiff, the said building was practically valueless, and the said erf was much less valuable, and, otherwise, the plaintiff had sustained damages in the sum of £500, for which he prayed judgment with costs.

The defendants, in their plea, admitted the formal allegations, and craved leave to refer to the written contract of the 8th February, 1901. They denied that the plaintiff was the registered owner of the said erf, and said the firm of Shutte Bros. were the owners. They admitted having entered into a contract with the Colonial Government for the erection of a building on the said erf for Post Office purposes, and said they informed the plaintiff of the conditions of the agreement. They admitted that the building was not completed until April, 1903, but said that that was due to causes wholly beyond their control, arising from the war, and the impossibility of obtaining material and labour. They denied that the building did not satisfy the requirements of the Post Office, or was unsuitable for that purpose, or that the postal authorities refused to pass it. The plaintiff objected to certain windows and a door which opened on to the adjoining Government erf, over which he claimed a right of way. The said building was erected to a plan with which the plaintiff was acquainted. They denied that the building was useless or valueless to the plaintiff, or that the erf was of less value to the plaintiff. They denied that the plaintiff had sustained any damage, and prayed that the claim should be dismissed with costs.

The plaintiff, in his replication, admitted that he objected to the windows and door, inasmuch as their position was wholly unsuitable, and would render the said windows and door useless in the event of a building being erected on the adjoining Government erf. Except as above, he denied the allegations of the plaintiff as to fact.

The rejoinder of the defendants was general.

Mr. Gardiner (with him Mr. Upington) for the plaintiff. Mr. Searle, K.C. (with him Mr. Benjamin) for the defendant.

Mr. Gardiner, with the consent of the other side, made certain modifications in the declaration with regard to the ownership of the land, and the tense of one of the paragraphs.

Walter Percy Shutte (he plaintiff), said that when the declaration was drawn, he did not know that the transfer had been passed to his brother and himself. On the 8th February, 1901, he entered into certain conditions of sale. No mention was made therein as to the erection of any building. On the 9th February he received a letter from the defendants, in which they said, "We beg to confirm the sale of the said erf under the following

conditions: The price paid, viz., £575, is for the erf as it now is, but we take the responsibility of erecting and handing over to you a new building to be used by the Government as a post office, the said building to be completed in due course, and passed by the postal authorities as per our agreement with them. In addition to the rent from the Government, £25 a year, we guarantee you an additional £3 a year for three years." Witness did not see the agreement with the Post Office. Defendants told him that the building would be completed about April, 1901. He had never seen any plan of the building. Defendants gave him no particulars whatever as to the building; he trusted to their treating him properly, and he was wishful to have this assured income of £25 a year from the property. There was a cottage at one corner of the erf. He saw the building erected from the foundation to the roof. He did not know where the pegs of his erf were, and how close the building was in proximity to the Government erf. The building operations were commenced in February, 1901, and were then stopped. He complained about the delay to the defendants, but did not write until April, 1902. The defendants wrote stating that owing to the military having commandeered wagons they could not go on—but they had reason to believe the Government would renew the agreement. Witness's firm wrote asking to be allowed to see the agreement. No reply was received. In June they again wrote to the defendants urging steps to be taken to complete the building. The defendants replied that they were unable to secure transport. Further correspondence ensued. The defendants, he believed, were military contractors and had under their charge hundreds of wagons. In August, 1902, witness's brother succeeded in getting furniture up. He should think the defendants would have been able to obtain the necessary materials to complete the buildings. The defendants resumed work on the building in February, 1903. He thought that work could have been resumed a month or two after the cessation of hostilities. He inspected the building at its completion, and he discovered about December, 1902, that it was built within four inches of the boundary of the Government erf No. 121. The step of the building was actually built on the Government erf. A man could not enter the door without trespassing on the Government erf. This door was to the postmaster's intended sleeping room. There would not be room to put up scaffolding to build on the Government land.

By the Court: If the door had been blocked up and placed on the other side of the building all difficulties would have been removed.

[Hopley, J.: Is it because that was not done that you are in the Supreme Court to-day?]

Witness did not reply. Continuing his evidence, witness said he saw John Hedley with regard to the matter between December and April, 1903. Witness's attorneys wrote to the defendants. In April the Post Office authorities were erecting fixtures in the new building. In April Mr. Campbell, who was an official of the Post Office, was in town, and he informed witness that they could not take the office. He afterwards saw another official of the department. Witness objected to the position of the door and windows, and asked that they should be removed to where he directed. That was not done. He had not been paid £3 a year mentioned in the defendant's letter. One of the walls of the building was tumbling, because the down pipe was only continued half way down the building, and the rain had splashed against the wall and washed out the lime.

[Hopley, J.: I thought the complaint at Prieska was that you had not had rain for three years?]

We have had seven inches now.

[Hopley, J.: Oh, this has happened since the rain has come?]

That is so. Continuing, witness said that it would cost £5 to remove the door to the other side of the building. It would cost a similar amount to remove the windows to the other side.

Hopley, J., said it would be impossible to put further windows on the other side of the building, the rooms were so small.

Witness said he had had an offer of £3 10s. a month for the building soon after hostilities had ceased.

By the Court: He could not get an offer like that to-day. When he had the offer the building was incomplete. Other buildings had since been erected.

Cross-examined by Mr. Benjamin: The erf occupied a central position in the village. He had not seen a letter by the defendants in which they undertook to complete the building within three months, "provided we are not prevented through the intervention of the military or other unforeseen circumstances." Witness knew nothing about that condition. He was clerk of the Municipality. He knew there had been a certain amount of feeling in the village in regard to the lease of the premises by the Government as a Post-office. Mr. Hedley was chairman of the Municipality. A resolution was not taken by the Municipality in regard to the contract. He had not seen a letter sent by Mr. Hedley, chairman of the Municipality, to the Postmaster-General, stating that at a meeting of the Council it was resolved that they should write a letter pointing out the unfairness of giving Hedley Bros. the contract for the new Post-office. Such a letter did not appear in the Council's letter-book. The Municipality passed a

resolution censuring Mr. Hedley as chairman of the Municipality for writing to the Postmaster-General on private matters. He admitted that there appeared an entry in the minutes in regard to a private letter between Mr. Hedley and the Postmaster-General; he did not, however, remember the letter. The building had not been commenced when he entered into the agreement with the defendants; there was not a stone in the ground. Mr. John Hedley had not previously shown him the plan now produced. He left everything to Mr. Hedley at that time. He did not trouble as to pegs and so forth. The conversation with Mr. Campbell took place in April, 1903. On that occasion witness asked the Post-office to take over the building, and he requested Hedley to alter the windows. He suggested to Mr. Hedley to overcome all obstacles that he should buy a strip of land from Government. Mr. Campbell could not give him a definite answer at that time. Witness stipulated that he should have access over the Government land or the removal of the door. Mr. Hedley offered there and then, if Government would occupy the place, to alter the windows and door; but witness said he must have £50 compensation from Hedley for delay in the completion of building. Mr. Hedley, Mr. Murray, and witness's brother were all present at the interview. Witness did not ask for a servitude from the Government. Mr. Campbell at first gave him a negative answer; then he said he was a subordinate, and would have to consult his superiors at De Aar, and promised to let witness know. Witness received no answer. He admitted having said, after the Government refused to take the building, that he did not care whether the Government took the building or not, as he could get £3 or £3 10s. a month for it. Property had appreciated in value in Prieska since the war. The erf occupied a position in the very centre of the village.

Witness estimated the value of the erf and the buildings erected on it at £2,000. He had expended about £1,500 on it, in addition to the store, dwelling-house, and stable, and had had the ground fenced. This property was let at £10 a month.

Re-examined by Mr. Gardiner: The Council were indignant because Mr. Hedley used the Council's name in writing to the Postmaster-General for private ends.

By the Court: The public were agitating to have new offices built. Mr. Hedley and himself, as chairman and clerk, pointed out to the Government that the office would be inadequate. The Council objected that he used the Council's name for his own

private matters without their consent.

Without prejudice, he must admit that it was a very nice little Post Office, as far as the inside was concerned.

The evidence of one Robert Copelin, taken on commission, was read in reference to a plan put in.

Mr. Gardiner closed his case.

Robert George Hedley, of the firm of Hedley Bros., storekeepers, Prieska, said witness and plaintiff wrote a joint letter to the Government complaining of the inadequacy of the Post-office. In consequence of those representations, witness was approached by the Government with regard to the erection of a building. In January, 1901, an agreement was entered into, the Government accepting witness's offer. Witness's firm commenced building operations at once. When the sale to Shutte took place, the building had been erected to a height of 4 or 5 feet. There were pegs in the ground showing the boundaries of the different erven. Plaintiff went along with witness to the erf, and saw the boundaries of the erf. Witness also showed plaintiff the plan which had been submitted to the Government. Witness showed it to him before the sale took place. The only alteration between the plan and the building erected was that a door was placed between the two rooms. Plaintiff was given every opportunity to see the letters which passed between Government and witness as to the Post-office. They gave no special warranty or guarantee to Mr. Shutte outside the letter. They made every effort to have the building completed, but it was impossible to complete it before it was actually finished. At the beginning of 1902 he came down to Newlands. His brother, John Hedley, afterwards had charge of the business at Prieska. They had great delay in connection with getting timber up. The delay was caused by the difficulty in getting trucks and delays on the railway, and the transport from De Aar was still in the hands of the military. Materials were commandeered by the military at De Aar, and had to be ordered three times over. They undertook to have the building completed provided they were not stopped by military intervention or other unforeseen circumstances. Except wood and iron goods that had to be got from outside, they carried the building up as far as they could.

Cross-examined by Mr. Gardiner: They had charge of the transport under control of the military officer. They were not provided by the military. Later on, wagons had to be conveyed. The conveyance commenced about the end of 1901. He could not remember whether martial law was withdrawn about the end of July. They continued after hostilities ceased to

be military contractors. Even then they could not put through their own goods without authority from the military. He did not consider that the building was in a very awkward position. The door at the side was only to be used by the Government for Post Office purposes. There was access to the building from three sides. Windows could be put at the front instead of at the side. The building was put close to the Government erf in order to save land. If he had been putting up the building for himself, he should have put it in the same place. They were prepared to pay the plaintiff £3 a year; he admitted they were liable, but he supposed it had been overlooked.

Re-examined: He put in this extra £3 a year in order to make up what Mr. Shutte considered would be a reasonable return for his outlay. Mr. Shutte did not consider £25 a year would be sufficient. He had never had a demand for this £3 a year.

John Hedley, a partner in the defendant firm, and brother of the last witness, said he went up to Prieska in July, 1902, his brother having left about the beginning of that year. When witness arrived he found that the brickwork was about completed. He made efforts to get the material through. The first material arrived about the middle of August, 1902, and consisted of wood and iron. Shortly afterwards, he put on a man to proceed with the erection. The rest of the material was received in December. The Government installed their wires about the end of March, 1903. Mr. Campbell, the Government inspector, approved the building in April; the Postal authorities were anxious to get possession. At the interview when the Bros. Shutte were present, Mr. W. P. Shutte pointed out that he wanted a right of way or must have the door and windows removed. Witness said he would remove the door and windows to any position the plaintiff desired. Shutte made no answer. On a later date plaintiff made a claim for £50 compensation, because he had not been given possession sooner. There was no reason why the Government should not have taken over the building except for plaintiff's demand for a right of way.

Cross-examined by Mr. Upington: Martial law was withdrawn about August, 1902. No restrictions had been removed before then as regarded transport. Their contract with the military ceased at the end of hostilities. Their wagons were engaged to carry the materials for this building from De Aar. They had great difficulty in 1902 or 1903 in obtaining labour. There was plenty of labour at the beginning of 1901, when the building was commenced. The last lot of materials came to hand in December, 1902, and the building was not completed until April 30, 1903, but they were then unable to get forward rapidly

with the work, owing to the scarcity of labour.

William Thomas A. Todd, a partner in the firm of J. B. McIvor, forwarding agents, De Aar, gave evidence as to the difficulty of getting goods through to Prieska during the war, and the restrictions imposed by the military. Certain building materials consigned to the defendants were commandeered by the military in 1901. There was one consignment that was lost by the railway. Some material was detained at De Aar, and could not be sent through. Eventually it was lost, probably stolen. Witness ordered a third lot from Port Elizabeth. They were doing their utmost to get materials through to Prieska. Hedley Bros. were constantly "worrying" them about it. Immediately after the war was over, practically all the transports were food stuffs, Prieska being almost without. There was a huge block of material at De Aar from soon after the war broke out. The block had only recently been cleared. Their store was choked with goods, and they had to keep a lot of goods in the open. Part of the timber intended for Hedley Bros. was probably stolen by passing troops.

Arthur Campbell, of the Postal Department, said that he inspected the building, and found that it was eminently suitable for the purposes of a post-office. At an interview that they had, Sidney Shutte (who was the spokesman) said that they must have a servitude before they could accept the building. It was a very suitable place; it was a lovely building. The furniture was second to none. In fact, he had never seen a nicer post-office in the whole of his peregrinations.

By the Court: As far as he knew, had it not been for the question raised by Shutte Bros. the Government would have taken over this building.

James M. Forbes, an officer of the Postal Department, said he authorised Mr. Young, as representing the Post-office, to accept Mr. Hedley's offer in regard to the office at Prieska. Witness also gave evidence as to the difficulties of transport.

By the Court: The plaintiff himself was the sole obstacle to the Government taking over the building.

Cross-examined by Mr. Gardiner: They did not raise any objection as to the building being on the boundary of the Government erf.

Counsel were then heard in argument on the facts.

Hopley, J.: It seems to me that in this litigation what ought to be small issues had been magnified into large ones, and that the expenditure of very little money, and the exercise of a certain amount of common sense and forbearance at one period must have saved the parties being involved in this expensive law suit. On the evidence.

I am of opinion, after careful consideration, that the foundations and portions of the walls of the building had been built when the defendants entered into the contract with the plaintiff. At the circumstances point in favour of this view, and I think that Mr. Shutte was wrong when he said that he did not see the building before he bought the erf. His recollection did not seem clear on several points, and I think that he was too much of a man of business to enter into a contract without knowing something definite as to its terms. If, however, I am wrong as to the plaintiff having seen the building actually laid down before he bought, and if the building was started after he had bought, plaintiff could have no grievance as to the position in which it was placed. The conditions of February 8, 1901, stipulated that from the date of sale and purchase the building shall be and remain solely at the plaintiff's risk, loss, and profit, so that the ground was then his piece of ground; it was at his risk, loss, and profit, and it was his business to see that nothing was going to be put on that ground which might possibly deteriorate or affect its value. Furthermore, I am not by any manner of means satisfied that any complaint could be made, because the building was put right upon the boundary. I am not certain that in some aspects it was not an advantage, and did not add to the value of erf 120 because the owner of the adjoining property, in order to obtain light and air, would have to build further back on his own land. At all events, there is no thing in law to prevent a man from building up to the extreme limits of his ground, and that was done in this case. The defendants in their letter to the plaintiff following the sale said that the building was to be erected as per the agreement with the postal authorities. It seems to me that a man in the position of the plaintiff, upon receiving that letter, must have been placed upon inquiry, and it seems inconceivable that he did not fully enter into and find out every bit of the agreement that there was between Hedley Bros., and the authorities. I personally believe that the plaintiff was not so much asleep in his own interests as not to say, "Let me know exactly what this agreement is." I think Mr. Hedley's memory in this matter must be trusted more than Mr. Shutte's. With regard to the alleged delay in the completion of the building, I see it was said, and said quite rightly, that when there was a state of war intervening people's contracts must be construed by the state of affairs that was going around them, or what they had a right to expect, and if there had been no provision in this contract, and defendants had simply undertaken, without any conditions, to complete the building within three months, it is possible that they might have been held to their contract hard

and fast on the ground that they had no business to enter into such an indiscreet contract. But having regard to these very circumstances, they were prudent enough to introduce the clause protecting themselves against "the intervention of the military or other unforeseen circumstances." I think the plaintiff knew of the existence of that condition. Then I have to decide as to whether that building was such a building as was stipulated for in the contract. So far as I can see the only real grievance the plaintiff has against this building is that it was built right along his boundary line, and that one of the doors was so placed that in certain eventualities he might be blocked from coming out of that door or afterwards be held liable for trespass on the adjoining ground. It seems to me all that was removable for a small outlay. The Government were perfectly satisfied with the building, and they were only stopped from becoming tenants by the plaintiff himself, who raised the question of a servitude being given him over the adjoining erf. The next point was whether the building having been built as stipulated, there was any unreasonable delay which was not due to "military intervention or other unforeseen circumstances" of a reasonable nature such as the Court might take notice of. I think no such delay has been proved. It is common knowledge, and it has been shown in this case, that there was great difficulty in transport, and that the plaintiff was unable for a considerable time to get the material required for the building from the coast. The whole of the allegations in the declaration upon which the plaintiff based his claim seem to me to have been disproved and, therefore, the plaintiff's case wholly breaks down. Judgment will therefore be given for the defendants, with costs.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Van Zyl and Buisinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLAY.]

ADMISSIONS.

{ 1904.
{ Feb. 29th.

Mr. Van Zyl moved for the admission of Shepherd Braithwaite Kitchin as an advocate.

Application granted and oath to be taken in the High Court of Grigualand.

Mr. W. P. Buchanan moved for the admission of Frederick Charles Alexander Hamilton Garner as an attorney and notary.

Application granted and oath administered.

PROVISIONAL ROLL.

MOLLER V. LLOYD AND POWER.

Mr. Benjamin asked for this matter to be allowed to stand over till the end of the roll in view of the prospect of a settlement.

Ordered to stand over.

At a later stage,

Mr. Benjamin said that no settlement had been arrived at, and he was informed that Mr. Rowson had been instructed for the defendant Lloyd. He now moved for the provisional order for the sequestration of the defendant Lloyd's estate to be made final. As to Power, he asked that so far as he was concerned the matter should stand over.

Mr. Rowson (for the defendant Lloyd) said that Captain Power had not been served with notice of this application. Captain Power was quite willing to meet the obligations of the partnership. He contended that only one partner in the joint venture having been summoned, the whole proceedings were null and void.

Mr. Benjamin said that judgment had been obtained against the defendants for £250, balance of purchase price of certain property. A writ of execution was granted, and goods to the value of £20 were attached, and no other goods had either been pointed out or afterwards found.

Mr. Rowson read the affidavit of the defendant Lloyd, who denied the validity of the petitioner's claim. Lloyd said that they were willing to grant a bond on the property. Power had gone up-country, and he was perfectly ignorant of the proceedings now being taken. Deponent thought it was the duty of the petitioner to have sold the 8 plots of ground and given credit to the defendants for the balance of the purchase price.

Mr. Benjamin read the affidavit of Mr. Peters, attorney to the plaintiff, which stated that certain papers had been sent with a view of a mortgage being prepared but had not been returned. Deponent added that he had written to the defendants at their address, London Chambers, Church-street, Cape Town, advising them of what was being done. He had been unable to ascertain the whereabouts of Power. Lloyd had failed to make an offer. Deponent was quite willing to entertain any reasonable offer.

Mr. Rowson, replying to the Court, said that Power was now at Boshof, Orange River Colony. He submitted that the proceedings were vicious *ab initio*.

The matter was ordered to stand over until the 12th March to enable the defendant Power to be communicated with.

Postea (March 12th). On the application of Mr. Benjamin, the provisional order of sequestration was discharged.

VAN DER BYL AND CO. V. KULMAN.

Mr. M. Bisset moved for provisional sentence for £40 on a promissory note, together with interest and costs.

Order granted.

HILL AND CO. AND R. WILSON, SON AND CO. V. MCGREGOR.

Mr. Struben moved for the provisional order for the sequestration of the defendant's estate to be made final.

Mr. W. P. Buchanan (for the defendant) put in the latter's affidavit, which stated that he started business in January, 1902, on a small scale in the district of Worcester, and that he afterwards moved to the Malmesbury district. He was a minor when he commenced business, and only attained his majority on the 20th December last. As regarded the debts owing to the first-named plaintiff he admitted that the goods referred to were supplied to him, but they were all supplied during his minority. He did not, however, wish to avail himself of that. He did not wish to have his estate sequestrated, and if given another six months he would be assisted by his relatives and others with £35, and he would pay the balance in monthly instalments. As to the second-named plaintiffs he only owed them £47, having ceded certain interests. He was not insolvent. Counsel said that the petition made no mention of the cession by the debtor to the second-named plaintiffs, and the application ought to stand or fall by what was done by the co-petitioners.

The Chief Justice, in giving judgment, said: The affidavit made by the defendant does not seem to me to be sufficient to disprove the statement made by the petitioners to the effect that the defendant is insolvent. The Court will have to make this sequestration final.

SILBERBAUER V. KARSTEN.

Mr. Gutsche moved for provisional sentence for £500 on a mortgage bond, and for the property specially hypothecated to be declared executable,

Order granted.

**AHLBOM, GULLANDER AND CO. V.
MERRY BROS.**

Mr. W. P. Buchanan moved for provisional sentence on a Magistrate's Court judgment for £123 18s., and £4 5s. 3d. costs, and for an order declaring certain immovable property specified in the summons executable. There had been a return of *nulla bona* in the Magistrate's Court.
Order granted.

LOTZ V. VOS.

Mr. Van Zyl moved for provisional sentence for the sum of £67 6s. 8d. on certain conditions of sale.

Defendant appeared, and admitted the debt, but stated that he was not in a position at present to pay the money. He was willing to pay £8 a month.

De Villiers, C.J., said the defendant should make this offer to the plaintiff.

Provisional sentence granted.

MOLL V. HEINEMANN.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £300, with interest and costs, and for the property specially hypothecated to be declared executable.

Order granted.

WILSON V. STEPHAN.

Mr. S. Williams moved for provisional sentence on a promissory note for £110.
Order granted.

ESTATE OF MARTING V. BERGHUYS.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for £175.

Order granted.

HILL AND CO. V. MCLACHLAN.

Mr. D. Buchanan moved for provisional sentence on a promissory note for £94 15s., with interest and costs.

Order granted.

THWAITES V. MOCKE.

Mr. Benjamin applied for provisional sentence on two mortgage bonds for the sums of £400 and £200, with interest and costs, and for property hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

**VAN DER BYL AND CO. V. } 1904.
MINNAAR. } Feb. 29th.**

Mr. Bisset moved for judgment, under Rule 329d, for the sum of £69 18s. 2d.
Order granted.

McKILLOP V. HEDDEN.

Mr. Bisset moved for judgment, under Rule 329d, for £80 15s., for work done.
Order granted.

**SOUTH AFRICAN BREWERIES, LTD. V.
MOSS.**

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £102 18s. 6d., balance of account for goods sold and delivered, together with interest and costs.

Order granted.

GREEN V. DE KOCK.

Mr. Rowson moved for judgment for costs in an action in which the principal sum had been paid.

Order granted.

GUTHRIE AND THERON V. VILJOEN.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £93 19s., work done, money advanced and expended on behalf of the defendant, together with interest and costs.

Order granted.

**BENNETT V. CAPE ESTATE SYNDICATE,
LTD.**

Mr. W. P. Buchanan said that this matter should have been set down on the provisional roll. The summons was returnable for that day, but through some mistake, had evidently not been set down. He asked for the indulgence of the Court that it should be now heard. He moved for provisional sentence on a mortgage bond for £1,000, together with interest, and for the property specially hypothecated to be declared executable.

Order granted.

GENERAL MOTIONS.

**SHEPPARD AND CO. V. } 1904.
STEER. } Feb. 29th.**

Mr. Schreiner, K.C. (with him Mr. Gardiner), moved on behalf of the plaintiffs for a day to be fixed for the

hearing of this action. Counsel said that the plaintiffs had been subjected to immense inconvenience by the delays of the defendant, and it was important to the plaintiffs that the action should, if possible, be heard this term. Plaintiffs sought to recover certain transfer deeds, diagrams, vendu rolls, and also asked for debate of account.

[De Villiers, C.J.: Is Steer an attorney of this court?]

Yes.

[De Villiers, C.J.: If these allegations are correct, defendant is incurring a very great responsibility in retaining these documents.]

Mr. Schreiner: That is so, and we contend that the matter should be brought to trial as soon as possible. Mr. Steer's position is: "I have given all accounts; I have always been ready to give accounts, and I have handed over all documents." On the 8th February he gives us another document, in addition to those he had handed in. Sheppard carries on an agency, and he is constantly being pressed by people who want their documents.

De Villiers C.J., said that there appeared to be no available date on which the trial could be set down for trial this term.

Mr. Schreiner said that he believed the action which was now set down for the 9th March was not likely to come to trial, and he was willing to take the risk of having the present action set down for that date.

De Villiers, C.J.: Under the special circumstances, the Court will take the action on the 9th March.

Ex parte MARAIS.

Mr. W. P. Buchanan moved for a rule nisi under the Derelict Lands Act to be made final, publication having been given as directed.

Rule made final.

FEDERAL SUPPLY CO. V. BUFFALO SUPPLY CO.

Award of arbitrators — Stay of execution.

Sir H. Juta, K.C., moved to have a certain award made a rule of Court, under the Arbitrations Act of 1898.

Mr. Burton, who appeared for the respondent, stated that he did not oppose the award, but he appeared to ask that, under certain special circumstances, execution of the award might be stayed for some little time. Counsel proceeded to read an affidavit made by the liquidators of the Buffalo Co., in which the deponents stated that when the applicant company took over the Buffalo Co.'s business, certain differences arose as to the terms of the sale of the busi-

ness, and it was agreed to submit the differences to arbitration. By the first paragraph of their award, the arbitrators declared that the Buffalo Co. was entitled to receive from the Federal Co. 35,000 fully-paid-up shares, of the value of £1, in the Federal Co., the said shares to be delivered to the liquidators of the Buffalo Co. on payment of the cash found by the arbitrators to be due by the Buffalo Co. to the Federal Co., amounting to the sum of £21,763 odd. The deponents further stated that the respondent company was not now in possession of sufficient available funds to enable them to make payment of the cash in return for the shares. Their (the Buffalo Co.'s) only outstanding assets were the 35,000 shares already mentioned and 15,000 shares in the Federal Co., which were at present in London. They also claimed that certain sums were due to them by Mr. A. Bergl. They were willing to have the award made a rule of Court, but asked that execution should be stayed for six months, by which time they hoped to be in a position to implement the award by paying over to the applicant company the sum found to be due to them in exchange for the shares. The forced realisation of the shares in the present weak state of the market would be detrimental to them.

Sir H. Juta read replying affidavits made by two members of the Board of the Federal Company, in which they stated that owing to the misrepresentation of the respondent company great delay had been caused in the settlement of affairs as between the two companies, and that the sum of £10,000 was included in the award to the Federal Company for damages by reason of such misrepresentation. The delay which had already occurred in the payment by the respondent company of the sum due to the applicant company had retarded the development of applicants' business, and the applicants would be caused great inconvenience should payment be longer deferred. Judgment had been obtained by the firm of Tetley and Fleming against respondents for the sum of £20,013, which judgment, applicants believed, had not been satisfied, and the deponents feared that if a stay of execution were granted, they would be greatly prejudiced. Counsel also read an affidavit made by Mr. A. Bergl, in which he stated that instead of, as alleged, the respondent company having a claim against him, the company was indebted to him in the sum of £6,000.

Mr. Burton was then heard in argument on the facts.

De Villiers, C.J.: The respondents do not deny that the applicants are entitled to have this award made a rule of Court, but they ask the Court to attach to this order a condition that there shall be a stay of execution for six months. The Court may have the power, under certain special circum-

stances, to stay execution, but no such special circumstances are shown to exist in the present case. All the respondents can say is that it might drive them into insolvency in case they paid now, but that is a defence which is continually set up by defendants when sued for amounts owing by them. This amount is owing, and if the arbitrators had intended that there should have been a postponement of payment they would have said so; but as they did not say so, I think it reasonable to conclude that they awarded that the money should be paid at once. The award must be made a rule of Court, with costs of opposition.

Hopley, J., concurred.

[Before the Hon. Mr. Justice HOPLEY.]

Ex parte LEWIS. } 1904.
 } Feb. 29th.

Mr. Russell moved for a rule *nisi* for the cancellation of a certain mortgage bond to be made absolute.

Hopley, J., asked why the publication in the "Cape Times," which was the only other publication ordered in addition to the "Gazette," did not take place until the day before the rule was returnable?

Mr. Russell: I believe there was some misunderstanding between the "Cape Times" and the attorneys. I understand it was not the fault of the attorneys.

Replying to the Court, Mr. Russell said that the mortgage was dated 1856, that it was believed to have been paid off, and that the amount was only £80.

The rule was ordered to be published again forthwith in the "Cape Times," and the return day was extended to the 12th March.

Postea (March 16th).

The rule was made absolute.

Ex parte VAN DER HEEVER.

This was a motion for an order authorising the cancellation of a certain mortgage bond on property in the district of Phillip's Town.

The petition set forth that the petitioner (Anna Christina van der Heever) was the wife of the late Stephanus A. van der Heever, to whom she had been married in community of property. After the death of petitioner's husband her father gave to her minor daughter a present of £1,200 which petitioner invested in a first mortgage on the farm Cijpherput, in the district of Phillip's Town. This sum was afterwards repaid to petitioner by one D. B. Joubert a purchaser of the farm from the mortgagor. £400 of this money have been invested on first mortgage on the farm Ruitgrevlei in the Colesberg district, and the successor in

title to the mortgagor of Cijpherput has agreed to take over the balance of £800 on a first mortgage of the said farm. Petitioner prayed for an order directing the Registrar of Deeds to cancel the said mortgage bond for £1,200 so as to enable the farm Cijpherput to be transferred to the said Joubert, and the Bond of £800 to be passed by him.

The Master raised no objection.

On the motion of Mr. P. S. T. Jones the Court granted an order as prayed.

Ex parte MCALLISTER.

This was a petition of one John McAllister, of Johannesburg, for cancellation of his appointment as executor testamentary in the estate of the late Elizabeth M. C. McAllister (his late wife) on the ground that he anticipated considerable difficulty in administering the estate on account of (1) the hostile position taken up by the relatives of his late wife; (2) his absence from the colony. One child (a minor) was the sole heir.

On the Master's recommendation the Court granted an order as prayed on the motion of Mr. J. E. R. de Villiers.

CAVANAGH V. HANSEN.

Mr. Gardiner moved for an order placing respondent under curatorship. The defendant was detained at Valkenberg, under a judge's order, and no steps had been taken to have him declared insane. The petitioners wished to sequestrate the estate. The summons had not been served on the defendant. The petitioners now desired a curator to be appointed to represent the defendant in the application for the sequestration of the defendant's estate. It was proposed that Mr. P. S. T. Jones should be appointed *curator ad litem*, and that on the 15th April the application should be further heard.

Order granted as prayed.

Ex parte MURPHY AND ANOTHER.

Mr. Schreiner, K.C., moved for the appointment of a trustee in the insolvent estate of the late Charles Goode, jun. The first-named petitioner was the executor dative in the estate of the late Charles Goode, jun., formerly of Cape Town, and the second-named petitioner, Charles Henry Holyoake Goode, was the only child of the late Chas. Goode, jun. Charles Goode, jun., died in 1872. His estate was sequestrated in 1869, and insolvent was never rehabilitated. Charles Goode, sen. (father of the late insolvent), died in England in 1862, leaving a reversionary interest to his son. The mother of Charles Goode, jun., died in 1895. The interest in the estate of the late Charles Goode, sen., was vested in Wil-

liam Britten (trustee of the insolvent), but it had at no time been sold or realised or brought to account by Britten. Messrs. E. C. and E. E. Browning, of Greenwich, England, had in their hands £1,700, an asset of the said insolvent estate, now unrealised owing to the death of the said Britten. Petitioners were unacquainted with the whereabouts of any of the creditors. Petitioners prayed for an order for the appointment of a trustee or curator, in the insolvent estate of the late Charles Goode, jun., and they submitted the name of Thomas Masterton, accountant, Cape Town. An affidavit was put in showing that the notice of petitioners had been called to the matter by particulars of a fund which had appeared in the "Cape Times."

A rule *nisi* was granted, calling upon all persons concerned to show cause on the 28th April why a trustee should not be appointed to finally administer the estate of the late Charles Goode, jun., and why costs should not be paid out of the estate, rule to be published once in the "Gazette," the "Cape Times," and "South African News," and to be served personally upon the representatives of the estate of Charles Goode, sen.

GREEN AND CO. V. KRETSCHMAR.

Mr. Gardiner moved for leave to sue by edictal citation. It was stated in the petition that the respondent was resident in Johannesburg, and that he had contracted a debt with petitioners in the Colony.

The application was granted, citation to be served personally, and to be returnable on the first day of next term.

DARTER BROS. V. KRETSCHMAR.

Mr. Gardiner made a like application in this case.

Order granted in similar terms.

Ex parte DU TOIT AND OTHERS.

Mr. W. P. Buchanan moved for an order authorising the transfer of certain property. Du Toit was one of the executors in a certain estate, and he applied for leave to have transferred to him certain property in the estate of which he was executor. The property, according to the terms of the will, was submitted to competition at auction amongst the heirs, and all the heirs, or their representatives, were present at the sale. There was considerable competition, and the property was sold to Du Toit as the highest bidder. Du Toit, as well as being executor, was one of the heirs.

Order granted as prayed.

Ex parte BEKKER AND OTHERS.

Mr. M. Bisset moved for an order authorising the transfer of certain property. The petitioner, Otto Bekker, stated that under a codicil of the will of his parents, he was appointed sole heir of the estate. The original of the codicil could not now be found, but a copy thereof was found in the office of the Resident Magistrate of King William's Town. The Magistrate, however, had not affixed his signature to the codicil. Under the original will, Otto Bekker and his brothers and sisters were appointed heirs. These persons now consented to the order being granted, with the exception of one Herman Bekker, who was believed to have gone to America, and whose whereabouts could not now be ascertained.

Hopley, J., said the proceedings should be brought to the notice of Herman Bekker.

A rule *nisi* was granted, calling on Herman Bekker, and all persons interested, to show cause on the 14th May why an order should not be granted in the terms prayed, the rule to be published in the "Cape Mercury" and the "East London Dispatch."

Ex parte LE ROES.

Mr. J. E. R. de Villiers applied for an order authorising the cancellation of a certain bond. The petitioner, a farmer, of the Prince Albert district, stated that a bond had been granted in favour of a minor, but the principle and interest had since been paid. The usual verifying affidavits were annexed. An application had been made to the Court previously by the father, the guardian of the minor, who then made allegations exactly to the same effect as the petitioner now made. The Court then held that the transaction was not made in the interests of the minor. Counsel referred to *Moodie's Executors v. Moodie's Heirs*. (9 Juta, 230.)

His Lordship ordered that the matter should stand over, pending a report from the Registrar of Deeds. The Registrar would have both sets of proceedings—the last and the present—before him, and would probably be able to make a report on which the Court could act.

CATHCART V. WAY.

Mr. Gardiner moved for an interdict restraining the defendant from removing certain goods and chattels from Melbourne Chambers, corner of Long and Shortmarket streets, Cape Town, pending payment of certain rent and plate glass insurance premium. Petitioner stated that she let the property to the defendant at a rental of £51 10s. per month for three years from the 1st No-

vember, 1903. Defendant had paid the rent for November, December, and January, but, as regarded February, he had only paid £20 on account, and he neglected to pay the balance of £31 10s. and also a sum of £2 10s. 9d., owing to the petitioner for plate glass insurance. Petitioner had heard that the said Way was making inquiries with a view of securing other premises and contemplated breaking his lease and removing his goods. Defendant had not been served with notice of this application, and counsel now applied for a rule *nisi*.

A rule *nisi* was granted, to operate as an interim interdict, and to be returnable on the 12th March.

Ex parte PERCIVAL JOHN GRIFFITHS, THOMAS WEST EDKINS, AND ZACHARY STANLEY BAYLY.

Mr. W. P. Buchanan moved to make absolute a rule *nisi* calling on all persons in the electoral division for the representation of which petitioners were candidates at the recent Legislative Council election to show cause why petitioners should not be authorised to pay certain amounts which had been omitted from the return of expenses made to the Returning Officer. There was no opposition, and it had been ascertained that the return of expenses, as it was now wished to conclude them, would not exceed the amount allowed by Act of Parliament.

The rule was made absolute.

Ex parte PRINGLE.

Mr. Benjamin moved for an order authorising the registration of the grosse of a certain anti-nuptial contract. Counsel stated that the facts were similar to those in the case of Stephens, recently heard by the Court, and he did not know that it was really necessary to come to Court for the order. However, the Registrar had stated that an order of Court was necessary, and the applicant had, therefore, been obliged to come to Court.

Hopley, J., said that the application seemed perfectly *bona fide*. It would be desirable if some general rule were laid down for the guidance of the Registrar in such cases. However, he did not feel called upon to do so himself. An order would be granted for the registration of the grosse, saving the rights of creditors prior to registration.

Ex parte FIRTH.

Mr. Benjamin moved for an order directing a meeting to be called of the creditors of Macfadyen and Thom, lately trading at Observatory-road, for Friday next, the 4th March, for the purpose of electing trustees. It was now suggested that Messrs. G. W. Steytler and T. H.

Hasell should be appointed joint trustees. A disagreement had previously arisen as to the choice of a trustee, and the present suggestion met with the approval of all the creditors.

Order granted as prayed.

HIDDINGH V. ESTATE HERTZOG.

Mr. Schreiner (with him Mr. Upington) moved for an order setting down the case for trial during next term, and also granting a commission to take the evidence of Thomas Henry Gurrin, F.R.M.S., handwriting expert, of London, England. It appeared that the plaintiff, after having the case set down, gave notice that he did not intend to proceed with the action; that the Court subsequently directed the defendants, on applying for judgment, to set down the case; and the plaintiff now intended to proceed with the action. Counsel read a letter from Mr. Peters, attorney to the plaintiff, stating that he understood that Mr. Hiddingh had abandoned his action, and he thought the case had been withdrawn. Counsel said that they were informed by Mr. Roos, of the Board of Executors, that Hiddingh had declared his intention of proceeding. The action was still pending, and had not, as a matter of fact, been withdrawn. The petitioners, who were the executors of the estate, desired the assistance of the Court to bring this matter to a decisive issue. After the original notice of the intention to withdraw was given the plaintiff was furnished with a bill of costs, which he had paid. No appearance was now entered for the plaintiff.

Hopley, J., said that it would be unfortunate if the petitioners went to all this expense if it were not the intention of the plaintiff to proceed with the action. He thought the petitioners should try to ascertain definitely what the intentions of the plaintiff were. The matter would, therefore, stand over until the 12th March.

Ex parte LUMSDEN AND OTHERS.

Mr. Schreiner, K.C., moved for an interdict restraining the Municipality of East London from selling certain ground, which petitioners alleged was a street or roadway, and to the use of which they claimed to be entitled. The Municipality proposed to sell the ground on the 5th March. It was stated on affidavit that the ground in question had been used as a street, and that its sale would involve a danger to health, inasmuch as it would interfere with the sanitary conveniences, and would involve pecuniary loss to the petitioners, who were owners of property adjoining. The ground was described on the diagrams attached to petitioners' transfers as a street.

A rule nisi was granted, to operate as an interim interdict, calling on the Municipality to show cause why an interdict should not be granted restraining them from selling the land in question, and why they should not be ordered to pay the costs of the application, the rule being made returnable on the 15th April.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

Ex parte HUNTER. { 1901.
Mar. 1st.

Mr. M. Bisset moved for an order extending the time within which a certain account should be filed with the Master of the Supreme Court in the insolvent estate of Joseph Frank, of which the petitioner was the sole trustee. Delays had taken place in consequence of proceedings commenced in the Magistrate's Court against the insolvent for culpable insolvency. Several further claims had been filed, and it was proposed to call a further meeting of creditors on the 23rd March at Port Elizabeth. Petitioner asked for an extension until the 10th April.

Order granted as prayed.

ROBERTSON V. ROBERTSON.

Divorce—Domicile.

A petition for leave to sue for divorce by edictal citation must state that the petitioner is domiciled in this colony. A mere allegation of residence is not sufficient.

Mr. Close moved, on behalf of John Alexander Robertson, for leave to sue his wife by edictal citation for restitution of conjugal rights. Petitioner was now resident at Cape Town, and was employed at the Docks. Respondent lived at Durban, Natal, whither she had gone after leaving the petitioner in Johannesburg. The marriage took place in Durban in July, 1899.

Hopley, J., said that the petition ought to state whether the petitioner was domiciled in this colony. The Court did not desire to interfere in matters outside its jurisdiction.

The matter was allowed to stand over pending information as to domicile.

ESTATE DE WET V. MARAIS.

Mr. Benjamin applied for this matter to stand over until the 12th March to enable the respondent to file affidavits.

Mr. P. S. T. Jones (for the applicants) said they had no objection to Mr. Benjamin's application, but in the meantime they would like an undertaking not to remove the weir, in regard to which the plaintiffs desired to interdict the respondent. The respondent, added counsel, was removing the weir.

Mr. Benjamin said that their allegation was that they had not interfered with the weir, but he was instructed to consent to an undertaking, subject to the matter being left *in statu quo* by both parties.

Ordered to stand over till the 12th March.

LAW SOCIETY V. GREENING.

Mr. Uppington said that it had been impossible to serve the respondent with notice of the Law Society's application to have his name removed from the roll of attorneys. He believed Greening was still in town, but service had not been effected, and he should like the matter to stand over until the 12th March.

Ordered to stand over accordingly.

SUBURBAN MUNICIPAL { 1904.
WATERWORKS V. COCHRANE { Mar. 1st.
AND CHERKY.

Arbitration—Act 6 of 1882.

The respondents had contracted to perform certain work for the applicants subject to the condition, inter alia, that should they fail to make such progress with the work as the town engineer deemed reasonable, the applicants should have the right to eject them and take possession of the works. The applicants did so eject them and the respondents having insisted on referring the question as to whether they had made reasonable progress to an arbitrator selected by themselves, the Court granted an order, restraining them from proceeding with the arbitration.

This was an application upon notice of motion calling upon the respondents to show cause why they should not be restrained from proceeding with a certain arbitration, why such an order should not be granted as to the Court

should seem meet, and why they (respondents) should not pay costs of this application.

The affidavit of the chairman of the Waterworks Board (Mr. Louw), stated that the respondents were the contractors for the construction of a certain reservoir and other works for the applicants on Table Mountain at Newlands. The contractors did not make satisfactory progress with the work, and the applicants stepped in in May, 1902, and took over the work, and had since continued to do the work departmentally. They took this course under clause 2 of the contract. Eighteen months later, viz., in December last year, they received notice from the respondents that they had appointed Mr. G. W. Steytler as their arbitrator "for the purpose of deciding certain disputes and differences which have arisen in relation to or out of the said contract." To this the Board replied that they refused to go to arbitration, holding that their powers under the 2nd clause were clearly defined, and that this was not one of the questions to be referred to arbitration. Consequently they held the matter should not be taken to arbitration under the Land Clauses and Arbitration Act. Subsequently the Board intimated that they were willing to consent to the matter being referred to arbitration on condition that Mr. John Parker should act as their arbitrator and Mr. Steytler should act on behalf of the respondents and that the two arbitrators appointed an umpire. This proposal was rejected by the respondents, who said that they proposed to proceed with the arbitration with Mr. Steytler as sole arbitrator.

The affidavit of Mr. W. G. Fairbridge, attorney, stated that the contention of the respondents was that the applicants wrongfully ejected them from the works and dispossessed them from the property they had therein. Respondents contended that they had reasonable and sufficient cause for not having accomplished more work than they actually did. They contended, however, that it was for the arbitrator to decide whether they had such reason for delay or not. The contract was entered into in September, 1901. The work was to be completed by the 31st March, 1902. Respondents carried on the work until on or about the 5th June, 1902, when they were ejected by the applicants, who entered into possession. From that time to the present date applicants had carried on the work, which was still incomplete. The works now being carried on differed in many respects from the works contracted for. Respondents contended that they were entitled to treat the contract as cancelled by their ejection.

Mr. Schreiner, K.C., for applicants. Mr. Searle, K.C., for respondents.

Mr. Schreiner said that the 11th clause gave a certain special function to the engineer, because the right of

ejection of the contractors was to be subject to his opinion that the progress of the work was not proportionate to the total time fixed for the execution of the contract. He submitted that the contractor put himself in regard to that matter entirely in the hands of the engineers, whose opinion on the point was what the contractors agreed to be bound by, always assuming, of course, that there was good faith. Counsel contended that there was nothing in the other clauses, 17 for instance, to show that the power of immediate ejection was a matter for arbitration. It vested entirely in the engineers.

Mr. Searle said his learned friend seemed to be inclined to depend entirely on one clause, the 11th, instead of taking the whole contract. The respondents were being kept out of their money. The Waterworks Board had their retention money, and they did not seem to have any desire to pay it over to the respondents. The applicants had been a far longer time doing the work than the contract provided. They themselves had been a period of twenty months carrying on the contract. As a matter of fact, the contract only allowed the respondents fifteen months in which to complete the work. Rightly or wrongly, the applicants had put an end to the contract. The clauses 17 and 18 set out most distinctly that all matters of dispute should be referred in the first instance to the opinion of the engineers, and, in case their opinion was unsatisfactory, to arbitration. Counsel cited the case of *Bull v. Colonial Government* (6 Juta, 283).

Hopley, J., said it was just a question whether it would not be best for counsel to inform Mr. Schreiner that they would be willing to go to arbitration under the terms suggested by the Board.

Mr. Searle said he could not consent to any such course.

[Hopley, J.: Then, suppose I decided against you?]

Well, I suppose we should have to go to action.

Hopley, J.: It is quite possible that in spite of the contention of the applicants that this is not a case for arbitration under the contract between the parties, it would be within the rights of the respondents to come under the sub-section 4, Sec. 3, of the Land Clauses Act, and that, Mr. Steytler having been appointed by them, he should now act as the arbitrator of both parties. The applicants, I may remark, have disputed all through that the circumstances have arisen, and the question now is whether the circumstances have arisen for arbitration, or whether the respondents should be restrained from going on with this arbitration. It is common cause that the agreement between the parties

must decide this question, and there appear to be three clauses which deal specifically with the subject which are set out in the petition of the applicants. It appears that the respondents had made a contract with the Suburban Municipal Waterworks to carry out a large water scheme, and the contract contained, first of all, this clause (No. 2): "If at any time during the continuance of the contract the contractor shall, without reasonable or sufficient cause, fail to make such progress with the work as shall, in the opinion of the engineers, be proportionate to the time fixed for the execution of the contract, the engineers shall, after having given the contractor 48 hours' notice in writing, have the power to eject him and his employees from the works, and to take possession of the work and plant, and provide material and the necessary labour, at the cost and charges of the contractor, and to pay such sum or sums or charges as they think just or fair, and to deduct the amount from any moneys that may be due and payable to the contractor, and should the total of such charges exceed in amount the contract sum the balance may be recovered by any officer duly authorised by the said committee of management to receive the sum on the completion of the same, or the engineer shall have the power to relet the contract."

It seems to me that in this particular clause of the contract, the contractors put themselves entirely, as also the authorities for whom they were constructing the works, into the hands, and at the discretion of the engineer. It seems to me, that if the engineer comes to the conclusion that the work is not going on in a proportionate manner according to the time fixed for the execution of the contract, the only thing that could possibly arise as being a matter of dispute would be whether there was reasonable or sufficient cause for the delay in the progress of the works. Now in May, 1902, the engineers came to the conclusion that the work was not going on in a proportionate manner to the time fixed, and they gave forty-eight hours' notice in writing to the contractors. As far as I can see from the affidavits, there was no dispute at that time, viz., May, 1902, as to whether or not they had a right to put an end to the contract. It is perfectly true on the affidavits they excused themselves on the ground that war had been going on, that martial law prevailed, and the plague, and that they had therefore been unable to obtain sufficient labour. But there seems to have been no dispute at that particular time; the respondents made no protest; they did not come to the Supreme Court, and they did not offer to refer the matter to arbitration. I suppose they entered into this contract at the time when war was

going on, and so they must have had their eyes open to the existing circumstances. They quietly went out of the works, and allowed things to go on for about eighteen months, when of a sudden they proceed to say: "We now raise a dispute for turning us off the works." Is that a position that they can maintain? The 17th and 18th clauses deal with the right of going to arbitration, but I see nothing in this case that gives rise to the working of these clauses. I do not think there was a matter of dispute. I do not think anything was in the first instance referred to the engineers which would give a right to the respondents to go to arbitration simply because they considered his decision unsatisfactory. It is clear from what Mr. Searle says that the contractors' object is to get hold of whatever retention money is due to them. As to retention money, it seems to me that under the 11th clause that will have to wait until the completion of the contract. I think it a pity, under the circumstances, that they did not accept the applicant's suggestion—a very reasonable suggestion, and appoint their own arbitrators and an umpire. They chose, however, to stand upon what they considered to be their strict legal powers, and in that I think they were wrong. The present application must be granted, with costs.

[Applicants' Attorneys: Van Zyl and Buissimé. Respondents' Attorneys: Fairbridge, Arderne, and Lawton.]

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

MACAULAY V. JUMBO GOLD } 1904.
MINING CO. AND B.S.A. CO. } Mar. 1st.

Mining Ordinances of Rhodesia—
Special registration—Indefeasible title.

It is a good defence to an action for ejectment from mining claims in Rhodesia alleged to have been acquired by the plaintiff before the passing of the Rhodesian Ordinance 1 of 1895, that a certificate of special registration had thereafter been bona fide granted to the defendant in terms of the 70th and 71st sections of that Ordinance after full compliance on his

part with the provisions of such Ordinance.

This was an appeal from a judgment of the senior judge of the High Court of Southern Rhodesia (Mr. Justice Vincent) upon certain exceptions taken in the first place by the plaintiff to a special plea, and the appellant to the remainder of the plea. The plaintiff's declaration set forth that:

1. The plaintiff is a stockbroker and company manager, residing at Bulawayo, and the first defendant company is a duly incorporated company under the English Companies Act, with limited liability, having an office and carrying on business in Southern Rhodesia; the second defendant is a company incorporated by Royal Charter for the purpose *inter alia* of administering the government of the said territory.

2. On or about the 27th day of February, 1889, and at Kimberley, in the Cape Colony, a written agreement was entered into between Cecil John Rhodes, in his capacity as the representative of the Matabeleland Syndicate, which syndicate then possessed all mineral rights over the territory known as Mashonaland and Matabeleland, and one Thomas Maddocks, of Kimberley, whereby it was provided that the said Thomas Maddocks should with certain companions of his proceed to Matabeleland to search, dig, and prospect for precious stones and minerals, upon certain terms and conditions. Copy of the said agreement is hereto annexed marked "A."

3. One of the said terms and conditions was as follows: That the said Thomas Maddocks should, upon finding gold or other precious minerals or stones, be entitled to mark off sixty claims, of 50 yards each in length and in breadth, equal to all dips, angles, and variations of the gold or other reef discovered by the said Thomas Maddocks and his said companions, and that the said Thomas Maddocks should be entitled to two-tenths undivided interest or share therein, and his companions to one-tenth undivided interest or share therein, or in all, to one-half undivided share therein, and the said Matabeleland Syndicate to the remaining one-half undivided interest therein.

4. Thereafter the said Thomas Maddocks, together with his said companions, proceeded to carry out the terms of the said agreement, and to prospect for precious stones and minerals in Matabeleland, and in the course of such prospecting they were successful in discovering certain gold-bearing property.

5. On or about the 3rd of July, 1890, it was further agreed between the said Cecil John Rhodes, then acting for and

on behalf of the second defendant company, which had succeeded to the rights and obligations of the Matabeleland Syndicate that in consideration of the said Thomas Maddocks having been the first prospector in the territory of the second defendant company and having experienced great risk and trouble in his said prospecting operations, the terms of the said agreement of the 27th February, 1889, should be extended for a period of 18 months dating from the expiration of the said first agreement, to wit, the 1st of March, 1890, during which period the said Thomas Maddocks was to proceed to Mashonaland, or other spot within the area under the control of the second defendant company and locate a further 100 claims, which were to be five blocks of twenty each on separate reefs, and that such claims were to be held in undivided shares with the second defendant company. The terms of the said extended agreement are set forth in a letter written by the said Cecil John Rhodes, and dated the 3rd day of July, 1890, copy of which is hereto annexed marked "B."

6. The said Thomas Maddocks thereupon proceeded to carry out the provisions of the said extended agreement, and in the course of his said operations he discovered a certain gold-bearing property known as the "Jumbo reef," and the said Thomas Maddocks, in terms of the said extended agreement marked "B," and in the exercise of his rights thereunder, duly marked off certain 20 claims upon the said reef, whereupon he became entitled to and there vested in him his said undivided interest or share in the said claims, and the second defendant company became entitled to its said undivided share in the same.

7. The said claims were duly registered in the name of the said Thomas Maddocks on the 27th day of October, 1890, and he took possession thereof and worked and developed the same and continued in full lawful possession of the claims in trust for himself and his said joint holders up to the time of his death.

8. The said Thomas Maddocks died in or about the month of March, 1896, being murdered in the course of the native rebellion of that time, and the plaintiff has *bona fide* and duly acquired from the executor of the said Thomas Maddocks's estate, for valuable consideration, all the right, title, and interest of the said Thomas Maddocks in and to the said claims.

9. On or about the 1st of September, 1899, the second defendant company wrongfully and unlawfully deprived the executor of the said estate of the possession of the said claims and purported to forfeit the same on the ground of non-compliance with the provisions of the Ordinance No. 1 of 1895, entitled "The Mines and Minerals Ordinance," more particularly of the provisions contained in section 22 thereof as to the execution

in each succeeding year of at least 60 feet of development work.

10. Subsequently the said claims were wrongfully and unlawfully thrown open to location by the second defendant company, and on or about the 20th of September, 1899, they were pegged off by one C. E. Wells, by whom they were transferred to the Mayo Development Company, and on or about the 10th April, 1903, were transferred by them to the first defendant company, which is still in possession of them.

11. That the plaintiff has sustained damage to the extent of £250,000 (two hundred and fifty thousand pounds) by the aforesaid wrongful and unlawful action of the second defendant company.

12. The plaintiff says that even if the amount of development work as required by section 22 of the said Ordinance has not been performed on the said claims, yet they were not liable to forfeiture in so much as the provisions in question of the said Ordinance were not, and are not, applicable to the said claims, and that the second defendant company had no right or power in law to forfeit the same as it purported to do.

13. He says further that the Mines and Minerals Existing Rights Ordinance, 1895, is *ultra vires* of the Royal Charter.

14. Alternatively and not otherwise plaintiff claims from the second defendant company an account of all money and shares received by or allotted to them in connection with the said claims and payment of whatever amount may be found due to the plaintiff.

15. All things have happened, all times elapsed, and all conditions been fulfilled entitling the plaintiff to bring this action.

Wherefore the plaintiff claims: (a) As against both defendant companies a declaration that the alleged forfeiture and the subsequent throwing open to location and location of the said claims were null and void and of no legal effect, and that the plaintiff is the lawful holder of the said claims subject only to the terms and conditions set forth in the agreements marked "A" and "B" and generally a declaration of his rights in the premises; (b) as against the first defendant company an order compelling it to deliver and restore to the plaintiff the possession of the said claims; (c) as against the second defendant company payment of the sum of £250,000 (two hundred and fifty thousand pounds) damages as afore said or in lieu thereof an account and payment thereunder as in the 14th paragraph hereof set out; (d) alternative relief; (e) costs of suit.

To the declaration the first-named defendants pleaded: For a special plea to the plaintiff's claim the first named defendants say the mining location which is the subject of this action is held by them under a certificate of special registration lawfully and properly granted in terms and after full compliance with the provisions of the Mines and Minerals Or-

dinance, 1895, and more especially the provisions laid down by section 70 of the said Ordinance, and that they cannot now be disturbed in their possession thereof nor in the exercise of any right appertaining thereto, and that they alone are the owners of any right appertaining to such location subject to the terms of the said Ordinance. And for a general plea, in case the above should be overruled, but not otherwise, the first-named defendants say:

1. They admit paragraph 1 of the declaration, but deny each and every allegation contained in paragraphs 2, 3, 4, and 5 thereof.

2. As to paragraph 6 they admit that one Thomas Maddocks marked off certain claims upon a reef known as the "Jumbo" reef, but deny that he did so under or in terms of the alleged agreement marked "B" and annexed to the declaration. They deny all the other allegations in the said paragraph contained.

3. They deny the allegations contained in paragraphs 7 and 8 of the declaration.

4. As to paragraph 9 of the declaration, they admit that the claims therein referred to were forfeited, but say that the said claims were liable to forfeiture, and were lawfully forfeited on the ground that the pegs and beacons were not duly maintained in terms of the mining regulations as well as for the reason set out in the declaration. They crave leave to refer especially to the mining regulations published and dated the 28th April, 1893, and the Mines and Minerals Ordinance, 1895. Due notice was given to the said Thomas Maddocks on the 25th September, 1895, and received by him that his pegs and beacons must be put in order and maintained.

5. They say further that prior to such forfeiture the said Thomas Maddocks had abandoned every claim he may have had to any mining right in Mashonaland, and any right he may have been possessed of or had in the said "Jumbo" reef had lapsed and become void.

6. As to paragraph 10 of the declaration they admit that the ground forfeited was thrown open to relocation, but deny that the ground pegged by the said C. E. Wells is the same as the ground originally pegged by the said Thomas Maddocks. They admit that the claims pegged by the said C. E. Wells are now held by them.

7. They deny each and every allegation in paragraphs 11, 12, 13, and 15 of the declaration.

Wherefore the first-named defendants pray judgment and costs.

The second-named defendants pleaded: For a special plea to the plaintiff's claim, the second-named defendants say that the mining location from which the plaintiff is now seeking to oust the first-named defendants is held by such defendants under a certificate of special registration granted *bona fide* in terms and after full compliance with the conditions of the

Mines and Minerals Ordinance, 1895, and more especially the conditions laid down by section 70 of that Ordinance and that they cannot now be disturbed in their possession thereof nor in the exercise of any right appertaining to such location, and that they alone are the owners of any right appertaining to such location subject to the terms of the said Ordinance.

The second-named defendants also filed a general plea in case the above should be overruled, but not otherwise, in which they denied paragraphs 1 to 5 inclusive of the declaration, they admitted that Maddocks pegged off certain claims, then known as the "Jumbo reef," and alleged the abandonment by Maddocks of his claims, and said that any right he may have had had become null prior to the forfeiture.

Plaintiff excepted to plea of first-named defendants as follows: Before pleading to the first-named defendants' plea plaintiff excepts to the special plea therein contained on the grounds that the said special plea affords no defence to the plaintiff's action against the first-named defendants as contained in the declaration and is otherwise vague, embarrassing, insufficient, and bad in law. And as to the general plea of the said defendants plaintiff excepts to so much of paragraph 4 thereof as refers to an alleged forfeiture of the said claims on the ground that the pegs and beacons were not duly maintained in terms of the mining regulations, inasmuch as the same is vague, embarrassing, insufficient, and bad in law, and affords no defence to the plaintiff's action against the said defendants as contained in the declaration.

Plaintiff also filed a replication as follows: For a replication to the first-named defendants' pleas in case the above exceptions should be overruled, but not otherwise, plaintiff says that none of the mining laws and regulations of the British South Africa Company are applicable to the said claims. In answer to paragraph 4, plaintiff says, even if the said pegs and beacons were not maintained as alleged, which he denies, the mining regulations therein referred to do not apply to the said claims; and, further, if even they should be held to apply, contravention of the said regulations as to maintaining pegs and beacons did not give the second-named defendants any right of forfeiture of the said claims, and, further, that the said claims were not forfeited on such account. Save as aforesaid, and save for admissions contained in the said plea, plaintiff denies all allegations of fact and conclusions of law therein, and again prays judgment in terms of the declaration.

The defendants excepted to the replication on the ground that it was inconsistent with the declaration, and raised a new cause of action.

The Judge's reasons for judgment were as follows. His Lordship found

that: (1) The exception to the replication must be dismissed, in so far as the allegation as to the effect of the certificate of special registration is concerned. (3) So much of paragraph 4 of the general plea as relies on forfeiture, by reason of non-compliance with the regulations of April, 1893, is bad, in view of the admission of the date of forfeiture and of the allegation that notice to keep the pegs in order was given at a date subsequent to the coming into force of Ordinance 4 of 1895.

Mr. Burton (with him Mr. J. E. R. de Villiers) for the Appellants. Mr. Searle (with him Mr. Benjamin) for the first Respondents. Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.) for the second Respondents.

Mr. Burton: The whole matter before the Court is the exception to the special plea and the plaintiff's point is that the special plea set up by the defendants affords no good defence in law. Special registration is provided for by Ord. 1 of 1895, Sec. 70 and 71. Prior to this Ordinance there were certain mining rules. This Ordinance applied only to rights acquired after it was passed. Ord. 4 of 1895, Sec 3 has a retrospective effect and brings all mining rights under Ord. 1. The facts set out in the declaration must be assumed to be correct as they are not denied in the plea. In 1879, before the Chartered Company existed, the Matabeleland Syndicate granted certain 20 claims to Maddocks and these were selected on the Jumbo reef. They had a title which was indefeasible as far as the B.S.A. Co. was concerned. The B.S.A. Co. were part owners of these claims and it must not be supposed that by subsequent legislation they meant to deprive themselves of their own property. There seems to have been some doubt as to the validity of Ord. 1 of 1890, and to do away with this doubt the Ordinance of 1895 was passed. The mining regulations contained provisions quite different from the conditions agreed upon between Rhodes and Maddocks and his companions. Under the former no-body could be a claim holder unless he held a licence, and even then he could only take 20 claims. Maddocks and his companions were allowed to take 60, then 100, and then another 100.

[De Villiers, C.J.: What is the definition of a claim-holder?]

[Sir H. Juta: It is given in p. 6 of the Ordinance of 1895.]

That does not dispose of the difficulty, because this was not a mining location. See the definition of a mining location in Sec. 4 of the Ordinance. There such terms as "Claim," "Block," etc., are introduced for the first time. Hence Maddocks and his companions were not claim holders in the ordinary

sense, but grantees under a special grant, and hence subsequent legislation could not affect their position.

[De Villiers, C.J.: You say that these claims are not part of a mining location?]

Yes.

[Buchanan, J.: If you are registered owners why is it not a mining location?]

Because the property does not fall within the terms of the Ordinance. It was a mistake to have granted special registration for this property, but the fact that it was wrongly granted cannot make these claims a mining location. The Ordinance (p. 7) makes certain provisions as to the acquiring and holding of mining rights, and here we find conditions and restrictions which were never imposed on Maddocks. Ordinance No. 1 clearly speaks of only future mining rights, and hence Ord. 4 was passed, and it was on that that the Judge in the Court below chiefly relied. Its terms certainly are very wide but the question is, did it touch the case of concessionaries? I submit it did not and that the Ordinance was intended to recognise in law this species of rights—special concessions like this—which had not been obtained under the provisions of the ordinary law, and which fell outside the ordinary law. Maddocks and his companions had an indefeasible right as owners as against the Chartered Company.

Mr. Searle: It cannot be held that Ordinance 1 of 1897 was intended to create new legislation in regard to special mining rights. All that it meant was this: that if there were any special mining grants between 1895 and 1897 they were to be dealt with under the provisions of this Ordinance. I submit that these rights were not affected by the Ordinance of 1897, but were covered by Ordinance 4 of 1895. It was provided that certain acts or omissions should constitute an abandonment, and we say that there has been such abandonment. The Jumbo Company had a title, which could only be defeated by proof that there had been fraud or mistake, and there is no allegation of fraud or mistake in the pleadings.

Mr. Schreiner: The judgment of the learned judge left matters perfectly open for decision upon the grounds of the merits, and I must say it seems to me that a lot of the time of the Court has been wasted, and a lot of costs unnecessarily incurred by reason of the present proceedings. The matter must go back to the Court below to determine whether there is a good claim for damages or not.

Mr. Burton in reply.

De Villiers, C.J.: The plea to which the defendants have taken exception is as follows: "For a special plea to the plaintiff's claim, the second-named defendants say that the mining location from which the plaintiff is now seeking to oust the first-named de-

fendants is held by such defendants under a certificate of special registration granted *bona fide* in terms, and after full compliance with the conditions of the Mines and Minerals Ordinance, 1895, and more especially the conditions laid down by section 70 of that Ordinance, and that they cannot now be disturbed in their possession thereof nor in the exercise of any right appertaining to such location, and that they alone are the owners of any right appertaining to such location subject to the terms of the said Ordinance." To this plea the plaintiff excepted as being bad in law, and the sole question which arises, in my opinion, is whether the claims of the plaintiff are embraced in the terms of Ordinance 1 of 1895. But for the Ordinance 4 of 1895, I should have had grave doubts as to whether these claims were intended to be embraced, but the Ordinance 4 of 1895 makes the matter perfectly clear. The third section says: "Every mining right whatsoever within the limits of this Ordinance before the Mines and Minerals Ordinance, 1895, came into force, shall be deemed to have been acquired under the Mines and Minerals Ordinance, 1895, and accordingly shall be held under and subject to the provisions of that Ordinance, but so that in every case in which any time is prescribed by the Mines and Minerals Ordinance, 1895, within which any money is to be paid or any act or thing done, such time shall not begin to run until the expiration of three calendar months after this Ordinance takes effect." Then the only subsequent Ordinance to which reference has been made on behalf of the appellants is Ordinance Number 1 of 1897, the third section of which provides that extra prospecting licences and special mining grants issued or granted prior to such Ordinance are to be deemed to be as valid and effectual as if issued or granted under these provisions, with a proviso that in respect of any case pending or proceedings commenced before its operation the same was to be judged and determined as if the Ordinance had not been passed. Reading this third section with the first section of this Ordinance, I am of opinion that this Ordinance was not intended to provide for licences and special mining grants which had already been dealt with by previous legislation. It was, therefore, not intended to include claims like that of the plaintiff, which had already been provided for by Ordinance 4 of 1895, and which should be held to be excluded from the operation of the Ordinance of 1897. Well, if this view be correct, the whole case for the appellants seems to me to fall to the ground. It is part of the plea that the 70th section of that Ordinance 1 of 1895 has been fully complied with, and that a certificate of special registration has been granted to the first defendants. That certificate, according to the 71st section, confers upon its holder indefeasible title to any location or site in

respect of which such special registration was granted, excepting in certain cases, which exceptions, admittedly, do not apply here. The first defendants, therefore, under the 71st section have an indefeasible title, and the plea, therefore, appears to me to be a perfectly good plea. For these simple reasons I am of opinion that the appeal from the judgment of the learned judge below should be dismissed, with costs.

Buchanan and Hopley, J.J., concurred.

[Attorneys for appellants: Fairbridge, Ardern and Lawton; Attorneys for The Jumbo Company, Syfret, Godlonton and Low; Attorneys for The B.S.A. Company: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

RAFFAELE AND BELLANTONE v. BINDEMANN. { 1904.
Mar. 2nd.

Law agent—Excessive charges.

This was an action brought by Raffaele and Bellantone, hairdressers, Cape Town, against C. L. Bindemann, law agent, Cape Town, to recover a balance of £25 5s. Plaintiffs deposited a sum of £50 with the defendant in connection with a certain bail bond which the plaintiff signed. The defendant rendered certain services in the defence of Raffaele, and he claimed the sum of £53 odd for those services, about £3 6s. more than the money deposited with him by the plaintiffs. The plaintiffs said that the sum of £24 15s. was a sufficient sum to be paid for the defendant's services, and they claimed the balance, viz., £25 5s. The defendant's account was made up as follows: Defence of Raffaele in the R.M.'s Court, £10 10s.; signing bail bond, £5 5s.; consultations *re* bond, £1 1s.; employing barrister, his fee, consultations with him and witnesses, £21; attendance at the Supreme Court and instructing barrister, £10 10s.; Deputy-Sheriff, service of subpoenas, £1 5s.; copying records of proceedings in R.M.'s Court, £2 10s.; drawing five subpoenas and copies, £1 5s. That showed a balance due to the defendant of £3 6s., but in the account annexed to the plea the balance was shown to be £2 5s. Defendant's plea admitted the deposit of

£50, but defendant claimed in reconvention £53 6s. The plaintiffs said that £24 15s. was a reasonable sum, and they tendered accordingly. Counsel submitted that the onus of proof was upon the defendant.

Mr. Benjamin for plaintiff. Defendant in person.

The defendant submitted that his charges were quite reasonable.

De Villiers, C.J.: said that the onus lay upon defendant to prove that his charges were fair and reasonable.

Christian Lambert Bindemann, the defendant, then gave evidence. He explained how his account was made up. There was an item of 10 guineas for attendance in the Magistrate's Court. He had to appear three days in the Walestreet Court for one of the plaintiffs. He charged five guineas for bail bond. He had only received £30 from the plaintiffs towards the bail bond, and he had to stand responsible for the balance of £20 for six weeks. Then he had charges for instructing counsel. He paid Mr. Advocate Wilkinson a fee of 10 guineas. The rest was for the calls of different witnesses upon him. He charged ten guineas for attendance on three occasions at the Supreme Court. He paid the Deputy-Sheriff £1 5s. Then he paid £2 10s. for the copying of the records. He did not receive any receipt from the assistant clerk, who copied the records. The plaintiff Raffaele was charged along with another man. The latter was sentenced to two years' imprisonment; Raffaele was acquitted. The other plaintiff Bellantone was a partner of Raffaele. His charges, he submitted, were fair and reasonable. These people came and worried him morning and afternoon. From November to the end of the trial these parties were calling at his office and taking up his time or his clerk's time. He submitted that there was no tariff. He had not entered into any agreement. He had just arrived from Robertson that morning, where he had received a fee of 25 guineas for his defence.

Cross-examined: He was a law agent, practising in the Magistrate's Court, Cape Town. He was not an attorney. He received no instructions. He had a brief for Mr. Arthur Brittain, a law agent, in these terms: "Will you appear?" Evidence was taken in the Magistrate's Court on two occasions; witness had to appear three times. He knew that the fee for attendance in the Magistrate's Court was 10s. 6d. in civil cases. He never undertook civil defence under two guineas a day. There was no tariff for criminal cases. He would not go and work in the Magistrate's Court for a whole day for 10s. 6d. He would not go into court unless he had the money down beforehand. He was entitled to charge what he wished in a criminal case. He did not approach Bellantone and offer to provide bail. He told Bellantone he must raise the bail.

Bellantone only raised £30, and witness accepted a promissory note for £20, and gave his undertaking for the balance of the bail. He charged £5 5s. because, in case Raffaele had disappeared, witness would have been liable for the £20.

Cross-examined by Mr. Benjamin: I see you make a charge for attending in the Supreme Court? What is your *locus standi* in the Supreme Court? You are not an attorney. What is your *locus standi*?

Witness: Same as you are, I suppose; I am a man and you are a man. I am a law agent, and am entitled to make my charge the same as you are.

Replying to the Chief Justice, witness said that Raffaele and the other man who was also in the dock with him were charged with housebreaking.

George Godwin, a clerk in the defendant's employ, said that in November last the plaintiffs frequently called at defendant's office, and took up a good deal of his time. They called about five days out of the six in the week.

Cross-examined: He made notes from time to time when the plaintiffs alled, but he had kept no diary. He did not know whether the plaintiffs asked him for their £50. They asked for a settlement.

Mr. Benjamin then called evidence.

Adamo Raffaele, an Italian (one of the plaintiffs), said he was arrested in September and charged with shopbreaking. He was committed for trial. The defendant then came, and spoke to him. Witness did not understand him. He told defendant that the value of the cigars in question had been over-estimated. Bindemann only once led evidence before the Magistrate. Witness went twice to the defendant's office before the trial. After the trial he went every day to get a settlement.

Cross-examined: He told his partner to arrange about bail. He did not know how often his partner called on the defendant.

Phillipo Bellantone (the other plaintiff) said he went to Mr. Brittain when his partner was arrested. He paid Mr. Brittain three guineas. He went a few times to Mr. Bindemann's office to ask him when the case was coming on. When the case was over, he went frequently to ask for the money.

Cross-examined: He asked for the balance of the £50. He did not ask for any specific statement. He received an account from defendant. This showed that plaintiffs owed defendant £3 6s. 6d. over and above the amount of the bond.

Defendant said that as regarded the balance due to him, he forgot about the guinea he had been paid by Mr. Brittain.

Arthur Brittain, law agent, St. George's-street, said he received a brief from his brother. He was proceeding to the Court when he was taken ill, and he handed the brief to Bindemann, and

asked him whether he would see the accused, and then communicate with Mr. James Brittain, who would arrange about the fees.

By the Court: The usual charge in the Magistrate's Court was two or three guineas for each attendance. They often had to attend the Court from 10 a.m. till 4 p.m.

Re-examined: He told his clients before he went into court what his charge would be for each day's attendance.

Alfred G. H. Osborne, a clerk in the employ of Mr. James Brittain, said he paid the defendant a guinea for conducting the case on his first day's appearance in court. That referred to the occasion when the case was first called on, and the evidence taken.

This concluded the evidence.

The defendant then addressed the Court.

Bellantone (recalled by the Court) said that he did not employ Bindemann after he had appeared for the first time.

De Villiers, C.J.: The defendant admits that he has received £50 from the plaintiffs, first of all £30, which was given him in cash, and then the promissory note for £20, signed by Bellantone, was also given. The defendant now charges £5 5s. for signing a bail bond, he having, at the time, received £30, and the promissory note for £20. In my opinion, this charge of £5 5s. is really extortionate. He has induced these people to get the bail bond, and then, having induced them to enter into the bail, he gets £50 in order in that manner to have a hold upon them, and to be able to charge any fees which he considers right. We have nothing now to do with the defendant's practice in other cases. The question I have to decide is whether the charges he has made in this particular case are fair and reasonable. I have looked into the proceedings before the Magistrate. There seems to have been no complication whatever; it is the simplest possible case that could come before any Court, and not requiring for its conduct any great skill or any great trouble. The only trouble that the defendant himself avers is that these people came to his office with witnesses, continually troubling him and bothering him. But he had the remedy in his hands; he could have told them not to trouble him, because there was nothing to be gained by obtaining any information from them. He could simply have told them: "You need not come again, because, if you do come, I shall make these high charges against you." If it had appeared to me that the defendant had beforehand warned the plaintiffs as to what his charges would be, then the plaintiffs would have had some notice, and they could not escape payment of these charges. The matter was an exceedingly simple one, and it appears to me

that the plaintiffs, in tendering to the defendant the sum of £24 15s., tendered what is amply sufficient for the work that he has done, including the amount which was paid by the defendant to counsel. The plaintiffs, therefore, are entitled to succeed in recovering back the sum of £50, less the sum of £24 15s., and judgment is therefore given for the plaintiffs for £25 5s., with costs.

LONDON AND WESTMINSTER BANK V. RECEIVERS GRAND JUNCTION RAILWAYS AND OTHERS.

Mr. Benjamin moved for an order declaring (a) the applicants, as the holders of £90,000 debenture bonds in the Grand Junction Railways, Ltd., and entitled to payment thereof out of the moneys received by the respondent Hills from the respondent, the Cape Government on the Grand Junction Railways contract, in preference to the unsecured creditors of the respondent Hills and others, forming the Grand Junction Railways; (b) that, in the alternative, the applicant bank is entitled to payment out of the said moneys of their claims, amounting to £77,497 12s.; (c) that the respondents, the receivers of the partnership, be interdicted from drawing the sum of £79,656, and for other relief.

Mr. Searle, K.C., appeared for one of the respondents; (Mr. E. R. Syfret, official liquidator of the Grand Junction Railways), and Mr. Uppington appeared for the receivers of the partnership, the Grand Junction Railways.

Mr. Searle said that he merely appeared in regard to the point raised by prayer (a) of the petition, in which it was asked that the official liquidator should proceed to establish the claims of the debenture holders. He held that, as there were trustees of the debenture holders, they should be instructed to proceed with the claims, otherwise he submitted to the judgment of the Court. They had already notified to the receivers of the partnership that there was such a claim in existence, and their opinion that the trustees of the debenture holders were the proper parties to pursue the claim.

Mr. Uppington said that he appeared for the receivers in the partnership, who were appointed by an order of this Court, by consent of the principal creditors of the partnership. They merely suggested that if the Court thought fit to order this money to be paid over to the receivers of the partnership, they would be quite ready not to distribute it in any way.

[De Villiers, C.J.: Who are the receivers?]

Messrs. E. R. Syfret and J. E. P. Close.

[De Villiers, C.J.: Couldn't they deposit it with the African Banking Corporation?]

Mr. Uppington: I understand that has already been arranged, subject to the approval of your lordship.

De Villiers, C.J.: As to the first prayer of the petition, an action must be brought. The Court will make the following order: "By consent of all parties, it is ordered that all moneys received by Hills from the Colonial Government be paid to Messrs. E. R. Syfret and J. E. P. Close, as receivers of the partnership, Grand Junction Railways, the said money to be deposited with the African Banking Corporation or such other bank, and at such rate of interest as the Registrar of the Supreme Court shall approve, and to remain on deposit until the further order of Court; in the meantime an action to be brought by the proper party to decide upon the claims of the debenture holders to a preference in respect of the moneys he has paid over to the receivers, the question of costs to be reserved." His Lordship added that it was not for him to say who were the proper parties to bring the action. If the bank brought the action, the other side might take exception that they were the wrong parties, and that the trustees of the debenture holders were the proper parties to bring the action.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

DALVI AND JAFFE V. AHMED.	$\left\{ \begin{array}{l} 1904. \\ \text{Mar. 2nd.} \\ \text{" 3rd.} \\ \text{" 7th.} \end{array} \right.$

This was an action to recover possession of a certain shop.

The declaration set forth that the plaintiffs were general dealers, residing at Salt River, and the defendant a general dealer, residing at Cape Town. Plaintiffs alleged that in 1903 they were the owners of a business at Salt River, and in August they entered into a partnership with one Achmodien, in respect of a shop in Rochester-road, Salt River. On the 7th December, defendant wrongfully took possession of this shop. Plaintiffs prayed for an order for restoration of the shop, and £60 damages for loss of profit, or, in the alternative, for £200, being the value of the stock and goodwill.

In his plea the defendant admitted having taken possession of the shop, but stated that he paid £98 to the man Achmodien for the stock and goodwill. He denied that plaintiffs had any interest therein, and stated that the licence was

in the name of Achmodien, who also paid the rent. Defendant made a claim in reconvention for £100 for loss sustained by reason of the plaintiffs having obtained an interdict restraining him from carrying on the business.

In their replication and plea in reconvention, the plaintiffs said that the shop was the property of the partnership, and that the partners agreed that none of them should do anything on account of the partnership without the consent of the others, and that no one of them should dispose of the stock or goodwill.

Mr. J. E. R. De Villiers for plaintiffs. Mr. McGregor for defendant.

Shiek Hamet Jaffe, one of the plaintiffs, deposed that in April, 1903, he entered into a partnership with Achmodien in regard to a shop in Chatham-road, the licence for which was taken out in witness's name. In August they took Dalvi into partnership, the latter having advanced £25. The partnership was made in respect of the business at 75, Rochester-road, for which they paid £96 or £98. They took stock on the 24th August, the defendant being then present. Witness told Ahmed that they were taking stock, because Dalvi was coming into partnership. They paid £50 in cash for the shop, and gave promissory notes for the balance. The three partners signed the promissory notes. Later, Dalvi was taken into partnership in the Chatham-road business, the stock being taken for this purpose on the 14th September. Defendant was also there on that occasion, assisting them to take stock, and witness told him they were going to take Dalvi into this business as a partner. The agreement was read out in his presence. Subsequently the Chatham-road business was removed to 21, Rochester-road. Dalvi was in charge of the shop at 75, Rochester-road, and witness and Achmodien looked after the other. Witness produced receipts from wholesale dealers for goods supplied to the shop. These were addressed to witness at 75, Rochester-road. In November, Ahmed and Achmodien came to 21, Rochester-road, and offered witness and Dalvi £150 to go out of the other shop, but they refused the offer. On December 7 witness was informed that Ahmed had taken possession of the shop, and he thereupon went to his attorneys, who took action, and obtained an interdict against Ahmed. Witness calculated his loss at £60, and the value of the stock and goodwill at £200.

By Mr. McGregor: When they paid for the house it was Achmodien who signed, the seller stating that the document only required the signature of one partner. Dalvi was never paid by Achmodien for working at 75, Rochester-road. On the partners raising money on loan, Achmodien sent the greater part of the money to India. It was understood this was to buy goods. The licence for 75 was in Achmodien's name, and was stuck

up in the shop. Achmodien arranged with the landlord of the place.

Ebrahim Dalvi gave corroborative evidence.

In cross-examination, he denied having spoken of Achmodien as his boss, or that the merchants regarded Achmodien as the owner of 75.

Ebrahim Norodeen, general dealer, Woodstock, said he was the owner of 75, Rochester-road, Salt River. Last year Achmodien came to witness and asked him if he would sell the shop. Witness agreed to sell the goodwill for £23, and asked Achmodien what his position was. Achmodien replied that he had two partners. Witness sold the stock and goodwill of the shop for £95. Witness asked Achmodien why he did not get his partners to sign the promissory notes. Achmodien replied that it was all right, and that they were not going to humbug him (witness). Witness was satisfied to receive the notes with Achmodien's signature. When the promissory notes were given, Achmodien mentioned the plaintiffs by name as his partners. The day before the shop was shut up in December witness went there, and saw the stock, which he valued at £150.

Ali Mohamet, assistant to the last witness, gave similar evidence.

Shiek Ahmed, the defendant, said he had been in this country for six years, and had two shops at Woodstock. Witness and Achmodien served together on a ship in their youth. Achmodien told him he had bought the shop at 75, Rochester-road, Salt River, from Ebrahim Norodeen, in August. Witness went to the shop, and saw Achmodien, who told him his servant had gone from the shop. On the 4th December Achmodien told witness he wanted to sell the shop. Witness agreed to buy the shop. They took stock, which amounted to £98, including £22 for goodwill. Witness, accompanied by Achmodien, went to the landlord to see if the shop belonged to Achmodien, and if witness could get the lease. Witness paid £50 in cash, and gave promissory notes for the balance, obtaining a receipt from Achmodien. The receipt embodied an agreement of sale, and witness and Achmodien made their marks on the document (produced). Achmodien took down his licence from the wall, and witness fixed his up in its place. When witness entered the shop, Dalvi gave Achmodien 12s. (the day's takings), and left the shop, after demanding his wages. Achmodien gave witness the 12s., as witness was entitled to the day's takings. Witness spent the whole day on September 14 at a house at Maitland, and did not go to Chatham-road at all that day. He bought the shop as being Achmodien's shop.

Cross-examined: They sold goods for a week, and then they had to close the shop. The sales were not large.

They only sold £9 worth of goods. He had not brought the book to Court. He did not know whether Achmodien owed a good deal of money.

Mr. De Villiers: You do not know that he owes £500?

Witness said he did not know.

[Hopley, J.: What are you fighting for if that is the case?]

Mr. McGregor said that if plaintiff got the shop he would only succeed to a bankrupt stock.

Further cross-examined: Witness had two shops. He knew that the Court ordered him to give up the shop or provide security. He was unable to raise the security.

Henry George Wilmot, house and land agent, Cape Town, said he had to do with the letting of 75, Rochester-road. He had given receipts to Achmodien for payment of the rent. He looked to Achmodien alone for payment of the rent. Subsequently the defendant came with a Mr. Holland, and a six months' lease was entered into in December.

Saladin Alie, general dealer, Rochester-road, Salt River, said he helped to take the stock at the defendant's shop. The value was £90 8s. 4d. Ahmed said he had bought the shop, and he asked witness to take the stock. The shop belonged to Achmodien before it came into Ahmed's hands.

After further evidence had been led, Hopley, J., after commenting strongly on the contradictory nature of the verbal and documentary evidence that came before him in cases where Indians were concerned, gave judgment for the plaintiffs in terms of the order prayed for in their declaration, namely, that possession be restored to them, with £30 damages and costs.

contract, and it was thought that it would be best, in the first instance, that it should be put before a referee.

Mr. Searle, K.C., said he appeared with Mr. Gardiner, for the defendant. If they could agree upon a referee he should be prepared to accept a reference.

Mr. Benjamin mentioned the names of several builders from whom choice of referee might be made.

Mr. Searle urged that an architect should be appointed as referee. Mr. John Parker, he might say, had already acted in similar cases.

Mr. Benjamin urged that this was a matter with which a builder would be more competent to deal. The question was one of estimating the cost of building and certain additional work. He thought, perhaps, it might meet the views of both parties if the Court appointed both a builder and an architect.

[De Villiers, C.J.: That would make it very expensive, because they would also have to appoint an umpire.]

Mr. Benjamin: This was work done solely upon the tender of the contractor, and without the intervention of any architect. The amount in dispute is about £400, but the whole account is something like £2,000.

De Villiers, C.J.: I think it would be more satisfactory to refer all questions in dispute to a single arbitrator. The Court will, therefore, refer all matters in dispute to an arbitrator, and appoint Mr. John Parker, and if he is unable to act, the Court will appoint Mr. George Smart as arbitrator, costs to be costs in the cause.

WIENER V. VAN DER BYL. { 1901.
Mar. 8rd.
" 7th.

Party wall—"Common wall"—
Servitude—Destruction or
rebuilding of common wall—
Agreement—Interdict.

The rights to a common wall partake of the nature of a servitude, but the wall itself is also regarded in many important respects as common property.

The neighbouring proprietors are not co-owners, in the proper sense of the term, of the wall, because the land on which the wall stands is not their common property, but they have the rights of co-owners to this extent that each is entitled to the maintenance of the wall on his neighbour's property as

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

TRIAL CAUSES.

HOESEN V. DAY. { 1901.
Mar. 3rd.

Mr. Benjamin called his lordship's attention to this case, which was set down for hearing to-morrow (Friday). The matter, he said, related to a building

well as of the part standing on his own property.

The applicant and respondent, being co-owners of a certain building, agreed to subdivide the same and to erect a party wall on and along the boundary line, such party wall to take the place of a partition wall then existing and separating the portions allotted to each. It was also agreed that the party wall should be constructed in manner directed by arbitrators. Their award was given, but the party wall was not constructed. A fire occurred, in consequence of which the partition wall had to be demolished.

Held, that one of the parties to the agreement was not entitled to an interdict restraining the other from building a party wall in the manner directed by the award.

This was an application brought by Ludwig Wiener, merchant, Cape Town, against Adrian van der Byl, also of Cape Town, for an interdict restraining the respondent from building or trespassing on the property of the applicant in St. George's-street, between Riebeck-street and Dock Road.

The affidavit of the applicant stated that respondent and himself carried on business for many years in partnership in Cape Town as general merchants. In 1895 the partnership was dissolved, and a deed was executed whereby it was provided, *inter alia*, that the landed property standing at the corner of Dock-road and St. George's-street should be divided, and that a party wall should be erected conjointly by the respondent and applicant. Certain questions were referred to arbitrators, and it was agreed that the manner in which the said wall should be erected should be determined by two arbitrators and an umpire. The award was made on the 9th January, 1896, and appended to it was a specification of the work to be done in the erection of a wall, which was to completely separate the two properties. The party wall was not erected. In September, 1903, the buildings were completely gutted by fire. Thereafter the respondent decided to erect the wall, and he stated that he would hold the applicant responsible for one half the cost.

The respondent's affidavit stated that a thin party wall, originally ex-

isted for about three-fourths of the distance along the dividing line drawn by the arbitrators. After the award had been made, a party wall which complied with the specification laid down in the award was built between the two properties for the remaining quarter of the dividing line, and it was agreed between the parties that the wall should not be carried out through the roof, and that the award should remain in abeyance until a new roof was built. In September, 1903, a fire broke out on the applicant's premises, which spread to respondent's premises. The party wall and portion of deponent's premises were so damaged that it became necessary to pull down the wall. Subsequently negotiations took place in regard to the reconstruction of the wall. The applicant desired to have the party wall built of sufficient strength to enable him to put two or three stories on in future, should he wish to do so. To this deponent would not agree, but subsequently he withdrew the refusal, and he proposed that the wall should be built by the applicant of extra strength on both sides, to enable him (respondent) to build other stories on it, should he decide to do so at some future date, when he would pay to the applicant the extra cost of such portion as he should use. Applicant's attorneys said that he could not consent to this, and as a matter of fact he had definitely decided to sell the land. He was advised that it would materially affect the value of the said property for sale purposes if he granted the party wall. He said further, that as the premises were destroyed by fire, the agreement of 1895 had become of no effect. The affidavit of Vincent van der Byl, who held the respondent's power of attorney during his absence in Europe when the fire broke out stated that the applicant agreed to accept from the insurance company, after the fire, one half the cost of reinstating the wall, which amount was allowed. He was informed that the applicant was also paid one half by the insurance company.

The replying affidavit of the applicant stated that it was agreed between respondent and himself that the party wall should not be carried through until a new roof was necessary. He paid one half of the cost of erecting portion of the said party wall. He had no knowledge of the allegations as to the insurance.

Mr. Searle, K.C., for applicant.—Mr. Schreiner, K.C., for respondent.

Mr. Searle said that the point was whether under the circumstances this agreement for erecting a party wall could be held to be in force now that both the buildings had been destroyed, and whether there could be anything in the nature of a servitude. It was clear from

the transfer deeds, which were passed many years ago, that there was no servitude on the buildings, and the question then arose whether an agreement, that certainly could not possibly be carried out now in regard to the greater part of it, could be held still to exist as some kind of servitude over these premises. If Mr. Baker's award and the specification that he referred to were looked into, it would be seen that the only object of that award was to separate entirely two existing buildings. Now the premises had been destroyed, and Mr. Baker's specification could not possibly be carried out. Was it to be said that Mr. Weiner, who had actually sold his property was to allow another wall to be built, portion of which was to stand upon his own ground. Mr. Van der Byl took up the position that he himself could alone rebuild the wall, and that the applicant could be held responsible for half the cost.

[De Villiers, C.J.: Is it the party wall that you object to, or is it the cost?]

Mr. Searle said he believed the main objection was to paying half the cost, though they had objected both on the ground of cost and trespass. The buildings had, by act of God, been entirely separated. Could it still be held that the agreement was in force, and that the applicant was to have a large party wall on his ground, and to pay part of the expense. He submitted that authority would have to be cited for such a course.

Mr. Schreiner said that it must be borne in mind that this was an application for an interdict. If the agreement were held to be still in force, then the case for an interdict must fail entirely. The applicant had got half the cost of reinstating the wall from the Insurance Company.

Mr. Searle: That is denied in paragraph 4 of the applicant's affidavit.

Mr. Schreiner: It is not actually denied by the applicant.

Mr. Searle: I may say we were very largely uninsured to the extent of £4,000, so that the question could not possibly arise in regard to us.

Mr. Schreiner said that Mr. Vincent van der Byl, in his affidavit, made this statement: "I was informed by Mr. Mouat, who adjusted the applicant's claim as well, that he also received from the insurance company one-half of the cost of reinstating the said party wall." The applicant says he has no knowledge of these allegations.

Mr. Searle: What I deny is that we got the money.

Mr. Schreiner: That is not so stated in paragraph 4. Counsel went on to contend that the whole of the point that now arose was not as to cost of the building (which was in no way brought into prominence until it was now raised by his friend, Mr. Searle, but whether the respondent could build on that part of the ground. That was the only point

that was now before the Court, because the respondent was sought to be interdicted from "trespassing on the property of the applicant situate in St. George's-street." His friend, he submitted, had failed to show why they should not continue to use in the future as they had in the past ground which was definitely agreed upon between the parties for purposes of a party wall. It was contended by the applicant that because there came a fire, the respondent's rights at common law were burnt up. The whole point at present was, was the respondent to be interdicted from building? As to the question of cost, the respondent made the very reasonable proposal that the applicant should pay the extra cost of making the wall broader in the first instance, and that if respondent afterwards wanted to go higher than his present idea of three storeys, then he would refund half the cost of building the stronger wall. Counsel submitted that there had been no renunciation of the award by the respondent. He thought his learned friend would search in vain for authority to show that respondent had lost his rights under the award in consequence of the fire.

Mr. Searle, in reply, repeated that the destruction of the property put an end to the obligations of the award. The award really could not now be carried out in its terms. He added that the award had never been registered. He quoted *Voet* (8, 2, 16), *Grotius* 2, 34, 5, *Van Leeuwen* (vol. 1, p. 301), and *Van der Linden*, *Book 1, cap. 11, sec. 4*.

Cur. Adv. Vult.

Postea (March 7th).

Do Villiers, C.J.: The facts of this case are really not in dispute, and the only question to be decided is whether the respondent is legally entitled to build a wall as a party wall in terms of an agreement entered into between him and the applicant on the 31st of December, 1895. By that agreement the parties, having agreed to dissolve partnership and divide the assets of their business, further agreed to subdivide the buildings now in question, and to erect a party wall on and along the boundary line, such party wall to take the place of a partition wall then existing, and separating the portions allotted to each. It was also agreed that the manner in which the party wall was to be erected should be submitted to the determination of two valuers, assisted by an architect. Their award was to the effect that a party wall was to be constructed in accordance with the specifications prepared by the architect, and was to completely separate the two properties and the roofs covering them. The party wall was not, however, erected for its whole length, but only for about one-fourth of its length, and the thin partition wall which stood on the boundary for the remaining three-fourths of the length

was allowed to remain as before. In September, 1903, a fire occurred on the premises, with the result that the walls of the applicant's portion had to be demolished, as well as the partition walls in question. The respondent now proposes to rebuild the partition wall, but to make it of the thickness approved of by the architect, namely, 18 inches. The applicant, however, objects to any portion of this wall encroaching on his property, and, while admitting that the respondent could, before the fire, have carried out the award, he contends that the practical destruction of the wall puts an end to any rights which the respondent might have had under the agreement. The respondent, on the other hand, maintains that the agreement is still in force, and that, in erecting the wall, he is entitled to encroach to the extent of 9 inches, that is to say, one-half of the thickness of the new party wall, upon the applicant's share of the property. It is clear from the terms of the agreement that the respondent would have been entitled at any time before the fire occurred to carry out the terms of the award in regard to the building of the party wall. That being so, I fail to see upon what principle it could be maintained that the demolition of the partition wall by reason of the fire puts an end to the right of either party to build the wall in the manner previously agreed upon. It is true that some of the details of the architect's specifications will have to be omitted, but in their essential features these specifications are quite capable of being carried out, notwithstanding the alterations of structure caused by the fire. It is said that the right to the maintenance of a party wall is in the nature of a servitude, and that, as the agreement has not been registered against the title-deeds, neither party can claim the benefit of the servitude. It is quite true that the right partakes of the nature of a servitude, and is so treated by the writers on our law; but the non-registration of the right cannot affect the decision of the present case, which has arisen between the parties themselves to the agreement. The authorities are clear that, although the destruction of the servient tenement as a general rule puts an end to a servitude, the destruction of a party wall standing on the servient tenement does not involve the destruction of the rights of the owner of the dominant tenement in respect of that wall, whenever it might be rebuilt. (*Voet* 8, 6, 4.) The owner of the servient tenement cannot be compelled to rebuild it, but if he should rebuild it, he must rebuild it in such a way as to enable the owner of the dominant tenement to enjoy his rights as they existed before the destruction. The circumstance that the owner of the servient tenement cannot be com-

pelled to rebuild the wall is no reason for holding that the owner of the dominant tenement cannot rebuild it himself. I have already observed that the rights to a party wall partake of the nature of a servitude, but the wall itself is also regarded, in many important respects, as common property. The neighbouring proprietors are not co-owners, in the true sense of the term, of the wall, because the land on which the wall stands is not their common property, but they have the rights of co-owners to this extent, that each is entitled to the maintenance of the wall encroaching on his neighbour's property, as well as of the part standing on his own property. Such a wall is consequently termed in our law a "common wall." According to *Ulpian* (Dig., 10, 3, 12) the persons entitled to a common wall have the same rights in regard to the demolition or rebuilding of such a wall as co-owners of a house held in common have in respect of such house. Upon this passage *Voet* (8, 2, 16) remarks that the neighbours entitled to a common wall may not demolish or rebuild it except in case of urgent necessity, but he adds that according to the customary law of Holland, one of the neighbours may break down a wooden fence which is common to both without the consent of the other, and substitute for it, at his own expense, a brick wall, which, when constructed, would become common between them. It would follow, *a fortiori*, that if a common wall is destroyed by a fire, either of the neighbours may rebuild such wall, more especially if, as in the present case, there was an agreement in existence before, and at the time of the fire, that either of them should be entitled to remove a then existing partition and substitute for it a proper wall. In the present case the respondent claims the right not only to construct the wall in the manner authorised by the award, but also to recover half the cost from the applicant. It is not necessary for the Court, however, at this stage to decide as to the latter part of the claim. The question to be now determined is whether the applicant is entitled to restrain the respondent from building the wall, according to the architect's specifications, and for the reasons already stated, I am of opinion that the applicant must fail. The application must, therefore, be refused, with costs—with leave to the applicant to bring an action for a perpetual interdict, or for damages, and to recover back the costs paid on this motion. It is to be hoped, however, that instead of entering on further litigation the parties may still settle their dispute. The applicant at first offered to allow the building to proceed if the party wall were made somewhat thicker than the one authorised by the award, but that offer was refused by the respondent. He afterwards notified his acceptance of the offer, but the applicant then unfortunately refused to adhere to his offer. That offer appears to me to contain a fair basis for

an amicable settlement of the dispute, but if such settlement is not arrived at, the respondent cannot, upon the facts now before me, be legally restrained from building the party wall as directed by the award.

[Applicant's Attorneys: Sauer and Standen; Respondent's Attorney: V. A. Van der Byl.]

Ex parte NEWMAN AND (1901.
ANOTHER.) Mar. 3rd.

Mr. Sutton moved for an order authorising the executors testamentary in the estate of the late Jane Featherstone, of Stutterheim, to sell certain property. The second-named petitioner, Wm. George Featherstone (husband of the deceased), desired to take transfer of a piece of land in the division of Komgha, at the Divisional Council's valuation of £80. The children, all majors, consented. The husband had executed a deed of renunciation.

Order granted as prayed.

Ex parte DE GREEFF.

Mr. W. P. Buchanan moved for an order, authorising the registration in petitioner's name of certain property in the township of Malmesbury, belonging to the estate of the late Casparus Andries de Greeff. Petitioner was executor in the estate, and he purchased the property at public auction for £110, the Divisional Council's valuation being £78.

Order granted as prayed.

Ex parte HAYLETT.

Mr. Russell moved for an order authorising petitioner, executor in the estate of his late wife, to acquire certain property. The parties, who were married in community, executed a joint will, but at the death of the testator the petitioner executed a deed of renunciation of benefits under the joint will. There was one minor child of the marriage. It was felt that the present was an unfavourable time in which to offer the immovable property for sale, and he was willing to take over his wife's share in the estate for £2,585.

Order granted, subject to the Master's approval.

STRANGMAN V. SOMERSET STRAND
MUNICIPALITY.

Mr. Gardiner moved for an award of arbitrators to be made rule of Court, and for costs of application.

Mr. Van Zyl (for the respondents) consented.

Order granted as prayed.

Ex parte REES AND ANOTHER.

Mr. Gardiner moved for an order authorising the survey of a certain roadway in the Municipality of Cambridge (East London), and transfer of certain portions to be deducted. Counsel said he had previously mentioned the matter, but His Lordship Sir John Buchanan said that the application was premature. The Municipality had consented to take over the roadway, provided it were of uniform width throughout.

De Villiers, C.J., said there was not enough information before the Court at present. They knew nothing about the people below in this road who might be entitled to the use of it.

Mr. Gardiner: We are still leaving the road, and I submit that we are leaving what would be a reasonable width. We only wish to narrow the road, not to do away with it. I would suggest that a rule should be granted.

[De Villiers, C.J.: I cannot understand what the object is of having this little strip of roadway narrowed.]

The Municipality want a road of uniform width. We want the Municipality to take over the whole length of road, narrow and broad.

De Villiers, C.J., said there was not sufficient information before the Court to justify the granting of the application, and no order, therefore, would be made.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

WILEY AND CO. V. ISAACS	} 1901.
AND CO.	

Party wall—Subsidence of building—Negligence—Damages.

This was an action to recover the sum of £5,509 damages for alleged improper and negligent construction of a building.

The declaration set out that in August, 1902, the defendants, for the purpose of erecting a certain wall, which it was agreed between the parties should be a party wall, made certain excavations to a considerable depth partly from the defendants' side and

partly in and upon a narrow lane between the plaintiffs' property and the defendants' property. It was alleged that the excavations were so negligently, improperly, and insufficiently shored and supported, and were otherwise so negligently carried out that the lateral support to which the plaintiffs were entitled was withdrawn, and the land subsided, and shifted from the foundations of the wall of the store. The wall cracked and subsided, and the building was rendered highly dangerous, and the plaintiffs' store became uninhabitable, and wholly useless to the plaintiffs, and had to be demolished. The defendants also broke, or caused to be broken, a certain drain pipe under the said land used to carry off storm-water. In consequence thereof large quantities of water were discharged from the said pipe into the excavations, contributing to the subsidence, and cracking the walls aforesaid. In consequence of that the plaintiffs had to pull down their store, and were deprived of the use and occupation and benefit of it. Large quantities of stock in the store were damaged and destroyed, and plaintiffs were put to great inconvenience and expense in removing the stock to other premises. They alleged that by reason of the foregoing they had sustained damages in the sum of £5,509.

The defendants, in their plea, admitted the formal allegations, and said that in January, 1902, the defendants entered into a contract with the contractors, Messrs. Small and Morgan, to rebuild premises adjoining the plaintiffs' premises, that before rebuilding or excavating the defendants consulted the plaintiffs and the plaintiffs' architect as to the method of erection, and they agreed that the wall was to be a common or party wall, and was to be built in a certain manner which required excavations being made under the boundary wall, and which was approved by the plaintiff. They denied that there was any legal negligence, and said that the work was carried out as agreed upon. The plaintiffs' wall was in an extremely rotten and unsafe condition, and there was an old drain pipe which was running along the wall in a dilapidated condition, and it leaked and otherwise caused the wall to subside. The work was done by independent contractors. The defendants said that if there were any liability at all, then that liability rested upon the contractors. They denied damage, and that they had received particulars of the alleged damage.

Sir H. Juta, K.C. (with him Mr. Gardiner), for plaintiffs. Mr. Searle, K.C. (with him Mr. Benjamin), for respondents.

Mr. Searle said the defendants did not intend to place any reliance upon the plea of independent contractor, and it seemed that an agreement had been entered into between defendants and the contractors.

Sir H. Juta then made formal application for inspection of certain documents.

Mr. Searle submitted that the plaintiffs had no right to inspect correspondence between third persons. The plaintiffs asked to inspect correspondence that had taken place between the architects of the defendants, Messrs. Baker and Masey, and the builders of the defendants.

Sir H. Juta contended that in accordance with what was done in the case of *Van der Horst v. Colonial Government* (13 C.T.R. 1038) the plaintiffs were entitled to inspection.

[De Villiers, C.J.: The only question is as to whether notice has been given].

Sir H. Juta said that proper notice had been given.

De Villiers, C.J., said it surely could not be argued that these documents were privileged.

Mr. Searle said they did not take up the position that the documents were privileged. The respondent only received notice of the application on Saturday.

An order for inspection was granted.

Evidence was then called for the plaintiffs.

David Arnett, clerk of works employed by Mr. Parker (architect), said he had had considerable experience of the taking out of basements. He was clerk of works at the building of the Tivoli. The property was part of the site of the Old Masonic Hotel. He saw what was going on near to Isaac's property. He saw a number of pits being made about 6 feet square and 15 feet deep. The pits were partly on the lane and partly where the old wall would be. He had never seen excavations made in that fashion before. The usual thing was to take out about 6 or 8 feet, and make that up before opening another section. He saw the ground taken out as well before the pits were filled up. He thought when he observed this method that he was going to learn something.

A trench 52 feet long was formed. He did not attach any importance to the drain pipe. The soil was black and loamy. There was nearly 8 feet of water in the trench. He saw Wiley's wall begin to crack; his recollection was that it would be two or three weeks before the wall collapsed. The excavations were continued after the crack had appeared. The wall was well shored right along, and further shoring was put up. Both the cross wall and the internal walls were cracked. The roof was also broken. The collapse was caused by the foundations giving way in consequence of the soft soil percolating through the sheeting into the trench. The soil was very much in the nature of morass. It was really mud that percolated into the trench. In his opinion each pit should

have been filled up with concrete; instead of which a concrete bottom was laid, and a granite pier was built on top of that. Each pit should have been filled up as it had been excavated.

Cross-examined by Mr. Searle: Four pits had been opened when the wall fell. Practically speaking, the wall never fell; but it was in such a dangerous condition that it had to be taken down. Originally the pits had to take iron stanchions, and were to have a flooring of concrete. He thought ten days would be sufficiently long for a hole to stand open after it had been floored with concrete. A good deal would depend on what was to be put above. The defendants' building was about five stories high, and was on the American principle—steel framework. The depth of the trench before the job was done was not less than 11 feet. He saw a crack in the wall two or three weeks before he made the plan on the 18th September. The wall was very old, and it might be that there were a few cracks in it. The taking down of the Masonic Hotel would not affect the wall at all, because there was a wall between.

Edmund James Sherwood, architect and quantity surveyor, said he assisted in making up a tender for Isaacs's building. In making the tender special attention was paid to the risk in connection with Wiley's wall. The architects drew attention to it, and an allowance for the risk was made in the tenders. He saw the work from time to time as it progressed. He could not give any particulars as to the depth of the trench and pits. The soil was similar to what they had to contend with at the new City Hall. The shoring at the time was sufficient. He was called in about two days after the collapse had taken place. The wall had sunk vertically about 15 inches; the foundations had been drawn away by the pumping. Two floors of Wiley's building collapsed towards the new building. The roof also went. He attributed the mischief to the breaking of the drain pipe. As to the method of doing the work, he agreed with the evidence of Mr. Arnett entirely. He thought that the method employed in this case was extremely risky. He thought if the pipe had been connected and the drain water had been carried away as it should have been, the damage would have been considerably minimised at any rate. After the subsidence had taken place, no amount of shoring would have saved the building. He had prepared an estimate for reinstating the building in its former position. The amount was £2,963.

By the Court: The suggested new wall would carry a larger superstructure than the old wall would have borne. The old wall would, however, have been sufficient for plaintiffs' purposes. He did not think the building would be more

valuable to the plaintiffs after the new wall was put up.

Cross-examined by Mr. Searle: He did not attribute the collapse entirely to the drain pipe. If he had said so, then he should modify the statement, because he thought the excavation of the trench had a good deal to do with the collapse; in fact, he should say that the excavation was the more important cause. The drain pipe was not full of cracks and leakages prior to the fracture caused by the contractors. The old wall was such as would be allowed by the Town Council to-day. The anchor in the wall would probably have been put in originally. Anchors were put in walls at the present day upon their completion. He maintained that the old wall was not cracked until it had been disturbed by defendants' contractors. Upon the new wall, for which he had estimated, it was possible to put an extra two stories. It would be necessary to provide a new foundation under the wall. The old foundations had gone for a good distance.

Alexander Forsyth, architect, Cape Town, said he found the wall in such a state that it was impossible to repair it. He thought it was dangerous for Wiley to remain in the premises, and he advised his removal. His opinion as to the cause of the collapse was the depth of the trench being lower than the bottom of Wiley's wall, and the fact of the trench being opened over such a length at one time. No amount of shoring would have prevented the vertical collapse of the wall.

Walter S. Law, architect, Cape Town, said that he prepared plans for the construction of the party wall. On the 21st August he inspected Wiley's wall, and found a big crack in it. He observed that the foundations had begun to subside for a length of four or five feet at the centre of the wall. The earth under the drain pipe had given way, and the two ends had broken. He drew the attention of a man in the contractors' employ to the pipe. He found preparations for six shafts. Four were in various stages of excavation. He found in one of the pits water to a depth of about 8 feet 6 inches. He thought the method of working showed a lack of experience. An attempt was made to shore up the wall, but it was all hopeless. The ground in that locality was very treacherous. He had prepared an estimate for the work necessary to be done in consequence of the damage, the amount being £4,300. The estimate took into account other portions that would have to be reinstated in addition to those included in Mr. Sherwood's estimate.

Cross-examined by Mr. Searle: He did not think more than one hole should have been opened at a time. Each hole should have been filled in before another was opened. He measured the depth of one of the holes in process of excavation.

It went 13 feet down. He admitted that the wall was a very old one, but it was like a good many other old Dutch walls. He was astonished at the solidity they showed after so much wear and tear. These old Dutch walls were all right if left alone, but they had an objection to being pulled about. His estimate of the cost was very approximate.

Mr. Gardiner read the evidence of Wm. Henry Dunning, taken on commission. Deponent said he was an architect's assistant, in the employ of Mr. Parker. In September, 1902, with Mr. Forsyth, he proceeded to Wiley's store, and among other dilapidations, found a big crack in the wall, under the words, "Settlement under this window." At the end furthest from Darling-street concrete was being put in. The trench was covered with water. He did not think the drain pipe was intact. The length of the excavation was about 52 feet, and in four places the trench was wider than in others. His firm would not have opened the trench all at one time, that being a very unusual course. The proper course was to excavate in sections, and if that had been done, there would have been no danger.

George Herbert Dunn, partner in the firm of George Findlay and Co., said he examined certain stock for Mr. Wiley. He made his report in conjunction with Mr. Smithers. There was a large crack in the wall, and water had come through it, damaging the stock. The damage was estimated at £750.

Cross-examined by Mr. Searle: He had no figures to show how the damage was arrived at. The stock consisted of general ironmongery, including tools, bedsteads, etc. He could give no exact details whatever. Some of the articles were entirely useless, and others were deteriorated very much by rust, due to rain and dust. Many of the packages bore traces of damp, and the greater part of the steel goods were damaged by rust.

John Robert Wiley, the plaintiff, said that when the contractors commenced their excavations, his wall was not shored up. On the 21st August no saw several cracks in the wall. He spoke to the contractors' foreman, and sent for his architect, Mr. Law. The foreman put paper over the cracks, but the cracks got larger. Mr. Morgan (of Messrs. Small and Morgan) ultimately came and instructed his men to shore up the building. The most serious crack was about three-quarters the whole way of the wall in front of the trench. He saw Mr. Isaacs, and spoke to him about the damage done by the contractors. Mr. Isaacs said: "I am thoroughly disgusted with Small and Morgan; they call them first-class builders, but I am thoroughly

disgusted with them, and so are Baker and Masey." The cracks continued to become worse, until the wall collapsed. With regard to the earthenware pipe this pipe carried off the rain water from three sides of the building, and the water from the w.c. He spoke to the contractors about this pipe, and asked them to be careful. A plank was put under the pipe by the contractors, but he found that the pipe was damaged, and it remained leaking for some months. Witness did everything he could to stop the damage caused by the contractors. He ultimately received a little help from the contractors, who patched the roof, but this only served for two days. Whenever witness spoke to Isaacs, the latter refused to do anything, saying that it would prejudice his case with his builders. The day after the inspection of the stock by the assessors, he removed his stock to his store in Buitenkant-street. As to the claim for damages, there was an item of £1,550 for loss of rent for nine months. He calculated that it would take nine months to remove the stock back again, and have the building put in order again. He did not include anything for loss of business in his claim. His business had been ruined through having to remove from Darling-street, where he occupied an old and well-established stand. He had no intention at that time of rebuilding or moving his business. They had ruined his building, and they had ruined his business. His business was nil at present.

Sir H. Juta: We don't know what your business was before. Can you give his lordship any idea what your loss has been?

Witness: I should think that it will take £10,000 to cover me against actual loss. Continuing, witness said that the damage assessed by Messrs. Smithers and Dunn was £750. He claimed £157 10s. for removal of stock to Buitenkant-street, and also a similar amount, estimated cost of taking the goods back again. He claimed £130 14s. 3d. on account of expense incurred in taking down fixtures and re-fixing. The estimate of Mr. Sherwood for rebuilding was also included in his claim for damages. Since that estimate was prepared he had taken more of the building down, in fact practically the whole building had been taken down.

Cross-examined by Mr. Searle: He had not any immediate intention of rebuilding at the time the mischief occurred. It was true that certain arrangements were entered into between his architects and Mr. Isaacs's architects as to digging out basements, but this was only in case at some future time he should desire to enlarge his premises. He repeated that Mr. Isaacs did not assist him. It was true that he received a letter containing an offer, but he de-

clined the proposal because he would not have a patched job made of it. They were willing to take a lump sum. He first removed some goods from the south-east side of the building in response to a request from the Town Council. He did not give Mr. Isaacs notice of the assessment of the damage because he thought it was quite useless. The claim sent to Mr. Isaacs amounted to £2,900 in full settlement. He denied that he had told Mr. Morgan and his foreman that he had had to repair the wall every year. He had not had the wall repaired frequently. Every few years he had the old Dutch roof and the wall cemented for the winter. He reckoned the value of his premises in Darling-street at £150 a month. The item for removing stock was an estimate. He had previously had this store in Buitenkant-street, and had not had a tenant there, so that he did not lose any rent through taking his goods there. He did not consider that the drain pipe was very old—it was put down in 1874. The drain pipe was not patched with glass and tin.

Re-examined by Sir H. Juta: The claim that he sent to Mr. Isaacs, in response to the offer which he made, was for £2,900, but further damage ensued subsequently, and witness withdrew his proposal.

[De Villiers, C.J.: Who paid for pulling down the building?]

Witness: I pulled it down.

[De Villiers, C.J.: How is it that you don't charge for that?]

I never thought about it, my lord.

Mr. Gardiner read the correspondence which had passed between the parties.

Sir H. Juta closed his case.

James Morgan, of the firm of Small and Morgan, contractors, said he had been in business for 27 years, and had built several large buildings in the Colony, as well as elsewhere. He built the Post-office in Cape Town, the Rondebosch Town Hall, the Port Elizabeth Custom House, and other large buildings. He was contractor for Isaacs's buildings, and for the Tivoli superstructure. He noticed, soon after they began work, that there were cracks in the wall in May because it appeared to be unsafe. They first took down Isaacs's building, and commenced to excavate at the back. Then they took down, by consent, an extension of this wall just behind. He first noticed that this wall was weak after taking down the extension. The extension helped to support the wall in question. A bulge showed about 8 or 10 ft. from the end; this would be about June. They put up props. Mr. Wiley was mistaken when he said no shoring was put up before August. The props were put in long before the excavation was begun. His foreman, Stradling, came from Simon's Town in July, and the shoring had taken place before then. The excavations were commenced about the beginning of August. They had to make

eight pits, about 15 feet deep. The brickwork between the pits did not go down so far within three or four feet. The pits were to carry iron stanchions. It was not true that they opened a big trench along the whole length of the wall. There might have been 30 ft. of trench opened at one time. The stanchions were put in first, and the trench was dug between. He had to fill up the whole with granite, with two or three feet of concrete at the bottom. Before filling up the pit it was necessary that the concrete should be allowed to settle. About the middle of August he noticed the wall crumbling towards Darling-street. At that time three or four holes were open. The cause of the collapse in the wall was the rotten state of the wall. The season was extremely wet, and he thought that the fact of the masonic building being down would precipitate the decay. The water in the passage soaked up the wall, and witness discovered when the trench was opened up that the drain pipe was leaking in several places.

By the Court: The pipe was repaired from time to time.

Witness (continuing his evidence) said that judging from the condition that he found the pipe in, water must have been escaping for a considerable time, and in his opinion the wall in any case would not have lasted more than a year or two. In September there was a further subsidence of the wall, which injured the roof. When the wall was taken down at the end of November, it was in a hopeless condition; but in September it could have been renewed for £500 or £600.

Cross-examined by Sir H. Juta: At the present time Messrs. Isaacs held him responsible, but he repudiated liability. On the 25th March, and again in May, Messrs. Baker and Masey complained of delay on the part of witness, in connection with the work. His intention in May was to open up the trench in sections. It would be very improper to open up the whole trench. Mr. Masey urged him to proceed with the work, and he said that he would not on his own responsibility excavate the whole of the trench, on account of the danger. The wishes of the architects were to excavate at once. He never knew any man open up all the excavations at the same time. The adjoining property was so bad that he wrote to the architects, telling them that he would not consider himself responsible for any mishap, and he wrote that because he thought there was every danger of the wall coming down. Towards the end of May he anticipated danger, and on the 4th June he wrote suggesting the substitution of brickwork in order to minimise the danger; but the architects were unable to see their way to adopt the suggestion. Witness was finding fault with the architects, and

they in turn found fault with him. The wall did not come down on account of inadequate shoring. When the first crack appeared in the wall, he still went on with the excavations, and the wall continued to get worse. He did not attach any importance to the pipe, which was exposed during August. It was patched up several times.

Re-examined by Mr. Searle: He did not think that one of the lengths being opened to its full length endangered Wiley's wall.

Paul William Stradling, stated that he acted as foreman at the excavations from the middle of July. The wall had bulged at the top, and the bricks were crushing at the bottom so that shores had to be put up. Mr. Wiley admitted to him that he had from time to time to patch the wall, and witness found the roof cracked from end to end along the roof before the excavations along the wall commenced. In the beginning of August he started the excavations with one of the six feet square holes. About eighteen feet from where he was excavating the bricks were crushing out on firm ground. He attributed that to the weight of the building, and the removal of the end wall. At no time was there 52 feet of continuous trench open. Between the holes the trench was shaped out to the depth of eighteen inches or two feet. Towards the end of August, the wall got worse, and more struts were used. The excavating work, in his opinion, had nothing to do with the crushing out of the wall, which, he believed, would have only stood for about twelve months more when it was exposed to the wind and weather. The first time he saw the old pipe it had been broken for cleaning purposes, and the leakage would "melt" the bricks away. If he had not stopped the pipe he would have had all the sewage coming into the works. The material in the wall would not be permitted to be used now.

Cross-examined by Sir H. Juta: No rain came in as far as he knew. A wall beginning to fall over had a tendency to crush out the foundations, and that was the result of removing the small wall. There never was a continuous trench of 52 feet. He absolutely contradicted the witnesses who said there was an open trench of 52 feet, and Mr. Morgan, who said that two lengths were opened to their full depth.

John Hankinson, manager for Small and Morgan, said that he supervised the work. About the end of July he found that the roof was cracked like a spider's web, many of the cracks having been patched up. There had been shoring up before August, when the excavations of the holes was commenced. In his opinion the sinking of the pits might have had a slight effect on the wall, but the wall, to his mind, would have had a

very short life. There was a great deal of rain in July and August, and the bricks were of a class that would easily absorb water and decay. The condition of the old pipe might have had a slight effect on the foundations.

[De Villiers, C.J.: Do I understand you to say that if no excavations had been made the wall would have come down?]

Yes.

Mr. Searle: Would the exposure shorten the life of the wall?

Witness: Considerably.

Cross-examined by Sir H. Juta: In September two-thirds of the trench was not open, the utmost length being 26 feet. The statements by Messrs. Arnett, Dunning, and Forsyth were imaginary, as when they reached 11 feet of depth the next length would only be four or five feet deep. The bulging out of the wall would cause a leverage on the foundations, and crush them out.

[De Villiers, C.J.: Did the architects ever find fault with you for having too large an extent of excavation?]

No.

Geo. Ransen, architect, said that he visited the work principally with regard to the shoring. He examined Wiley's wall, and found a fracture towards the other end of Darling-street. The wall was composed of soft brick and clay. From the fracture that he saw he concluded that the wall had been exposed to wet. The wall would not stand any great weight, but while the masonic wall was in existence Wiley's wall received a certain amount of protection. About the first week in August four holes had been sunk, and the bulging was between two of them. He attributed the bulging of the wall to the saturated bricks. There was no alteration in the foundation when he was there. Leakage from the pipe would affect the foundation. The wall had been patched up on several occasions. He did not think the wall would have lasted any length of time.

Cross-examined by Sir H. Juta: Witness was called in to see if he could suggest any further shoring. The bottom of the wall was saturated with water, two of the holes being about fifteen feet deep, and the other two about eight.

Re-examined by Mr. Searle: The holes would have to be open for about three weeks, while the concrete was settling.

Francis Edward Masey, member of the firm of Baker and Masey, architects, for Messrs. Isaacs, stated that the rear of the work where there was another building, and where excavations had also to be made, was commenced first. When Small and Morgan wrote on the 14th May, witness did not take it that they meant the portion of the wall that came down. There was no work at the time that could have endangered the wall. That wall, to his mind, could not last any time. The wall had been built for a dwelling-house, and had been used for a warehouse, and

was gradually giving way. Too heavy a load had been put on it. About June, some time before any excavation was commenced, Mr. Wiley gave his consent to part of the wall coming down. It was necessary in the construction of the foundation to have the stanchions put in at the same time, and consequently the holes had to be opened at the same time. No trench of the length and depth stated by Messrs. Arnold, Dunning, and Forsyth ever existed. The wall looked dangerous, and he immediately wrote to the contractors to shore it up. When the agreement was come to on the 21st August, with Law, the holes were filled up as soon as the concrete had settled. In September there was another subsidence of the wall, and in his opinion a good job could have been made of the wall; but in October it had gone too far. About £400 would have renewed the wall in September. The wall, in any case, ought to have been condemned by the Town Council, and had it been a front street, it would have been shaken down by the traffic. Irrespective of the protection from the Masonic wall, it would not have lasted very long.

Cross-examined by Sir H. Juta: When Small and Morgan wrote to him in May, they referred to the wall generally. It was not the case that he wanted Mr. Morgan to go on with the whole of the excavation. On the 21st August there were four holes made, and at that time he was aware of the nature of the foundation of Wiley's premises; but the whole site was full of water, as a result of terrible rains. He did not notice the coming out of the foundation into the trench. When he wrote to Small and Morgan to excavate the whole, he did not mean a continuous excavation. He thought the contractors were not as expeditious as they might have been. There were three continuous excavations of fifteen feet long, ranging from fifteen to seven feet deep. The plan put in by the other side was a plan of something that never existed. He would not say it was a forgery. He attributed the collapse of the wall to bad weather, the fact that it was an old wall, and the building operations having disturbed it. The reason, he believed, the wall was not rebuilt, was that the attorneys could not agree to the amount of damages.

Re-examined by Mr. Searle: The negotiations fell through on account of the large amount of compensation demanded by Wiley. To the best of his belief, the depth of the trench stated by witness for the plaintiff was incorrect.

James Preston, clerk of works, in the employ of Messrs. Baker and Masey (architects), on the work in question, said he started there one June 1, 1902. No thing had been done at that time in connection with the party wall. He had been made acquainted with the nature of ground in 1901, when he went for the pur-

pose of making the original drawings of the old building. He continued as clerk of the works until the work was finished. On July 22, 1902, the wall was shored the full length, but, prior to that date, some shoring had been put up at the back of the passage beyond the end, to support a lean-to. Before they opened trenches, it was evident that the wall was in an unsafe condition. On the 25th August three pits had been made, but, practically no excavation had taken place in the passage. The concrete foundations were laid in the pits on the following dates: No. 1, October 22; No. 2, August 16, No. 3, August 25; No. 4, August 5; No. 5, September 4. The granite piers had been built on the following dates: No. 1, October 23; No. 2, September 8; No. 3, about September 8; No. 4, about September 20; No. 5, September 26 (completed). Brickwork to the depth of 11 ft. was erected in the trenches. Witness gave other data with regard to the progress of the excavations and erection of foundations for stanchions. He examined Wiley's wall during January and February, 1901, and found that its life was gone; it was practically decaying. He attributed that to old age and poorness of material. The wall could not have lasted long. The passage was practically level with the street, and the water had sunk down into the earth. An area of about 2,000 feet was discharging rain water on to the passage. He had made calculations from the rainfall in 1902.

[De Villiers, C.J.: You say, then, that the material was of such a character and the wall was so old that it would have collapsed in any case?]

Yes; within a short time the building would have collapsed.

[De Villiers, C.J.: You think that Isaac's building operations had nothing to do with the collapse of the wall?]

Well, there may have been some fault due to the excavations, naturally assisting in the subsidence of Wiley's building. I think a little more precaution might have been taken.

Witness (continuing his evidence) said he could see that the water had soaked into the ground and affected the brick work. The ground of the passage was about 6 to 9 inches above the top of the stonework foundations. The wall had a damp course. The roof of Wiley's building was also in a decaying condition. There were a number of old cracks in the wall before the excavations had been commenced. The cracks had all been patched up.

Cross-examined by Sir H. Juta: The water from the passage would have to rise over the footpath to reach the street. He did not see any grating there, he did not say there was no grating. He had complained about the dilatoriness of the contractors in regard to shoring. The Town Council also made similar complaints. He was of opinion that the contractors had not sufficiently shored the

wall. After the crack had appeared, the whole wall was shored. He thought a little bit more precaution could have been taken by the contractors. He thought they made a mistake in opening up the trench between pit 2 and 3, and pit 3 and 4. He told Mr. Stradling at the time that it was a risky thing to do. Mr. Stradling said he would only go down to the old stone foundation, but, after remaining there a few days, he went on again. Stradling said that Mr. Morgan had told him to push on with the work.

Mr. Searle closed his case.

Sir H. Juta, on the question of damages, said that the declaration was dated as far back as July, 1903, and the hearing of the case had been delayed on account of the absence from the Colony of Mr. Morgan. The damage as claimed really did not represent what Mr. Wylie had lost, but urged that as long as they kept within the amount they would be entitled to damages of varying amounts. They had the estimate of Mr. Sherwood as to the cost of reinstating the building.

[De Villiers, C.J.: Would the plaintiff be satisfied if the walls were reinstated in the same condition as before?]

Sir H. Juta: Yes, if you can get someone to do it. They cannot build the same as they used to do for some reason or other; at any rate, we don't get the same building. I have known one of these old Dutch walls condemned 30 years ago, and it is still standing.

De Villiers, C.J., said he had been past Isaacs' premises. He found that the defendants had put up a skyscraper. Was it to be expected that the plaintiff would not ultimately have erected a high building on his adjacent site.

Sir H. Juta said that he did not know what the plaintiffs' intentions were in regard to the building, but the fact remained that he had been deprived of his premises. The estimate of Mr. Sherwood of £2,900 did not actually cover the full extent of building that would have to be reinstated. Then the plaintiffs had lost the use of these premises for nine months, and it was not attempted to be gainsaid that the rental value was £150 a month. There was also the removal of stock to Buitenkant-street, and the prospective removal back to Darling-street.

Mr. Searle addressed the Court on the question of whether the defendants were liable. He submitted that this was not a case where the doctrine of lateral support could be applied. Part of this work was actually for the benefit of the plaintiffs. The excavations were continued further down in order to meet plaintiffs' wishes. The defendants did not give a guarantee against damage being done. There was no proof of negligence on the part of the contractors. He maintained that the trench was not open to such an extent as to have materially effected this wall. The mischief it was evident was accountable to exposure

of the wall to wind and weather and the discharge of rain water into the passage and its consequent absorption in the ground. The deepest part of the excavation was made for Mr. Wile's own benefit. The mere fact that the contractors might have taken further precautions was not sufficient to charge the defendants with liability. Therefore the plaintiffs were in the same boat with the defendants, and they must have shared the risk. Counsel reviewed the evidence, and submitted that it had not been conclusively shown in what specific respect the contractors had negligently performed the work. Coming to the question of damages, in case the Court should hold that there had been negligence, counsel submitted that the other side had adopted a novel principle in arriving at their assessment. Mr. Wile had never made a claim for loss of business. How he could now bring in the fact that he had lost, as he alleged, £10,000 by this damage to his premises counsel could not understand. No figures had been produced to show what the extent of business was that Mr. Wile was doing in that tumble-down old place in Darling-street. His learned friend (Sir H. Juta), he contended, had no right to say that if the plaintiffs were not entitled to the amount of £2,960 for reinstating the building they were entitled to a large sum for vague loss of business. Counsel read correspondence in support of his contention that the defendants had offered to assist the plaintiffs to repair the damage, and had been refused. The whole thing could have been settled, but the plaintiffs said they must erect the wall again and pay £2,000 for damage to stock. Mr. Masey estimated that £300 or £400 would be sufficient for reinstating the wall and repairing the roof and so forth. He (Mr. Searle) thought that that sum would be quite enough to allow the plaintiffs. As to the alleged damage to stock, he submitted that the estimate of £750 was of the most random description. There was no proof of that item, and it should be wiped out altogether. The expense of taking down the fixtures seemed to be a legitimate claim. With regard to the claim for rent, it had not been shown that the plaintiffs had lost any rent by having to remove to Buitenkant-street. If they had any loss at all it would be by the diminution of business through being in Buitenkant-street. Plaintiffs had taken their goods to premises which had not been bearing rent and upon which they had no rent to pay. Counsel also urged that the item of £157 for removal of stock back to Darling-street should not be allowed.

Sir H. Juta, in reply, said his learned friend had no right to say that the plaintiffs refused the defendants' offer. The plaintiffs made no refusal. Mr. Wile was not going to re-build when this mishap occurred. If he had wanted to re-

build there was nothing to prevent him rebuilding at that time. He submitted that the items, as long as they were not absolutely new, were quite right and proper, and as long as the other side were not taken by surprise. The thing had altered somewhat after the summons was issued, and plaintiffs' business had suffered far more than at first it was thought it would. Counsel contended that £150 a month was a reasonable estimate of the rental of premises in such a position.

De Villiers, C.J.: I quite agree with the counsel for the defendants that the wall now in question was in a very precarious condition at an early stage of the building operations. The first danger, the first real danger, began when part of this wall was broken down at the back, because, being a very old wall, it required all the support that it could possibly have, and losing part of that support from the wall, that was the first contribution towards its ultimate fall. The next step in the building operations which conduced to the final collapse was, in my opinion, the digging of the pits. They were dug at a considerable depth below the foundation of the old wall, and they must have conduced towards the many additional cracks which appeared in this old wall. But the final cause of this collapse was, in my opinion, the making of these trenches in the manner in which they were constructed. But it is admitted that the wall was in a very precarious condition, and that they knew it. Well, the fact of their knowledge of the dangerous condition of the wall imposed upon them the duty of using every precaution to prevent the final collapse of the wall. In my opinion, if the trenches had been properly constructed, the wall might still have been shored up, and saved from collapse, and might perhaps have been restored to the condition in which it had been before. But, these trenches being at a greater depth than the bottom of the foundation, the natural result was that the soil, which, in that neighbourhood, seems to be of a treacherous character, oozed away from underneath the foundations, and escaped into the trenches. If the trenches had been made in smaller sections, and filled up as the sections were completed, the oozing would have been less, and the wall would probably have been saved, and therefore, in my opinion, it is the want of due precaution on the part of the defendants in preventing this oozing of the soil contributed to the fall of the wall. There was, in my opinion, a want of due precaution, and, therefore, negligence on the part of the defendants in the construction, which renders them liable for the damage done to the plaintiffs. The more difficult question seems to me the question as to the measure of damages to be applied. I cannot lose sight of the fact that the building was

a very old building, not built for business purpose at all, but built for a dwelling-house; that it was in a precarious condition; at all events, the wall was, before these works began; and the plaintiffs will ultimately derive great benefit from the party wall constructed by the defendants, and in the ordinary course of events it is extremely probable that the plaintiffs would not have long retained their building in the condition in which it was. The fact that they made this stipulation that the wall should be a party wall, and that the basement should be of sufficient depth to be able to be utilised by them, shows what was passing in their minds, that they had already desired to take advantage of the building of this wall for the purpose of placing a building of greater height, if not of the same size as the buildings of the defendants, on the same site as their (the plaintiffs'), building stood on before. This site is certainly one of the best in Cape Town, and one can hardly believe that it would have been possible for the plaintiffs to have long continued to occupy the premises in the condition in which they were. The walls, I do not think, would have lasted very long. It is difficult to say when they would have come down, but I am satisfied from the evidence and from the photographs which have been put in that the condition of the wall was very precarious. It appears to me that the witnesses for the defendants have given their evidence very fairly, and especially Mr. Preston, in regard to what he said as to the condition of the premises. They certainly seem to have been in a very dilapidated condition, but then he (Mr. Preston) admitted that the works constructed by the defendants did contribute to the collapse. He candidly acknowledged that, and, having admitted that, I am prepared to attach considerable weight to the rest of his evidence, in which he states what the condition of the plaintiffs' own premises was, and I am satisfied that the condition was such that they would not for any length of time have continued to occupy their premises in the condition in which they were. Well, in that view of the case, it is impossible for the Court to give the heavy damages which have been asked for. I think the Court should confine itself to actual losses; of course there must be a liberal estimate, but beyond that I am not inclined to go. I think that the plaintiffs will never re-build the wall; the buildings are such that it is extremely unlikely that they would have occupied them in any case in their former condition, and they will derive great benefit from the party wall which has been constructed. But there should be a liberal estimate of actual losses. Well, we have the evidence of two gentlemen who examined the stock, and Mr. Dunn said that he and his colleague put the loss at £750.

No doubt his evidence is open to the observation that he did not give particulars. At the same time, he is an experienced man, and he could, by two hours of inspection of the premises and of the articles which he found to be injured arrive at a pretty fair estimate of what the damages were. He estimated them at £750. Then there is also the cost of removing the goods to Buitenkant-street and the cost of removing them back again to Darling-street. I think those items should be allowed, and also the item of £130 for taking down fixtures and refitting. That would make a sum of £1,195. As to the other claims, for the reasons I have stated I am not prepared to allow them. I do not think it would be right, just, or equitable to allow any further damage. As to the rent, well, there was no rent to be paid by the plaintiffs for the store in Buitenkant-street, and if the plaintiffs had rebuilt their store they would have been in the same position, because they would have had to remove to other premises and to have either hired premises elsewhere or go to the Buitenkant-street premises. I am not inclined, therefore, to say that £1,300 should be allowed for rent. The sum of £1,200, in my opinion, would be a fair estimate of the real damage done to the plaintiffs, and for that amount the Court will give judgment (£1,200) and costs.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

CRANFORD V. CRANFORD. { 1904.
Mar. 7th.

Mr. Buchanan (for the plaintiff, Mrs. Cranford) applied for leave to sue her husband in *forma pauperis* for judicial separation. Counsel said that the parties were married at Simon's Town in 1894, and there were three children of the marriage. They were married in community of property, and lived happily together until 1898. Since then the defendant had cruelly ill-treated the applicant, and since 1903 had not contributed anything towards her support. The husband was a clerk in the Harbour Board, and earned £4 10s. per week.

The applicant, in reply to his lordship, said that her husband had struck her on several occasions. He earned £4 10s. a week, but he had given her nothing since September, and had stopped her getting goods on credit.

Subject to counsel producing a certificate of *probatis causa*, a rule *nisi*

was granted, calling upon the applicant to show cause why he should not be sued in *forma pauperis*, the rule to be returnable on the 12th March.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTION.

HEDDON V. SAWKINS. { 1904.
Mar. 9th.

Mr. J. E. R. de Villiers was for the plaintiff, and Mr. Sutton was for the defendant. Counsel for the plaintiff put in a consent paper signed by both attorneys to have the matter postponed until the 12th inst.

Ordered to stand over.

APPEAL CASES.

REX V. JAFFA. { 1904.
Mar. 9th.
" 18th.

Natives—Private location - Lease
—Act 30 of 1899.

The accused had housed a considerable number of natives on his property. He was not their employer and had not taken out a licence under Act 30 of 1899 for a private location. Several groups of these natives hired, on lease, certain specified rooms, at a monthly rental of £11 5s., for each group. The Magistrate held that these leases were not bona fide, and convicted the accused.

Held on appeal, that as the accused (now appellant) had kept within the letter of the law, the conviction must be quashed.

This was an appeal against a decision of the A.R.M. of Port Elizabeth, by which the appellant was fined in £25 for not taking out a licence for a private location as required by Act 80, of 1889.

From the record it appeared that the appellant was the owner of certain lands in the district of Port Elizabeth. He was charged with contravening section 3 of Act 30 of 1899, in that, between June, 1903, and November, 1903, he wrongfully and unlawfully failed to take out a licence as by law required. Evidence was given for the Crown to the effect that no licence had been issued to the accused, and that 120 male adult natives were living on his property. They did not work on the farm, but had employment in different stores throughout the town. The native evidence called showed that a lease existed between nine of them, and the appellant, by which they agreed to pay a total amount of £11 5s. per month rental, and should eight of them leave the remaining one to make good all the rental to the lessor. The Magistrate held that the lease was not *bona fide* as required by the Act, and found the accused guilty. The original lease was not produced, and the Magistrate was of opinion that the document would not be a *bona fide* lease, but that it was drawn up to evade the law, and would not exempt the accused from taking out a licence. Mr. Schriener, K.C. (for the appellant), contended that the idea of the law seemed to be that where there was danger from a congregation of natives it was necessary to take out a licence. The Court would have to determine whether or not there was a *bona fide* written lease. It was perfectly clear that the owner, in drawing up the lease, had the 10th section of the Act in view. The rental was in accordance with what was required by the 10th section, and as long as there was genuine payment of the amount of money stipulated for, that made the lease *bona fide*.

Mr. Howel Jones (for the Crown), pointed out that the 5th section limited the occupation to 40 male adults in a private location. The onus of proving that he was exempted from taking out a licence lay upon the appellant. There was no lease put in, and if the appellant relied on the 10th section the onus was on him to produce it. Section 2 laid it down that if any two or more native adults joined in any written *bona fide* lease they should not be subjected to the provisions of the Act in respect of the payment of licence fees, and hut tax, but it did not exempt the owner from taking out a licence, because the inspector must satisfy himself as to the number of persons on the lease, and the 3rd section distinctly laid down that a licence must be taken out. There was no evidence before the Court to establish a *bona fide* written lease.

Curr. Adv. Vult.

Postea (March 9th).

Hopley, J.: This is an appeal from a conviction of the appellant by the Acting Assistant R.M. of Port Elizabeth on the 6th of January last, for contravening section 3, of the Native Locations

Amendment Act, No 30 of 1899. The evidence in the case has not been very well taken, and it would have been well if the production of the original lease or leases had been insisted on; but there seems to be no reason to doubt the accuracy of the facts as found by the Magistrate. The appellant, it appears, is the owner of lot 26 in the village of Korsten, near Port Elizabeth, beyond the Municipal boundaries of that town, and not subject to the jurisdiction of any municipality or Village Board of Management. Upon the said lot he has erected sufficient dwellings to house, and he does so accommodate, about one hundred and twenty native males (and presumably the families of such of them as have any). These natives seem to be labourers working in the town of Port Elizabeth, where they earn substantial and regular wages. They go to their work in the morning, and at night return to their suburban dwellings at Korsten. The appellant has taken out no licence for a private location, contending that upon a proper interpretation of the terms of the Act, and especially of Section 10 thereof he is exempted from so doing. The *modus operandi* of the appellant seems to have been to divide his tenants into groups of nine, and to enter into a lease with each group, in which he lets, and the nine "jointly hire" certain specified rooms, part of his buildings, for one year, at a monthly rental of £11 5s. The lessor is responsible for rates and taxes, and the lessees may not sublet or assign without his written leave. There is a clause authorising the lessor to cancel the lease forthwith on non-payment of rent, and to eject the lessees; and also a provision whereby the lease shall, *ipso facto*, cease, and the tenants be obliged to quit the premises, in case it should be judicially decided that the lease is an infringement or contravention of the Location Act No. 30 of 1899, or any other Act of Parliament. It will thus be seen that each group of nine is responsible to the lessor for £135 per annum, and in practice it amounts to each individual member of the group paying his share, viz., 25s. a month, to one of their number, who then hands the whole £11 5s. over every month to the lessor. The leases are in writing, and each individual tenant has, as I gather from the evidence, a copy handed to him, and one of such copies was produced, and forms part of the record. It is clear that the terms of Act 30, 1899, have been carefully studied, and that the appellant has made his calculations so as to endeavour to secure for himself exemption from licence fees and hut tax under section 10 of the Act. Section 2 thereof defines a private location to be any number of dwellings or huts on private property, occupied by one or more native male adults, such occupants not being in the employ of the owner or

occupier of the land. It is, therefore, clear that, unless there is something in the Act to modify this provision, the appellant has set up a private location at Korsten, and rendered himself liable to the penalties for not taking out a licence as prescribed by the Act. Section 10, however, provides that "Any two or more native male adults joined in any *bona fide* written lease, and paying in cash a rental amounting to £48, or upwards, in the case of two such lessees, and no less than an additional £12 each for any greater number of lessees. . . . shall not be subject to the provisions of this Act in respect of the payment of licence-fees and hut-tax." On the basis fixed by this section it seems clear that 9 native males joined in a *bona fide* written lease, and paying in cash £132 per annum as rental, would be exempt from payment of licence fees under the Act. On the basis fixed by the appellant his nine tenants, under each of his leases, pay him £135 per annum as rental. There has, therefore, been an apparent compliance with the demands of the law to procure the exemption which the appellant claims; but the Magistrate has found that the leases are not *bona fide*, "as they were drawn up probably with a view to evading the provisions of the law," and on that ground he found the accused guilty. It must, however, be borne in mind, that the restrictions imposed by the Act upon the use of his land by an owner, are in themselves infringements on and limitations of the liberty of such owner to do what he likes with his property, provided he does nothing harmful to the community, or immoral: and it seems to me that if the Legislature has left the Law in such a state that a landlord by following with care the requirements of a particular section of the restrictive law can gain exemption from of its restrictions, he is entitled to do so. That seems to be what that present applicant has done. Moreover, I am not sure that the Legislature did not contemplate the possibility of what has occurred in this case, and purposely keep open a way by which a number of industrious natives willing to pay substantial rents should not be debarred from becoming tenants to a landlord without his having to licence himself as the keeper of a private location. That seems to be the plain meaning of the 10th section, and if the course adopted by the owner of the land in this case is objectionable, it is a matter for the Legislature to remedy. I think that the appeal should be allowed.

[Appellant's Attorneys: Tredgold, McIntyre and Bisset.]

REX V. TOOCH.

Liquor licence — Evidence of "Trap" — Irregular procedure.

T. had been convicted of selling liquor after hours on the evidence of a native "trap" and two policemen. There were certain discrepancies in their evidence, which was contradicted by that of disinterested witnesses. The Magistrate refused to compel the trap to answer an important question.

Held, that the proceedings must be quashed.

This was an appeal against a decision of the R.M. for the district of Oudtshoorn, in which the appellant was fined £7 10s. for contravening sub-section 7, of section 73, of Act 28, of 1883, in that he wrongfully and unlawfully kept his premises open for the sale of liquor during the time that he was not so authorised by his licence.

This case was set down as an appeal, but was really in the nature of a review on account of gross irregularity in the conduct of the case in the Court below, because the R.M. did not compel a witness to answer an important question, and that the judgment was wholly against the weight of evidence. The evidence for the prosecution showed that two policemen called at the house of one McKenzie on the 13th November last. McKenzie offered them a drink, and when he found he had none in the house, he suggested that the troopers should accompany him to the accused's hotel. The constables saw some one with a light go into the bar about 10.25 p.m., and shortly afterwards McKenzie returned with three bottles of liquor. McKenzie gave the time of his return as 10.15 p.m. The bar should close at 9 p.m. The note handed to him, which was sent by a boy that morning, to supply him with three bottles of liquor, was written by him, but he refused to answer a question on cross-examination as to how he disposed of the brandy. He denied that the liquor was given in pursuance of that note, and that Vanenberg was in the bar at 8.20 p.m., when he got the liquor. The Head Constable put in the hours of the licence, which were: 7 a.m. to 8 p.m., from 1st April to the 30th September, 1903, and from 1st October, 1903, to the 31st March, 1904, 7 a.m. to 9 p.m., with an extension to midnight for *bona fide* travellers, and Sunday privileges. For the defence the post-cart driver Vanenberg, a man named Griffiths, a passenger by the cart, Miss

Adams, and other witnesses, fixed the time of McKenzie's appearance in the bar at between 8.20 and 8.30 p.m. Mr. Schreiner, K.C. (for the appellant), contended that the whole proceedings should be set aside on the ground of gross irregularity in conducting the case. Here was a man who upon his own showing, or, at any rate, upon the showing of the two police-constables, was prepared to trap Toooh, and his denial of it was at once discreditable. Surely it was necessary to test whether the statement on oath was true as to whether he had that morning sent for two bottles of brandy, and one bottle of whisky? If that evidence broke down, there was absolutely nothing on which to convict. There was nothing to discredit Vanenberg's evidence that within a short time of his arrival he was in the bar with McKenzie. If Vanenberg's statement was true, then the whole of the prosecution failed, and his evidence was substantiated by another disinterested witness, Miss Adams. McKenzie might have hung about for a long time, and the police might have assumed that the liquor was purchased when they met him. The verdict was entirely against the weight of evidence. Counsel quoted the case of *Rex v. Dam* (3 Juta 63), on a technical point, the conviction in which was quashed on appeal to the Supreme Court.

Mr. Nightingale (for the Crown), contended that even had McKenzie answered the question it would have been impossible for the defence to bring rebutting evidence on that point. The elementary facts in the case were that the Magistrate believed the evidence of the two policemen, that when they walked two and a half miles from McKenzie's house to the hotel it was 10.20 p.m., and he submitted that any irregularity that might be held to have occurred in the proceedings could not in the least affect the case. The notes were brought forward by the defence, but did not affect the elementary basis of the case. The second note from McKenzie that was produced Jackson discovered in the lining of his coat the night before the trial, and he did not seem to have told anyone anything about it, and it was difficult to believe that there was not collusion between the witnesses for the defence. If the Court should allow the appeal, it amounted to something like deliberate perjury on the part of the two policemen.

Hopley, J., said that if the Magistrate had had such experience as he had had with trap witnesses, who were sometimes backed up by the evidence of zealous policemen, and had become impregnated with the necessity of safeguarding against injustice, he would probably have come to a different conclusion. At the same time, no one as yet had been able to see any other

way of doing justice in such trades as the diamond and liquor trades. Had the case come up before him in review he would probably have asked the Attorney-General's representative to argue before him in court, because of the suspicious circumstances. He did not believe the evidence of the policemen that they did not go down to the hotel with the intention of trapping, and there was the significant fact that they trudged three miles and did not go into the hotel, but walked about outside, which was consistent with the idea that they had gone down from McKenzie's place to trap Toooh, and if that was so they had not been perfectly open in their evidence before the Magistrate. He thought in all these matters there should be the supervision of the higher authorities, as a common policeman should not have such power in his hands as to go and trap without instructions. The whole point in the case, as far as one of the lines of the defence went, was whether or no the liquor, which undoubtedly was obtained on that night, was or was not sold to McKenzie, who was a trap, during a time when the hotel-keeper was not authorised by his licence to sell. On that point there was a great conflict of evidence. On the one hand there were the two policemen without any authority to trap this man, stating that it was after ten o'clock, and undoubtedly they might have been led into making that statement by the fact that the liquor came into their hands after ten o'clock, and the man may have lied to them, and said he just bought it, but, on the other hand, it might be their zeal for promotion that led them into making the statement. There was a conflict of evidence between McKenzie and themselves as to some 15 or 20 minutes, and again their watches may have been wrong. On the other hand, not only interested, but disinterested witnesses state that the bar was closed at the proper time, and that McKenzie was there between 8 and 9 o'clock, and that the liquor was obtained by him at that time. McKenzie admitted having given the note to the boy, and having followed him up to the hotel, and then he refused in cross-examination to answer what he had done with the bottle of brandy. The Magistrate committed an irregularity in not allowing the question to be pressed, and forcing the witness to answer. The second note from McKenzie to the barman when he suggested a bogus defence, showed him to be a man whose word was unreliable, and his evidence as a trap would be most unsafe to act upon, and for these reasons alone it would be quite sufficient to say that the case was not one in which any judge would say that substantial justice had been done. On the technical objection raised as in the case of *Rex v. Dam*, he thought the case would have broken down, but on the absolutely untrustworthy nature of the evidence and the unsatisfactory way

in which the case was conducted, the conviction would be quashed.
[Appellants Attorneys: Tredgold, Mc Intyre, and Bisset].

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).

APPEALS.

REX V. BENNING. { 1904.
{ Mar. 10th.

Cape Town Municipality — Licence.

Under the Cape Town Municipal Act the Town Council is empowered to impose a licence duty for any vehicle drawn by any horse or plying for hire or profit.

Held, that a cart and horses used by a building contractor for the purposes of his business are liable to the duty.

This was an appeal from a judgment of the Acting Resident Magistrate, Cape Town, in a case in which the appellant was summoned for and found guilty of contravening section 504 of the Cape Town Municipal Regulations, in that, he being the proprietor of a conveyance, kept and used it within the city of Cape Town, wrongfully and unlawfully, without a licence, as required by the said regulation.

The part of Sec. 504 of the Municipal Regulations framed under Act 26 of 1883, essential to this case, reads as follows:—

"The proprietor of every conveyance drawn by any horse or animal power kept or used within the City of Cape Town for the purpose of, or in connection with any hotel or business of any description, other than conveyances plying for hire on public waggon stands shall annually apply for and obtain from the Corporation a licence etc. . . ."

The evidence in the Court below showed that on October 28th, a cart,

admittedly the property of the appellant, with no name or number thereon, laden with sand, was driven along the public street within the Municipal limits. That this sand was to be used in connection with certain buildings which the appellant had contracted to construct, and that the sand cart had frequently been used for similar purposes. The cart was used solely in connection with the appellant's business, and did not ply for hire. The appellant was convicted, and sentenced to pay a fine of £1. Against this conviction he now appealed.

Sir H. Juta, K.C. (for the appellant), after reading the Municipal Regulations, said the questions were: had the Corporation any power to tax any vehicle or cart when it was not plying for hire or profit, or could they tax any private vehicle or cart? Counsel contended that the Legislature never intended to give the Corporation power to tax private vehicles which were not "plying for hire or profit," and he submitted that the words "hire or profit" governed the words "kept or used." The evidence in the case showed that on the day in question sand was being conveyed to the defendant's private stable for his own private use.

Mr. Schreiner, K.C. (for the Town Council) said that the regulations gave power to regulate and supervise the licensing of wagons, carts, and other conveyances; but carriages used solely for private persons would not be in the same category as carts and wagons. The Regulation 390, which provided that the name of the owner should be painted on the cart, showed that it was not wholly a question of revenue, as the name of the owner on the cart facilitated the identification of these conveyances, and the Council should be encouraged in endeavouring to guard against fraud, by putting a reasonable duty on such vehicles.

Sir H. Juta said that these regulations applied to carts which plied for hire. But there were other carts which did not ply for hire. There were no regulations which applied to these carts, unless it were Regulation No. 504.

[De Villiers, C.J.: Was not this cart used for profit?]

No it is not used for profit, any more than a private individual having a cart for private purposes keeps it for profit. A man who drives down from the top of the Gardens to Adderley-street to business saves a tram fare, but he does not use his cart for profit.

De Villiers, C.J., said the point was, whether this cart was kept for hire or profit? If a shopkeeper had a cart which he used for conveying his goods to his customers, was he not keeping that cart for profit?

Sir H. Juta: One can hardly say he keeps it for profit; he keeps it really as a means of inducing customers to come. Of course, in a round-about way, everything in that way would be for profit, but he does not keep it for purposes of profit, because the cart may be a loss. I take it that "kept for hire or profit" means a direct monetary profit. I agree that carts used in parcels delivery may be used for profit, though they may not be hired.

De Villiers, C.J.: It is of importance in ascertaining the intention of the Legislature first of all to consider the grammatical meaning of the words actually used. The words of the section are: "For regulating, supervising, and licensing wagons, carts, and other conveyances or vehicles, drawn by any horse, mule, donkey, or ox kept or used within the Municipality, or plying for hire or profit" for which a licence must be paid. The grammatical meaning is that the two portions are separate and distinct. The words "kept or used within the Municipality" are distinct from the words "or plying for hire or profit." It seems to me that the two phrases were intended to be kept quite distinct, and that being so, I think that the Municipality clearly had the power to make the regulation in question. But I am inclined to go further, and hold that, if Sir Henry Juta's construction is correct, and the clause were read, "kept or used within the Municipality for profit," a person who keeps carts for the purposes of his trade as a contractor is using those carts for profit. It is admitted here by Williams that he has been carrying bricks for other people. The cart is used for conveying building material in connection with the defendant's business, which is that of contractor. If, he then, keeps that cart for a profit, I am inclined to think that the case would fall within the section. But it is not necessary to decide that point, because, as I said before, the grammatical construction, in my opinion, is such that the words "for hire or profit" should be confined to the word "plying," and not extended to the words "kept or used within the Municipality." For these reasons I am of opinion that the appeal should be dismissed.

Mr. Schreiner applied for costs.

Sir H. Juta: There are special circumstances in this case to show that the appellant should pay the costs.

Mr. Schreiner: It is important that the Council should not be lightly put to expense such as they have incurred in this case.

De Villiers, C.J.: It does not appear to me that the appeal is in any way frivolous. I think there is a good deal to be said from the point of view of the ap-

pellant, and that it is a matter of some public importance. It is to the interests of the Council that this question should be decided. I am not inclined to give costs in this case.

No order as to costs

[Applicants' Attorneys: Silberbauer, Wahl and Fuller; Respondents' Attorneys: Fairbridge, Arden and Lawton.]

REX V. EASTON.

This was an appeal from a conviction of the Resident Magistrate of Victoria West, who had found the appellant guilty of a contravention of the Police Offences Act, part 1, section 5, par. 5, and imposed a fine.

The accused was charged with letting off fireworks in a public place—to wit, the Public Library at Victoria West—without leave of the public authorities. The appeal was brought on the grounds that there was no clear evidence against the appellant, assuming that the fireworks were let off, and that the leave of the authority had not been obtained, that reasonable doubt existed as to whether the appellant really was the party who let off the fireworks, and of which doubt he should have had the benefit, and also as to whether fireworks actually were let off.

De Villiers, C.J., said that he had read the evidence. The question seemed to him to be one entirely of credibility. The policeman was positive that he saw the accused, and he says that when he spoke to the accused, the latter said, "I'll chuck crackers if I like."

Mr. Searle, K.C., for the appellant. Mr. H. Jones for the Crown.

Mr. Searle said it was a curious thing that only one civilian should have been called for the prosecution, and that the police should all have been strangers to the district. This offence was alleged to have been committed at an entertainment at Victoria West on Christmas Eve and no doubt the elite of Victoria West would be there. There were other cases dependent on this case, and it was agreed that these should stand over until this appeal had been decided. Some people were charged, it seemed, with throwing crackers, and others were charged with resisting the police. Apparently there was considerable feeling in regard to the matter in Victoria West. Counsel urged that it should be borne in mind that it was a dark night when this offence was alleged to have been committed, and that the evidence for the Crown consisted of the testimony of the police, who were in plain clothes, and were strangers to the district, and of a civilian who said he did not see the accused there at all.

Without calling on Mr. Howel Jones,

De Villiers, C.J., said that the question was one of credibility. The

police identified the lad as one of those who threw the crackers. It was not possible for the Court to reverse the decision of the Magistrate on a question purely of credibility. A certain number of witnesses were called on one side, and a certain number were called on the other, and there was ample evidence to show who it was that threw the crackers, and the police swore it was the accused. There was no appeal in this case upon the question of law; it was simply a question of fact, and the appeal must be dismissed.

REX V. PAUL.

Act 35 of 1893—Constructive possession—Evidence.

This was an appeal from a conviction of the Resident Magistrate of Molteno. The appellant had been charged with an offence under the Stock and Produce Thefts Act (No. 35 of 1893), and had been found guilty and sentenced to imprisonment for twelve months with hard labour. The facts sufficiently appear from the judgment and from the arguments of Counsel. Mr. Benjamin appeared for the appellant; Mr. H. Jones was for the Crown.

Mr. Benjamin said that the accused was charged under Act 35 of 1893. That Act was an extremely stringent one. The only provision in the Act, he would submit, under which the accused really could be charged, was the 28th section. This section required anyone who was or had been in unlawful possession of any stock or produce to give a satisfactory account for such possession, or be deemed guilty of the crime of theft. Counsel submitted there was really no evidence to show that this man had ever been in possession of the stock or produce. A certain portion of a carcass was found, but there was nothing to connect the accused with the theft of the stock. The only evidence against him was that he was seen by a special constable, and detective to go to a certain hole, where there was a portion of a carcass.

[De Villiers, C.J.: They found the stolen property in a hole, and the police went and hid themselves. Shortly afterwards the accused went straight there from his hut, and went into the hole, and when he sees the police coming he gets out of the hole and runs away].

Mr. Benjamin said it was admitted that this was an old slaughter ground. Leading up to the hole were a number of rivines, and the accused said he had gone there to search for his stock.

[De Villiers, C.J.: I think they made a great mistake in going at once. They should have waited to see whether the accused took any of the meat. The only point against him is that he seems to

have gone away rather hastily from the hole].

Mr. Benjamin submitted that there was nothing more than suspicion against the accused.

Mr. Jones contended that there was sufficient evidence for a jury to have drawn the inference of theft, and that the Magistrate was right in drawing that inference.

De Villiers, C.J., remarked that the great mistake seemed to have been on the part of the police in rushing to the hole when the accused went there.

Mr. Jones said that apparently it was not a case of this man going to the hole out of curiosity. He seemed to have gone there of set purpose. Again, the accused actually denied afterwards that he had been in the hole. The stock had been stolen only a few days before.

Mr. Benjamin, having been heard in reply,

De Villiers, C.J.: The conviction has already been confirmed by a Judge in Chambers, but if it were clearly a case in which the conviction ought to be quashed the previous confirmation would not stand in the way of the present appeal. But, upon the whole, I have come to the conclusion that the Magistrate's judgment should not be disturbed. The evidence shows that the hole in which the stolen property was found was not far from the prisoner's hut. When the police had found the stolen property in the hut, they went to a neighbouring spot, hid themselves there, and watched, on the assumption that the person who went to the hole to fetch the meat would be the one concerned in the theft. And sure enough, they did see the prisoner go direct to the hole, and not only did he go to the hole, but he went into the hole, and when he saw Soamo coming he got out of the hole and ran away. Well, that is very strong evidence that the prisoner went there, knowing that the meat was there, and having placed it there himself, or knowing who had placed it there, with the object of taking the meat. The evidence therefore, of possession, I think, under all the circumstances, is sufficient. The prisoner's own conduct seems to be the worst feature in the case—his running away and his afterwards denying that he had been in the hole, and had run away. Upon that point, the witnesses are all clear, and the Magistrate believed these witnesses, that they saw the prisoner going into the hole, and running away from the hole. He gives the explanation that he went to look for cattle. It seems an extraordinary thing that he should go and look for cattle in a place where it is very difficult even for a man to get in, that a man should expect to find cattle in that hole. The whole of the circumstances of the case seem to show that the prisoner was concerned in the theft, and that the Magistrate was right in finding him guilty, and for these rea-

sons I am of opinion that the appeal should be dismissed.

SPECIAL CASE.

DE SMIDT V. ESTATE } 1904.
MARTING. } Mar. 10th.

Will—Construction.

The words in a will: "Should any of my children die" refer to the death of such children after the making of the will and not merely to death after the death of the testatrix.

This matter came before the Court for judgment upon a contention by the plaintiff that she was entitled to certain benefits under the will of her late grandmother, Johanna Hendrika Marting (born Bruyne).

The special case was stated in the following terms:

1. The plaintiff is Johanna Hendrika de Smidt (born Berghuys), of Cape Town, who is married out of community of property to Jacob Walter Charles de Smidt, by whom she is assisted as far as need be in this action.

2. The defendants are Edward Alfred Thomas, and George William Steytler, in his capacity as secretary to the Colonial Orphan Chamber and Trust Company of Cape Town, and they are sued in their capacity as the duly appointed executors testamentary of the will in the estate of the late Johanna Hendrika Marting (born Bruyns), hereinafter called the testatrix.

3. On or about the 2nd day of September, 1886, the testatrix executed the will aforesaid, copy whereof is hereunto annexed, and the parties pray that the said will may be considered as inserted herein.

4. The testatrix died on the 8th day of August, 1903.

5. The testatrix had, as lawful issue born in wedlock, six children, of whom (a) four were alive at the time of her death, namely: (1) Wilhelmina Marting, (2) Johanna Hendrika, married to P. J. P. Vos, (3) Henrietta Johanna Maryna, married to E. A. Thomas, (4) Mary Ann Isabel, married to C. H. Osborne; (b) two were dead at the time of her death, namely: (5) Caspar Hendrik, who died in 1886, before the execution of the will, leaving a son, Frederick William Caspar Marting him surviving, (6) Jacoba Cornelia, who died in July, 1902.

6. The plaintiff is the lawful issue and only surviving child of Jacoba Cornelia, the last-mentioned child of the testatrix, and was born in 1879.

7. The plaintiff lived with and was on very affectionate terms with the testa-

trix, who was godmother of the plaintiff.

The plaintiff contends that, according to the true construction, meaning, and intent of the will aforesaid, she is entitled to the benefits therein provided for the surviving lawful issue of any child of the testatrix who dies leaving lawful issue; and that she is now entitled to that share of the interest or usufruct of the estate of the testatrix, which her mother, Jacoba Cornelia, would have been entitled to had she been alive at the time of the death of the testatrix, and that upon attaining the age of twenty-six years she, the plaintiff, is and will be entitled to have paid out to her the part or share of the capital sum of the estate upon which she herein claims to be at present entitled to the interest or usufruct as aforesaid.

The defendants contend that they are not justified in paying to the plaintiff, without an order of this Honourable Court, such share of the interest as the plaintiff claims, or any other benefits under the will; but the defendants submit to the judgment of this Honourable Court.

Wherefore the parties pray for judgment upon the above contention, or that this Honourable Court may declare the rights, if any, of the plaintiff under the will aforesaid; and they pray that the costs of this action may be directed to come out of the estate of the said testatrix.

Mr. Close, for plaintiff; Mr. Benjamin for defendants.

Mr. Close said that the contention of the plaintiff was based upon two words in the will—first of all, the word "surviving," as obviously being intended to apply in regard to the state of facts as existing at the time when the testatrix made the will; and secondly, the word "predeceased," as applied to Caspar Hendrik. He submitted that the intention of the testatrix was clear. Right away through she spoke of how the property must be divided fairly and equally, share and share alike, between the whole of her children. It was clear that the testatrix had no intention to exclude the plaintiff from a share in the estate.

Mr. Benjamin said he was prepared, on behalf of the executors, to submit to the judgment of the Court in this matter. The executors did not think it safe for them to adopt this construction of the will without having the question first determined by the Court. It seemed very clear from the terms of the will that the construction contended for by the plaintiff was the correct one.

De Villiers, C.J.: The will has not been very artistically drawn, but upon the whole the intention of the testatrix seems to me to be reasonably clear. She intended to provide for her children but I think that she also intended to

provide for her grandchildren, in case any of her children should die during her lifetime. She has not expressed her meaning very clearly, but I think she endeavoured to give expression to her meaning in the following words: "Should any of my children die, and leave any lawful issue, their share of the usufruct or interest of my estate shall then devolve to and upon their surviving children, born in lawful wedlock, and shall continue to be paid," and so on. Well, those words, "Should any of my children die," seem to me to refer to any children who might die after the date of the will. It should not be necessarily confined, having regard to all the provisions of this will, to children who die after the death of the testatrix. Bearing in mind especially that in cases of doubt there is every presumption in favour of the testatrix intending to provide not only for the children, but for those who were still more in need of provision, viz., the young children of her children. I am of opinion that the judgment of the Court must be in terms of the plaintiff's contention. The costs will come out of the estate.

[Plaintiff's Attorney, A. W. Steer; Defendant's Attorneys, Van Zyl and Buissinné.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

KILGOUR V. SONNENBERG. { 1904.
 { Mar. 10th.
Engineer—Plans—Fees.

This was an action brought by George Kilgour, civil engineer, Cape Town, against Charles Sonnenberg, also of Cape Town, to recover the sum of £100 damages for breach of contract.

The declaration set out that in June, 1903, the plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to prepare and supply proper plans for the sub-division of the estate Schoone Kloof, on the Lion's Rump, Cape Town, and such plans as would meet the lawful requirements of the Cape Town Council. The defendant agreed to pay the plaintiff £105 for such plans. Plaintiff did prepare and supply proper plans, such as would meet with the requirements of the Council. He received from the defendant the sum of £5, and defendant undertook to pay the balance of £100. In the alternative, the plaintiff said that the plans had not been submitted to the Town Council, and if they did not meet the requirements of the Council, he was, and always had been, ready and willing to amend them to satisfy such re-

quirements. The defendant refused to submit the plans to the Town Council. By reason of the said breach of contract, the plaintiff said he had sustained damages in the sum of £100, and he prayed for judgment for £100, with interest *a tempore morae* and costs.

The defendant, in his plea, said that before the agreement was entered into between the parties, certain plans for the sub-division of the land in question had been prepared for the former owner, Mr. McGregor. These plans were submitted by Mr. McGregor to the Town Council, and were rejected as unsuitable and impracticable. The agreement between plaintiff and defendant was that the plaintiff should frame suitable and practicable plans, which would meet the requirements of the Town Council. The plans framed by plaintiff were practically the same as those prepared for the said McGregor. The sum of £5 was deposited by defendant with plaintiff, conditionally on plaintiff carrying out his part of the said agreement. Plaintiff had failed to fulfil his part of the said agreement. Save as above, defendant denied plaintiff's allegations. Defendant prayed that the claim be dismissed, with costs. In reconvention, defendant repeated the above allegations, and prayed that the said deposit of £5 should be paid back to him.

Mr. Gardiner, for plaintiff; Mr. M. De Villiers, for defendant.

Mr. Gardiner, in opening the case, said that Messrs. Sonnenberg and Smith were the owners of this land, Schoone Kloof. At the end of 1901 Mr. Roberts, Government surveyor, prepared plans for Mr. McGregor, who was then owner of the estate. These plans were submitted to the Town Council, and rejected by them. The plans were resubmitted, and again rejected. Mr. McGregor then dropped the matter, and submitted the business to certain surveyors, Messrs. Philips and Anne. They took these plans, and made certain alterations to meet the objections of the Town Council. Messrs. Philips and Anne submitted the plans to the Town Council, but they were again rejected, and no reasons were given. The last rejection of the plans was in November, 1903. Mr. Sonnenberg, after acquiring the estate, employed Mr. Kilgour to frame plans for the sub-dividing of the estate, and promised him 100 guineas. Mr. Kilgour discovered that there were in existence these plans, which had already been submitted and altered by Messrs. Philips and Anne. Mr. Kilgour went to them, and came to a certain arrangement with them. He took these plans; he discovered that it was necessary for these plans to be passed that an agreement should be come to with the military authorities, who, it appeared, were

the owners of the Military-road, which was the approach to this property, and that arrangement was afterwards come to. Mr. Kilgour also made inquiries from the Town Council, and discovered what the objections were. The plans had to be submitted, not by the surveyors, but by the owner. Kilgour put the matter in order, and he said that the plans were now ready to be submitted to the Town Council. Mr. Sonnenberg, however, refused to sign the conditions and to submit these plans. Evidence was then called for the plaintiff.

Thomas Nisbett Roberts, Government land surveyor, said that in December, 1901, he received instructions to make plans for the sub-division of the Schoone Kloof estate. He prepared plans, and in December submitted them to the Town Council. The plans were rejected, and afterwards abandoned. The arrangement was that he should receive a lump sum if the plans were got through. He consequently received no payment. The plans were afterwards handed over to Phillips, Aune and Co., by witness. They were not now in the same state as when he handed them over. Sewers were now included in plan No. 1; the passage had been widened. In plan No. 2, retaining walls had been added. Plan No. 3 he believed was entirely new. Plan No. 4 now showed sewer connections. Plan No. 5 he believed was entirely new. The plans, he thought, were such as should meet with the approval of the Town Council; considering the nature of the ground, he did not see how they could be varied. The road had to be zig-zagged, on account of the mountainous character of the ground, so as to get the grade within the limit of 1 in 10.

Cross-examined: The alterations would now meet the requirements of the Council, but his plans were all right but for a trivial improvement.

Wm. Phillips, Government land surveyor, said that he assisted Mr. Roberts in preparing the plans. In February, 1902, Mr. Roberts got disgusted with the plans, and handed them over to witness. He discovered the objections which the Town Council had made, and they were altered twice, and finally rejected without any reason. Mr. Sonnenberg saw the plans in February, 1903, but made no comment at all. In June, 1903, witness, Mr. Kilgour, and Mr. Starkey, jointly corresponded with the Town Council. Finally, the City Engineer requested a duplicate set of plans, which had been forwarded. All the suggestions made by Mr. Roberts to meet the objections of the Town Council had been put on the plan by witness, and his partner, and he thought the plans were the best possible under the conditions.

Cross-examined: Nothing had been done to obviate the objections in the Town Council's letter of August. The plans were perfectly feasible, and it was

merely a question of cost to carry them out. The gentleman that called to see the plans he took to Mr. Sonnenberg.

The plaintiff, George Kilgour, M.I.C.E., stated that about June, 1903, he saw Mr. Sonnenberg, who asked him to undertake to provide him with plans to pass the Town Council, and then mentioned the fee of 100 guineas. The defendant said that he had bought the estate from McGregor, but he said nothing about plans being in existence. The plans seemed to him to be as good as they possibly could be. The defendant said, when he saw the plans, "That's exactly what I want." Witness understood that the defendant would sell out as soon as the plans were passed by the Town Council. When witness drew his attention to the necessity of having an agreement with the military, the defendant said that he need not trouble about that, as the Town Council had bought the Military-road. This witness found out to be untrue; in fact, the Town Council officials laughed at him when he mentioned it. Witness arranged with the military authorities, and the defendant paid the first year's rent. He considered the plans suitable and practicable.

Cross-examined: The defendant was to pay 100 guineas when witness drew up plans which would be in accordance with the Town Council's regulations. Before witness saw Phillips, Sonnenberg said that the plans shown him were exactly what he wanted. Since the original plans were submitted, large alterations were made. On August 22 he saw Sonnenberg and Smith, and gave them a copy of the conditions. Witness told them it was no longer an engineering matter. He promised to give a rough estimate of making the roads, but the defendant went away to Kimberley, and on his return Smith and Sonnenberg kept fooling him about. Witness put it down at a rough guess of £100 a site. Unless the defendant put the plans to the test by complying with the conditions laid down, by the Town Council, he could not keep witness out of his money.

Wm. Jeffreys, Assistant City Engineer, said that before submitting plans through the City Engineer to the Public Works Committee, it was his duty to see that they conformed with the regulations of the Council. Provided the conditions enumerated in the Council's letter were carried out, the plans as plans would be submitted to the Council. Before they could be sent to the committee, it was necessary to have the signature of the owner. He did not think a better plan dealing with the particular estate could be made.

Cross-examined: He could not say whether the Council would pass the plan or not.

Robert Bromley, District Inspector of Public Works, stated that the plans, according to the regulations of the Town Council, could not be improved on. He

was really surprised at the clever way they had been drawn up.

Mr. Gardiner closed his case.

The defendant, Charles Sonnenberg, said that he purchased the estate as a joint transaction with Smith in May last. Witness told the plaintiff that he had purchased the property, and said that he would like some portion of the property laid out as a township. The plaintiff was aware that the plans by McGregor, the former owner, had been rejected, and witness asked Kilgour to draw up plans that would pass the Town Council. He told Kilgour to draw up a plan, which was practicable, at less expense than McGregor's. The plaintiff was to give plans different from those of McGregor. He totally denied ever saying to Kilgour that he was not concerned in the cost, and that he intended to sell out. Kilgour showed him McGregor's plans, but he refused to leave them with witness.

Cross-examined: Even if the Town Council passed the plans, he would not have them, as they were too expensive. The first time he saw the original plan he did not know it was McGregor's plan. He did not consult any engineers or surveyors to see whether the work could be done more cheaply.

Re-examined: Had he approved of the plan he would naturally have applied again.

By the Court: He did not send the plans in, because he thought they were impracticable; even if they were passed, he would not be prepared to go on with them on account of the expense.

[Hopley, J.: You seem to be frightened of the cost even if the plans were passed.]

Geo. David Smith said he was defendant's partner in the estate. He saw Mr. Kilgour at their (defendants') office. Mr. Kilgour produced a plan, and witness asked him to leave it, but Kilgour said he could not leave it, as he had borrowed it. Some time afterwards, witness heard Mr. Sonnenberg tell the plaintiff that he wanted a plan that would be feasible, not too expensive, and one that would be approved by the Town Council. On one occasion witness asked Kilgour what he thought would be the probable cost of making the roads. Witness never approved of Kilgour's plans. Kilgour produced a Town Council form for the making of roads. On one side was a diagram showing proposed roads. Witness declined to sign the application. It occurred to him at the time that the roads would mean a very great outlay.

Counsel having been heard in argument on the facts,

Hopley, J., said he thought that Mr. Sonnenberg was mistaken when he said that he told Mr. Kilgour that the plans were to be different to those of McGregor. He might have thought that he had told Mr. Kilgour something of this kind, but it was

probable that he was quite mistaken. Now, this was a very difficult piece of ground, and it had to be laid out so that every lot would be reasonably served with a street or a road, and at the same time have sufficient frontage to the various roads as to serve the requirements of the Town Council for sanitary and other purposes. It was, of course, a very intricate problem, and he (the learned judge) did not think that the figure named for the work that the plaintiff would have to do was more than a professional man would earn at work of this sort. Mr. Kilgour got into communication with Mr. Starkey, and then the plans which had previously been prepared by McGregor were brought under his notice. Kilgour's conduct in going and seeing whether he could not utilise McGregor's plans was quite *bona fide* so long as—as he believed was the case—there was no stipulation between the parties that the plaintiff should not frame plans similar to those of McGregor. It was clear that even then Kilgour had a good deal of work to do in the matter, in seeing the Town Council, and arranging the agreement with the military authorities and other things. Then came the further questions as to whether these plans were feasible, and as inexpensive as possible, and also as to whether they would satisfy the requirements of the Town Council. With regard to the question of feasibility, all the professional witnesses were on one side—the side of the plaintiff. They all thought it was the only feasible way of dealing with a particularly difficult piece of ground. It was clear that it would be impossible upon such ground as this to make a cheap job. It seemed to him, therefore, that the plaintiff had framed a feasible plan, and one that was as inexpensive as possible. The only other question was as to whether the plan was satisfactory to the Town Council. The defendant promised to give the plaintiff every facility to earn this money if he would do his portion of the work. The defendant, however, had not sent his plans in to the Council for approval. It seemed to him that the defendant had found that it would not be a good speculation to convert this land into building lots, and that that was the reason why he had not gone on with the work. Judgment would be given for the plaintiff for £100, as prayed, with costs.

[Plaintiff's Attorneys: Fairbridge, Arden and Lawton; Defendants' Attorney: H. J. Sonnenberg.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

APPEALS.

GRUNBERG V. SCHIEFEL- { 1904.
BEIN. { Mar. 11th.

Master and servant—Wrongful dismissal—Magistrate's finding on facts.

This was an appeal from a judgment of the Resident Magistrate of Cape Town. The appellant, Gruneberg, the proprietor of Kamp's Cafe, was the defendant in an action brought by the respondent, an employee at the Adderley-street Cafe, to recover £10 for wrongful dismissal, and £1 12s. wages for twelve days. The plaintiff alleged that on the 13th September, 1903, defendant did wrongfully and unlawfully, and without reasonable and just cause, dismiss the plaintiff from his (defendant's) service. Defendant tendered £1 12s. for wages.

From the notes of evidence, it appeared that the plaintiff had been employed as kitchenman or waiter at Kamp's Cafe at a wage of £4 a month, with board and lodging. He was dismissed at the Plein-street Cafe by Schiller, the manager, who at first declined to explain why, but, later on, informed him that it was because he had made a row. For the defence, evidence was led to show that the plaintiff came to the cafe under the influence of drink, and that he kicked up a row and screamed, with the result that customers went away disgusted. The manager said he dismissed the plaintiff because he made a row.

The Magistrate, in his reasons for judgment, said he did not believe that the plaintiff was drunk, and there was no clear evidence what the row was about, and supposing plaintiff did make a row, was the manager justified in dismissing him? He did not think there was sufficient justification. The Magistrate gave judgment for £9 12s., with costs—the tender of £1 12s. for wages and £8 damages. The Magistrate added: "I may state that I have had some experience of Mr. Schiller in this Court before, and I don't consider him a reliable man."

Mr. Schreiner, K.C., for the appellant. Respondent in default.

Mr. Schreiner said that the latter remark, he thought, was prejudicial,

and should not have been made. It was difficult to find on what theory the Magistrate had based his judgment.

The case of *Haupt v. Debell Bros.* (5 H.C. 185) was quoted by the Magistrate, but he (counsel) did not see how that case supported the Magistrate's view. Counsel went on to urge that it was a tacit condition of employment that the plaintiff should not be noisy. Counsel submitted that no action lay against the appellant for wrongful dismissal, and that a real hardship had been done to an employer who had acted quite rightly.

De Villiers, C.J.: If in this case I had to decide the question without the assistance of Magistrate's reasons I confess that I should have been inclined to hold that the evidence is sufficient to show that the dismissal was a rightful one, that the plaintiff was drunk, and that in a drunken state he made a row, which justified the defendant in dismissing him. But the Magistrate, after hearing the evidence, expresses a clear opinion that the man was not drunk, and this, after all, seems to me to be the gravamen of the offence for which the man was dismissed. Well, then, there remains the row. The Magistrate observes that there is nothing to show what the row was about. He does not find that there was a row. The tendency of his remarks seems to be to show that in his opinion there really was no row. What seems to have been passing through the Magistrate's mind was this: that the man might make a row without actually exposing himself to dismissal. The row might be a rightful one; there may be circumstances under which a man is justified in making a row. Well, it is a serious thing for a man to be dismissed from service, and it requires something tangible to justify the Court in holding that the dismissal was a rightful one. It is a slur upon a man to have been dismissed and for the Court to hold that it was a rightful dismissal. Therefore clear evidence is required. That is the view of the Magistrate. He wanted clear proof that there was such misconduct on the part of the plaintiff as justified the defendant in dismissing him. Well, the Magistrate was not satisfied that there was such clear proof of misconduct. After all, the burden of proving the misconduct lay upon the defendant. He had to satisfy the Court of the misconduct, and, as he failed in his proof, I am of opinion that the Magistrate's judgment should not be disturbed.

[Appellant's Attorneys: Friedlander and Du Toit; Respondent in default.]

GACULA V. DICKERSON.

This was an appeal from a judgment of the Resident Magistrate of Taban-

kulu, Native Territories, in an interpleader action. The appellant was the plaintiff in the Court below in an interpleader action in respect of certain oxen and a wagon, the Magistrate gave judgment in favour of the respondent.

From the record in the Court below it appeared that the interpleader case rose out of an action between Dickerson and one Henry Konyana, in which the former claimed £78 10s. with interest, in respect of two promissory notes of the amounts of £64 and £14 10s. respectively. The defendant failed to meet the promissory notes. Judgment was given by default for the amount claimed. That was on the 6th August. The messenger of the Court took an indemnity from the plaintiff, holding him harmless in case of execution. A writ of execution was issued, and the property now in dispute was attached. Then the property was claimed by the present appellant, Nomenti, widow of Gacula: and under the circumstances the messenger caused a writ to be issued in an interpleader, setting forth that one red ox and two white oxen and one wagon taken under a writ of execution were claimed by the plaintiff, Nomenti, and that the matter would be determined on the 24th August. The Magistrate then declared the cattle and wagon executable.

The Magistrate in his reasons for judgment, said that the complainant came to Court to show her right to certain cattle and a wagon, seized by the messenger, under writ of attachment. The Court did not consider that the evidence she brought forward was of a very credible nature, women, according to native custom, having nothing to do with business matters, which were for men only, and the only man brought forward being her son-in-law, whose statement that Nomenti bought the oxen, he thought was very doubtful. The admitted facts were that Henry Konyana pledged the oxen, that he lived with Nomenti, and that he used the wagon as his own. All the evidence satisfied him that the property was Konyana's own. The judgment was cattle and wagon declared executable, with costs.

Mr. W. P. Buchanan for the appellant. Mr. J. E. R. de Villiers for the respondent.

Mr. Buchanan submitted that the reasons given by the Magistrate for his judgment were wholly wrong. He contended that it was clear that these oxen claimed by the complainant were not left for security. The cattle were all the time in Nomenti's possession at her kraal, they were not in Konyana's kraal. The creditors had gone on the assumption that it was Konyana's kraal. All the evidence showed that the property was that of the present claimant. It only appeared that Konyana was us-

ing the wagon. Dickerson's man admitted that he simply went on the word of Konyana himself. Dickerson should either have made more inquiries before he gave credit for the grain supplied on Konyana's word, or he should have taken the property, in which case the claimant would have been put on inquiry. The defendant Dickerson did not even call Henry Konyana to give evidence.

Mr. De Villiers said that the sudden disappearance of Konyana had no doubt made the Magistrate very suspicious. Then his sister, with whom he had lived, came forward and claimed the cattle. This would be a very convenient arrangement for the debtor. The Magistrate found that the burden of proof of ownership was on the claimant. Konyana was the only man living in the kraal, and cattle belonging to him would, therefore, be at this kraal. That would make collusion between claimant and Konyana very easy. These white cattle seemed to have been twice pledged by Konyana.

[De Villiers, C. J.: How many cattle has the Magistrate declared executable?]

Mr. De Villiers said he believed two were declared executable. Mr. Dickerson only appeared to have claimed two. The Magistrate found that he could not believe the woman's evidence, because, according to native customs, a woman could not own cattle.

Mr. Buchanan, in replying, submitted that it was perfectly clear that three cattle had been declared executable.

De Villiers, C.J., said it did not appear to him that the summons had been amended, and was limited to two cattle.

Mr. De Villiers said it seemed to have been agreed that there were only two cattle really in dispute, and he gathered that the judgment only applied to two.

De Villiers, C.J., said that he would communicate with the Magistrate in the Court below, in order to ascertain whether the summons was finally amended, and whether two or three oxen were declared executable.

Postea (April 26th).

CAIRNCROSS V. NORTJE. { 1904.
Mar. 11th.
.. 22nd.

Fixtures—Sale and purchase —
Damages—*Quantum minoris*—
Acceptance—Waiver.

The plaintiff bought a farm from the defendant at a public auction. At the time of the sale there was a kraal on the farm, which admittedly was included in the sale. Inside the kraal was a shed, the roof of which, consisting of corru-

gated iron sheets, screwed on to rafters, rested in front on poles fixed in the ground, and at the back on the stone wall of the kraal. The shed had been erected by a lessee, who was still in occupation of the farm at the time of the sale, and who removed the shed after the sale, but before transfer. The plaintiff objected to the removal, but he paid the price and accepted transfer on the defendant's promise to put the matter right.

Held, in an action for damages for non-delivery of the sheds, that the action was not one of quanti minoris, and that consequently it was not prescribed in six months.

Held further, that the shed was a fixture forming part of the farm which the defendant, as vendor, was bound to deliver with the farm, and that failing such delivery, the plaintiff was entitled to damages.

Held further, that the acceptance of transfer under the above circumstances did not amount to a waiver of the defendant's right to damages.

The case of Irvine v. Berg (Buch. 1879, p. 183) distinguished.

This was an appeal from a judgment of the Resident Magistrate of the district of Uniondale. The appellant was sued in the Court below by the respondent for damages for breach of contract.

From the record in the Court below it appeared that the plaintiff was Henry Frederick Nortje, farmer, district of Uniondale, and the defendant was William Cairncross, a law and general agent, residing at Uniondale. The plaintiff said that in October, 1900, he bought certain properties advertised for sale at public auction by the defendant, the purchase price being £1,440, on the distinct understanding that the properties were sold as they were. The plaintiff said that between the date of sale and January, 1901, certain sheds or kraals erected on the said properties were removed by the former lessee, Thomas Cairncross. Defendant, by this wrongful and unlawful act, had committed a breach of contract by not having delivered the properties to the plaintiff in the same condition and

state as they were in at the date of sale, viz., the 6th October, 1900, and he claimed damages in the sum of £20, which sum the defendant refused to pay. The case was heard in November, 1903, and judgment was given for the plaintiff.

At the first hearing, on the 26th November, certain exceptions were taken to the summons. The defendant excepted, in the first place, on the ground that the summons was vague, unsatisfactory, and bad in law. This exception was overruled. The defendant further excepted on the ground of such a long time having elapsed that he could not now produce witnesses vital to his defence. The Court postponed the case until the 30th November for consideration of the exception, and at the adjourned hearing the exception was overruled. The evidence of the plaintiff was to the effect that he bought the farm as it was. The conditions were of the ordinary kind. There was nothing said about the rights of the lessee. Plaintiff found that between the time of becoming purchaser and taking possession on the 6th January, 1901, 98 iron sheetings, 32 wooden poles, and 20 rafters, part and parcel of the said sheds or kraals, had been removed by Thomas Cairncross without the consent and permission of the plaintiff.

The Magistrate's reasons for his judgment were as follows:—

1.—In this case plaintiff (H. F. Nortje) sues defendant (W. Cairncross) for damages to the amount of £20, by reason of failure on the part of the defendant to deliver to plaintiff in the condition which which it was in on the day of sale, 6th October, 1900, a certain farm called "Rietfontein."

2.—Before pleading, written exceptions were put in by defendant's agent (a) that plaintiff basing his claim on certain advertisement and conditions of sale had omitted to serve on defendant a copy of either of the said documents; and (b) that in the event of exception (a) being overruled (and not otherwise) the defendant excepts on the point of prescription.

3.—The exceptions were overruled on the following grounds:

(a.) The summons is one for damages, and the advertisement and conditions of sale are not such documents as contemplated in Act 20 of 1856. Schedule B., Rule 10. They are mere evidence, and the fact that copies of them were not served on defendant did not prejudice him in any way. *Shear v. Westminster* (9 C.T.R., 1900).

(b.) Plaintiff was perfectly justified in bringing his action within the time he did, as he is not prevented by prescription from doing so.

4.—It was agreed that plaintiff should take possession of the property on January 1st, 1901; but he states in his evidence that he did so on the 6th idem.

5.—Between the dates of the sale and occupation it is alleged that one Tom Cairncross, said to be a lessee of the farm removed certain corrugated iron, spars, poles and lathes, which were affixed to and formed part of a kraal. For these goods damages are claimed.

6.—In evidence, the description of the kraal given is, that its walls were built of stone, that it had two galvanized iron sheds, that sheets of iron laced together rested on the walls of the kraal, and that the poles to which the iron was screwed down at the corners, and at the top and bottom ends were planted in the ground. The Court, therefore considered that the roofs (or sheds, as styled by defendant), were firmly affixed to the stone kraal, and might safely be taken as part and parcel of the kraal, and as a fixture on the farm.

7.—It is contended by defendant that the then lessee of the farm "Rietfontein"—his son Tom Cairncross—had during his tenancy constructed the said sheds, the roofs of the kraal, and that he had a right to remove them at the expiration of his lease. But the court considered that this being so the fact should have been announced at the time of sale, and made known to intending purchasers, and that plaintiff was justified in thinking that he bought with the kraal the sheds which were after date of sale removed by the lessee.

Mr. W. P. Buchanan (for appellant) said that the plaintiff was really complaining of the action of the tenant, Thomas Cairncross, who had removed the sheetings, etc., and who had actually put them up originally, according to the evidence. That surely showed no cause of action against the defendant. On the merits of the case, it would be found that this property was sold, not including these things that Thomas Cairncross had taken away. The summons (counsel contended) was vague. He also urged that this was either an *actio quanti minoris* or an *actio redhibitoria*. If it was an *actio redhibitoria* it should have been instituted within six months, and if *quanti minoris* within a year. He relied on the case of *Irvine v. Bergh* (Buchanan, 1879, p. 183) and *Voet* (21, 1, 6). On the question of what was removable by a lessee, counsel quoted the case of *De Beers Mines v. London and South African Exploration Company* (10 Juta, 359). On the question of fixtures passing, he quoted *Burgess on Colonial Law*. *Voet* (41, 1, 24), *Instit.* (2, 1, 29), *Dig.* (41, 1, 7, 10, and *Groen. in loco*).

Cur. Adv. Vult.

Postea (March 22nd).

De Villiers, C.J.: This is an appeal by the defendant against a judgment of the Resident Magistrate of Uniondale in an action for damages alleged to have been sustained by the plaintiff by reason of the defendant's failure to deliver a

certain farm with the fixtures thereon as they existed at the date of the purchase by the plaintiff from the defendant. The sale took place in October, 1900, and, under the conditions of sale, the price was to be paid in instalments, the first of which was payable on the 1st of January, 1901. At the time of the sale there were some sheds, forming part of kraals, on the farm. These sheds consisted of poles fixed in the ground inside the kraal, with roofs of galvanized iron sheets, screwed on to rafters, which rested at one end on the poles, to which they had been screwed, and at the other end on the stone walls of the kraals. The farm had been let to a lessee, whose lease was to expire on the 1st of January, 1901. It would appear that the sheds had been constructed by the lessee, and that, as between him and the defendant, as lessor, he had the right to remove them before the expiration of the tenancy. The lessee did, in fact, remove the materials of which the sheds were constructed between the date of the sale and the 1st of January, 1901. The plaintiff objected to the removal, but he paid the price, and took possession of the farm on the 6th of January, 1901. He did not, however, acquiesce in the removal of the sheds, but, on the contrary, according to his evidence, he protested to the defendant, who promised that he would make it right. The plaintiff adds that he did not deduct the value of the sheds from the purchase price, as he was promised that the matter would be settled. In November, 1903, he brought his action, and the objection was taken in the Court below that the action, being in the nature of the action *quanti minoris* had been prescribed. The objection was properly overruled by the Magistrate. There was no question as to defect in the property delivered, nor could such a question have been raised, seeing that the defect, if there were any, did not exist at the date of the sale. As pointed out by Voet (21, 1, 8), the vice or defect, by reason of which relief is sought by this action, must have existed at the time of the sale, for if it arose afterwards the ordinary rule would apply that the risk belongs to the purchaser. In the present case there was no question of a vice or a defect in the property sold, but the question was whether the defendant had delivered the property actually bought by the plaintiff. The sheds certainly formed part of the farm at the time of the sale. It is admitted that the kraals were included in the sale as being part of the immovable property sold to the plaintiff. But the sheds standing inside the kraals were firmly attached to the walls of the kraals at the one end, and to poles fixed in the ground at the other end, and may therefore be fairly considered as having been part and parcel of the kraals (see Voet, 41, 1, 24). There was nothing to indicate to

any intending purchaser who inspected the farm before the sale that the structure was not intended for permanent use. As between the defendant and the lessor, the latter may have had the right, upon the principles laid down in *De Beers Company v. Exploration Company* (10 Juta, 359), to disannex the materials of the sheds before the expiration of his term, but the existence of that right does not prove that the sheds did not form part of the farm. In the very same case it was decided that on the expiration of the lease the owner of the land becomes the owner of all materials then remaining annexed, thus showing that it is only by reason of the relationship of lessor and lessee that the latter has the right during the subsistence of the lease to remove the materials. No such relationship exists between the purchaser of the land and the lessee. It is true that the former is bound to abide by the lease, but he retains the right to recover from the vendor any damages he may have sustained through being kept out of possession of the land by reason of the existence of a lease of which he has no knowledge before he bought. In the same way, if the vendor conceals from him that erections which seemingly form part of that land may be removed by a lessee, the purchaser is clearly entitled to damages if the structure is removed before he obtains possession of the land. The defendant, as vendor, was bound to deliver possession of the sheds with the farm (Voet, 18, 1, 4), unless there was an agreement to the contrary. The plaintiff, if sued for the price, might, by claim in reconvention, have obtained damages for the non-delivery of the sheds. He paid the price, and accepted transfer, but he did so on the defendant's promise to put the matter right, and he cannot be held to have waived his right to damages. The case differs materially from that of *Irvine v. Berg* (Buch, 1879, p. 183), which was relied on by the defendant's counsel. The question there was whether the purchaser of mealies, after accepting them and dealing with them as his own, could claim damages for breach of warranty of quality. It was held that the purchaser had, under the circumstances, waived his right to claim damages by the *actio empti*, and that he could not claim by the *actio quanti minoris*, because the mealies, having been resold at a profit, could not have been worth less than the price. The judgment on this point was rather briefly reported, but its effect was as just stated. In the present case, as the sheds formed part of the land sold, it was the duty of the vendor, either to sell the land subject to the lessee's claim, or to arrange with the lessee that the sheds should be allowed to remain. But the defendant having given no notice to the plaintiff of the lessee's right cannot now escape liability to pay the damages sustained by the plaintiff. The appeal

against the judgment awarding £10 as damages must be dismissed with costs.
[Appellants' Attorneys: Herold and Gie; Respondent in default.]

SECOND DIVISION.

[Before the Hon. Mr Justice HOPLEY.]

BOUCHAILL AND JOHNS V. { 1904.
DRAKE { Mar. 11th.

This was an action to recover £24 12s. 3d. and £1 1s. for work done, and £50 damages for breach of contract.

The declaration set out that the plaintiffs were contractors, and they agreed with the defendant to erect certain ironwork on a building in Parliament-street. Defendant agreed to supply the ironwork, and pay the plaintiffs £1 12s. 6d. per ton for the erection. Plaintiffs had erected a certain portion of the ironwork, and about 31st July, 1903, the defendant refused to allow the plaintiffs to complete the work, and refused to supply the iron.

The defendant, in his plea, admitted the employment of the plaintiffs for the erection of certain ironwork. Plaintiffs had failed to perform the work with diligence, or in a skilful and workmanlike manner, to the satisfaction of the architect. The said employment was terminated by mutual agreement, and the defendant denied that the plaintiffs had sustained any damages.

Mr. Gardiner for plaintiffs; Mr. Benjamin for defendant.

Mr. Gardiner said that the defendants were prepared to pay the amounts claimed for work done, and the only thing that would come before his lordship would be the question of damages.

After certain evidence had been led for the plaintiffs, the case was withdrawn by consent.

SUPREME COURT

[Before the Hon. Mr Justice HOPLEY.]

ADMISSIONS. { 1904.
{ Mar. 12th.

Mr. Van Zyl moved for the admission of Stephanus Gabriel Malherbe as an attorney and notary.

Application granted and oaths administered.

Mr. W. P. Buchanan moved, under Act 30 of 1892, for the admission of Wm. Charles Leonard Hedding as an attorney the applicant being at present an attorney of the Transvaal.

Mr. Gardiner, on behalf of the Law Society, said they took an objection under sub-section (2) that there was no statement that the applicant had served articles for a period of three years immediately preceding the date of his enrolment as an attorney.

Mr. Buchanan said that the applicant had been admitted in the Supreme Court of the Transvaal in 1902. He also read an affidavit by Mr. Bensill, Chief Magistrate of Johannesburg, to the effect that the applicant had served the full term of three years under articles with him as an attorney and notary. Counsel added that there might possibly have been a lapse between the serving of articles and the admission of applicant in consequence of the outbreak of the war.

Mr. Gardiner said that the Law Society did not oppose, but they pointed out this irregularity.

Hopley, J., said that it certainly seemed that the Court should have more definite information.

Mr. Buchanan said he thought the Law Society ought to give some notification beforehand when they intended to oppose applications of this kind.

Hopley, J., said he was of opinion that some notification should be given by the Law Society. The matter would stand over until the 15th April for further information.

Postea, April 21st, the application was granted.

PROVISIONAL ROLL.

LEVIN AND C. V. SCHIM- { 1904.
PERS. { Mar. 12th.

Mr. Russell moved for a writ of civil imprisonment upon an unsatisfied judgment for £56 19s. 6d., and costs, £8 18s. 1d.

Mr. Van Zyl read an affidavit by the respondent, Frederick Schimpers, of Graaff-Reinet, who said that he had made a payment of £15. The balance owing was £50 17s. 7d. The debtor made an offer to pay £2 10s. a month until the debt was discharged.

Mr. Russell read a replying affidavit by the plaintiff, who stated that he should not have supplied the goods had he not supposed that the defendant was J. F. Schimpers. The order was written on a printed form of J. F. Schimpers, and it appears that the defendant was J. F. Schimpers's son.

[Hopley, J.: It rather appears as if there had been some underhand work.]

Mr. Van Zyl said they had had no time to prepare and file an answering affidavit. He applied for a postponement.

Hopley, J., said he proposed to grant a writ, to be suspended on payment of £5 a month.

Mr. Van Zyl said that he did not think the defendant would be able to pay £5 a month. He had a letter in his possession, which gave some important information as to the debtor's position, but, of course, he could not put that in, and he would have to obtain an affidavit.

Mr. Russell said they consented to the letter being put in.

Mr. Van Zyl read a letter, written by Mr. Nezer, auctioneer, Graaff-Reinet, who stated that the defendant possessed practically nothing, and had a wife and four children. The offer of £2 10s. per month which the debtor had made would have to be raised by his friends.

A writ of civil imprisonment was granted, to be suspended on payment of £3 a month, first payment to be made on the 1st April, leave being given to plaintiff to apply again.

PEDERSEN V. KENNEDY.

Mr. Russell moved for provisional sentence on a promissory note for £350. The matter, he said, had been before the Court before: the defendant then stating that he gave a second note, and that this had not been returned to him. Counsel put in an affidavit showing that the second note had been returned to the defendant.

The defendant appeared and denied that the note had ever been returned to him.

Mr. Russell then read the affidavit of Carl Robert Temple, of Observatory-road, one of the endorsers of the promissory note for £350, which set out that the second note was handed back to the defendant in his place of business, and he was told that it was no good without Hopper's signature.

The defendant said that the affidavit was absolutely false. The note was never handed back to him. It was not due until the 27th inst., and by that time he would probably be able to meet his liabilities.

Hopley, J., said that, in all probability, the defendant was more likely to be wronged than otherwise at the present stage. Provisional sentence would be granted, but it would be suspended as a matter of indulgence until the 27th inst.

GARLICK V. VINK AND CO.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

GARLICK AND OTHERS V. KULMAN.

Mr. J. E. R. de Villiers moved for the provisional order for the sequestration

of the defendant's estate to be made final.

Final order granted.

SOUTH AFRICAN BREWERIES V. SCHIPPERS.

Mr. Sutton moved for provisional sentence under a lease, and for judgment under Rule 329d, for £165 4s. 8d.

Order granted.

BISSET V. PHILLIPS AND ROUTLEDGE

Mr. Bisset moved for provisional sentence on a mortgage bond for £161 16s. 9d., with interest and costs, and for property hypothecated to be declared executable.

Order granted.

SOUTH AFRICAN PRODUCE, WINE AND BRANDY CO. V. NORMAN.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £190 10s. 1d. and costs.

Order granted.

BEYER V. VAN DER LITH.

This was an application for a writ of civil imprisonment. Defendant appeared, but the plaintiff was not represented.

Hopley, J., said he could not order the defendant to be kept indefinitely in custody for the benefit of the plaintiff, who did not choose to appear.

Defendant said he owed the money.

Hopley, J., said that he did not see how he could enter judgment without an application by plaintiff. The writ would be discharged.

INSOLVENT ESTATE LITTON V. BOAS.

Mr. W. P. Buchanan (for the plaintiff) said that this matter was standing over for the replying affidavit of the plaintiff. He moved for provisional sentence on a certain I.O.U. dated the 3rd July, 1901, given to one Litton, who was now insolvent, and whose trustee brought the present application.

Mr. Benjamin read the answering affidavit of the defendant, which set out that in July, 1901, he gave Thomas Albert Lyttle an I.O.U. for £35, and in satisfaction thereof he gave Lyttle goods to the value of £35. After repeated applications, Lyttle said that the document had been destroyed, and in receipt for the goods he signed a paper which cancelled the I.O.U.

Mr. Buchanan read the affidavit of Thomas Albert Lyttle, which set out

that the sum of £35 had been lent twice, and that the first I.O.U. was still due. A further affidavit was put in from David Lyttle corroborating the existence of two I.O.U.'s for the sum of £35.

Mr. Benjamin submitted that the matter should be decided in the principal case.

Hopley, J., said he thought provisional sentence should be granted. He could not see the object of the insolvent perjurying himself by stating that the note was still outstanding, and he was further backed up by another deponent. Provisional sentence would be granted with costs.

DURANT AND CO. V. POOLE.

Mr. P. S. T. Jones moved for provisional sentence on certain four bills of exchange of the following amounts, viz., £81 15s. 3d., £28 6s., £14 12s. 9d., and £20 4s. 3d., with interest from due dates.

Order granted.

TOWNSEND V. STEPHAN.

Mr. D. Buchanan moved for provisional sentence on a promissory note for £110, with interest and costs.

Order granted.

COLONIAL GOVERNMENT V. MILBORROW.

Mr. Howel Jones moved for provisional sentence of £480 upon a certain agreement of lease.

[Hopley, J.: Is the rent of a diamond mine?]

Mr. Jones: That is so.

Order granted.

LAWRENCE AND CO. AND OTHERS V. SWATT AND RODMAN.

Dr. Greer moved for the provisional order for the sequestration of the defendant's estate to be made final.

Final order granted.

MAXWELL AND EARP AND OTHERS V. BLUMBERG.

Dr. Greer moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

LAWRENCE AND CO. V. MATZ AND LEVY.

Mr. Pyemont moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

Mr. Pyemont also applied, on behalf of the South African Milling Co. and B. Lawrence and Co., creditors in the said estate, for the appointment of Mr. Thomas Herbert Hazell as provisional trustee, with power to sell the store. The debtors carried on business at Plumstead.

Order granted as prayed.

JOSEPH V. LE ROUX.

Mr. Van Zyl moved for provisional sentence on a promissory note for £350, with interest and costs.

Order granted.

WAKELING AND CUNNINGHAM V. SALONIKA.

Mr. Benjamin moved for provisional sentence upon certain conditions of sale for £154 13s., with interest and costs, the amount having become due by reason of non-payment of instalments.

Order granted.

ILLIQUID ROLL.

GUTHRIE AND THERON V. { 1904.
JACOBS AND CO. { Mar. 12th.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £22 11s. 9d., balance due to the plaintiffs by the defendant for work done, money advanced, and interest.

Order granted.

WILSON V. PHIPP.

Mr. Bisset moved for judgment, under Rule 329d, for £99 1s., balance of account, together with interest *a tempore mora*, and costs.

Order granted.

CROYDON BRICK CO. V. HAYWARD.

Mr. Sutton moved for judgment under Rule 329d, for £24, goods sold and delivered, with interest *a tempore mora*, and costs.

Order granted.

LEWIN AND HOTZ V. LUNTZ AND NURIK.

Mr. J. E. R. de Villiers appeared for the defendants to apply to have judgment signed against the plaintiffs for not filing his declaration against them in the next term after the summons. Plaintiff was barred on the 7th March. The declaration should have been filed in the February term.

Judgment was given, with costs, and costs of the present application.

LIEBENBERG V. LIEBENBERG.

Mr. Russell moved for judgment, in terms of the plaintiff's declaration, the defendant having been barred from pleading. The plaintiff had been subjected to cruelty by the defendant, and a deed of separation was formerly entered into. Plaintiff now prayed for a decree of judicial separation, and division of the joint estate. The defendant had signed a consent paper.

Hopley, J., said this seemed to him to be a novel method of obtaining a judicial separation.

Mr. Russell said that a similar case came before the Chief Justice on the 15th December last, when in *Burslem v. Burslem* a decree was granted under Rule 329e. (13 C.T.R. 1200).

Order granted in terms of consent paper.

SPILHAUS AND CO. V. VICKAR BROS. AND ARONOVITZ.

Mr. Sutton moved for judgment under Rule 329d, for £145 13s. 10d., goods sold and delivered, interest, and costs.

Order granted.

CAPE TOWN TOWN COUNCIL V. FRIEDMAN.

Mr. D. Buchanan moved for judgment under Rule 329d, for £18 8s. 9d., for water supply and balance of rates, and costs, less costs already paid.

Order granted as prayed.

HENDRICKS V. WOOD.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £2,100, being balance of purchase price of certain lots of land, together with interest and costs of suit, the plaintiff tendering transfer.

Order granted in terms of prayers 2, 3, and 4.

GENERAL MOTION.

WATSON AND CO. V. WIENER AND CO.

Mr. Searle, K.C., moved, as a matter of urgency, for the arrest of certain goods as security for rent. The plaintiffs let to the respondents certain premises in Loop-street, Cape Town, and a sum of £9 15s. was now owing for rent. Goods and effects had been removed from the premises, and were now lying at the Cape Town Railway Station for consignment to Pretoria and Johannesburg. Applicants asked for an order for

the arrest of the goods, pending an action.

A rule *nisi* was granted, to operate as a temporary interdict, and to be returnable on the 15th April.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROVISIONAL ROLL.

DICKINSON AND CO. V. { 1904.
GEO. WHALES. { Mar. 15th.

Mr. W. P. Buchanan moved for provisional sentence on an acknowledgment of debt for £252 3s., for value received, together with interest and costs.
Order granted.

ESTATE OF BUCHANAN V. WAY.

Mr. P. S. T. Jones moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order made final accordingly.

HIDDINGH V. WO'DING.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £1,000, the bond having become due and payable by reason of non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

MAXWELL AND EARP V. COHEN.

Mr. Benjamin moved for provisional sentence on a promissory note for £78 4s. 6d., for value received, less £16 13s. 9d. paid on account.

Order granted.

FRIEDMAN V. BELMAN.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note drawn in Birmingham for £550, less £195, paid on account, and for interest from the 28th September, 1901.

Order granted.

DU PLESSIS V. MANDELSTAM.

Dr. Greer moved for provisional sentence on a mortgage bond for £750, together with interest, and for the property specially hypothecated to be declared executable, the bond having become due by reason of notice having been given.

Order granted.

OLIVIER V. WEINTROB.

Mr. Gutsche moved for provisional sentence on a mortgage bond for £500, together with interest, and for the property specially hypothecated to be declared executable, the bond having become due by reason of non-payment of interest.

Order granted.

HENDRICKS V. KEYSER.

Mr. De Waal moved for a provisional order for the sequestration of the defendant's estate to be made final.

Final order granted.

RAFFAELE AND BELLANTONE V. BINDEMANN.

Mr. Benjamin moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £25 5s., together with taxed costs. Counsel put in certified copy of judgment and the return of *nulla bona*. The matter arose out of an action tried by His Lordship for the recovery of £25 5s., balance of a certain deposit made with the defendant by way of security in connection with the prosecution of one of the plaintiffs (14 C.T.R. 176).

Defendant offered to pay £3 a month. He said he made the offer to the plaintiffs' attorney before the summons was issued.

Mr. Benjamin said that when the action was before the Court, defendant represented that he was earning large sums of money.

Defendant said that he only occasionally had large cases. Business was very bad in their line.

A decree was granted, to be suspended on payment of £3 a month until the debt and costs had been discharged, the first instalment to be paid on the 1st April.

DE WAAL AND CO. V. DU PLESSIS.

Mr. De Waal moved for provisional sentence on a promissory note for £14 15s., with interest and costs.

Order granted.

DE WAAL AND CO. V. FICK.

Mr. De Waal moved for costs of a certain application for provisional sentence, the capital sum having been paid.

Order granted.

FOWLIE AND BODEN V. HENSON.

Mr. W. P. Buchanan moved for provisional sentence upon a bill of exchange for £281 14s. 10d., drawn in London and presented at the Standard Bank, Claremont, the answer of the bank being "Not provided for." Counsel also asked for judgment under Rule 329d for £1,000 for goods sold, together with interest amounting to £57 15s. 7d., upon the said bill of exchange, and on goods supplied, which the defendant undertook to pay.

Order granted as prayed.

MARQUARD AND CO. V. ROBERTSON AND CO.

Mr. De Waal moved for a provisional order for the sequestration of the defendant's estate to be made final.

Final order granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. } 1904.
VAN DYK. } Mar. 15th.

Mr. Howel Jones moved, under Rule 329d, for judgment for £59 19s. 4d., expenses incurred in connection with the extradition of one A. C. Gardiner on the charge of abducting one Lesa, the defendant's step-daughter. The defendant signed a guarantee for the costs of the extradition of the said Gardiner and for the expenses of the return of the step-daughter. Miss Lesa came back to the Colony at the expense of the Government, and, after certain expenses had been incurred in connection with the extradition of Gardiner, the present defendant abandoned the prosecution, and she had failed to pay the expenses.

Order granted as prayed.

ROCHESTER BRICK CO. V. ELLENBOGEN.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for the amount of £259 2s. 4d., goods sold and delivered.

Order granted.

CAPE TIMES LTD. V. ARON.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for an amount of £30, goods sold and delivered.

Order granted.

CAPE TIMES LTD. V. MCKAY.

Mr. Alexander moved for judgment, under Rule 329d, for an amount of £10 advertising, and £40 rent.

Order granted.

CLAREMONT MUNICIPALITY V. OLEWS.

Mr. Bisset moved for judgment, under Rule 329d, for an amount of £97 0s. 4d., being the balance of rates due by defendant to the plaintiff.

Order granted.

JACKSON V. HAUPEL.

Mr. Alexander moved for judgment under Rule 329d, for a sum of £40, being the refund price of two horses sold and delivered, together with costs of suit.

Order granted.

COLONIAL GOVERNMENT V. ONMAN.

Mr. Percy Jones moved for judgment, under Rule 330d, for an amount of £75, balance of account due by defendant.

Order granted.

COLONIAL GOVERNMENT V. PRICE.

Mr. Percy Jones, in moving for judgment under Rule 330d, stated this case was similar to the last.

Order granted.

PHILIPSON V. BROMLEY.

Mr. Searle moved for judgment, under Rule 329e, for an amount of £200, in terms of a consent paper.

Judgment accordingly.

TABOYSKI AND CO. V. BRUCKNER AND VARCOE.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for a sum of £31 14s. 2d., being balance of purchase price of goods sold and delivered, and a further amount of £15 7s., being the purchase price of certain other articles.

Order granted.

EVERETT AND MORTON V. ELLENBOGEN.

Mr. Benjamin moved for judgment, under Rule 329d, for an amount of £81 18s. 4d., for goods sold and delivered.

Order granted.

ESTATE SLINTER V. PIENNAAR.

Mr. Gardiner said the original intention had been to move for a decree of

perpetual silence. Defendant had written stating that he had a claim against the estate, and the trustees considered that he ought to have sent in the nature of his claim months ago. Defendant had now, however, taken out a summons in response to this application, and plaintiffs simply claimed costs in the present suit. The plaintiff had been compelled to take action on account of the great delay in the statement of defendants' claim, and it would be hard upon them if they had to pay the costs in the present suit.

De Villiers, C.J.: It would be rather hard also upon defendant if he had a good case to pay the present costs.

The question of costs will, therefore, stand over till the defendant's action shall be heard.

REHABILITATIONS.

Mr. M. de Villiers applied for the rehabilitation of Joseph Richard Lindsay. Counsel stated that the insolvent's books had been destroyed.

His Lordship ordered the application to stand over until the applicant gave some satisfactory explanation of the destruction of the books.

Postea (March 15th).

Mr. Benjamin applied for the rehabilitation of Max Rabinowitz.

Application refused. Leave granted to apply again within three months.

Mr. W. P. Buchanan applied for the rehabilitation of Joseph Manley.

Order granted.

GENERAL MOTIONS.

SHERIFF V. SHERIFF. { 1904.
{ Mar. 15th.

Mr. Benjamin moved that a certain rule *nisi*, granted February 2nd, with custody of the child, be made absolute.

Granted.

GRAHAM V. GRAHAM.

Mr. Benjamin moved that the rule *nisi*, granted in this case on February 3rd, be made absolute.

Granted.

ESTATE DE WET V. MARAIS.

Water—Weir—Reference to District Water Court.

This was a motion to make absolute a rule *nisi* restraining the defendants from interfering with a weir which plain-

tiffs had constructed in the Breede River, in the Robertson district, under arrangements with their predecessors in title. The petition set forth that respondent, in cleaning out a furrow in the river bed which they stated belonged to them, broke into petitioners' weir, and thereby prevented the water getting into their furrow. Respondents denied that they interfered with petitioner's property at all, and stated that they had a perfect right to the furrow in the river bed. Their weir was lower down the river than petitioners.

Mr. P. S. T. Jones appeared for the applicants, and Mr. Benjamin for the respondents.

Mr. Jones argued that this was a case of spoliation, and that the respondent should be ordered to restore the weir to its previous condition. Mr. Benjamin was not called upon.

De Villiers, C.J., in giving judgment, said he thought that an action should be brought by the applicant. He could not assume that the respondent had been acting wrongly—it was possible he

might have been—but he could not assume that he had on the conflicting testimony before him. The weir might have been put there by the applicants, but it did not appear that it was on their own land; there was no evidence that it was upon their own land. The mere fact that it was placed there did not settle the question of spoliation. It was really a question between the riparian proprietors as to whether one had taken more than a reasonable share. If he were to give any expression of opinion now, he might prejudice the matter. There would be no order, the applicants to proceed by action, and the costs of the present application to be costs in the cause.

Mr. Benjamin said he thought this was a matter that the Court might appropriately have referred to the water court which had been established in the district.

Mr. Jones said he thought their attitude was that they did not want to waste costs, and he felt almost certain that his clients would be prepared to come to any arrangement before bringing the matter into Court again.

Mr. Benjamin said that, if the parties consented, the matter could be referred to the Water Court, under the 16th section of the Act 40 of 1899.

[De Villiers, C.J.: Do you both agree that the matter should be referred to the Water Court?]

Mr. Jones said that that was so.

De Villiers, C.J.: There will be no order, then, except that the dispute be referred to the Water Court in terms of the Act 40 of 1899, the question of costs of this application to be also referred to the Water Court.

Ex parte MANN *in re* MOSS. { 1904.
{ Mar. 15th.

Licensing Court—Withdrawal of application for renewal of licence.

The holder of a licence lodged an application for its renewal with the Magistrate in manner provided by the 42nd section of Act 28 of 1883. An application was made for the sequestration of his estate, and within an hour before the order of sequestration was made he withdrew his application for renewal. A curator bonis was appointed to his estate, who at the sitting of the Licensing Court on the following day applied for the renewal of the licence. The presiding Magistrate ruled, that as the holder of the licence had withdrawn the application, his curator bonis had no locus standi.

Held, that as the holder had withdrawn his application, with the view of defeating the rights of his creditors, his curator bonis should be allowed to revive the application, and that for that purpose the Licensing Court should be authorized to hold a fresh meeting.

This was a motion on the petition of one Gother Mann, *curator bonis* in the estate of George Alfred Moss, of the Cafe Royal, Cape Town, for a review of the proceedings of a certain Licensing Court. The matter arose out of a ruling by the Acting Resident Magistrate of the Cape, who was president of the Licensing Court. The point was this: An application having been made by one George Alfred Moss, who was the lessee of the Cafe Royal and holder of the licence, for the renewal of the licence, he afterwards got into great difficulties, which eventually came to an acute stage, until an application was at length made for the sequestration of his estate. On the very day when the application for provisional sequestration was made, and about an hour before the application came before a judge sitting in Chambers, the insolvent wrote to the Magistrate saying that he withdrew "is application for the renewal of the licence. Then, on the following day, when the *curator bonis* appeared before the Licens-

ing Court, to apply for the renewal of the licence, the President ruled that there was nothing before the Court and that the application of the *curator bonis* for renewal could not be considered. The petitioner claimed that that was not regular, and that the President was in error.

The petition of Gother Mann, the *curator bonis*, stated that the application for the provisional order for sequestration of Moss' estate was made at 4 p.m. on the 1st March, upon the petition of Messrs. Gourlay, Cavanagh and Co., who were the lessees of the hotel, under the owner, Mr. M. L. Wessels. In order to keep the licence in full force and effect, it was necessary that an application should be made at the Licensing Court on the 2nd of March. Moss, instead of making this application, deliberately and vexatiously, an hour before the provisional order was granted, gave notice to the Resident Magistrate, Cape Town, for the withdrawal of the application for renewal of the licence. The Magistrate in consequence, removed his name from the list of applicants for renewal of licences. Petitioner added that the claims against the estate amounted to about £7,000. The value of the licence was £5,000 and upwards. The other assets were scarcely worth £500. It was desirable that the licence should be renewed for the benefit of the creditors and others interested in the estate. The present licence was current until the 31st March.

The affidavit of Mr. Rossouw, A.R.A., briefly stated that he placed himself in the hands of the Court.

[De Villiers, C.J.: I suppose Moss discovered that the petition was being sent in?]

Mr. Schreiner (for the applicant):

This motion is made as a matter of urgency; and the point of urgency is that we ask that the Licensing Court should be authorised to hold an extraordinary meeting on the 31st instant, to consider the application of the *curator bonis* in Moss' insolvent estate for a licence for the "Cafe Royal." At the time Moss withdrew his application for a renewal of licence he must have known that he was on the verge of sequestration, and he withdrew the application simply because he wished to throw away the licence. Section 62 of Act 28, of 1883, clearly provides for the trustee of an insolvent estate carrying on the business. Moss must have known that his estate was insolvent, and that by throwing away this licence he was throwing away the only asset of anything like considerable value in the estate. As to the authority of the Court, see *Runchman v. Kimberley Licensing Court* (4 H.C., 42). In this case the Magistrate overlooked the fact that he had no power to strike off the list of applicants

an applicant who withdraws. The Magistrate, as Chairman of the Licensing Board, can only report to the Board the names of the applicants. The Act nowhere gives him authority to sanction the withdrawal of the name of any person who has once made application.

[De Villiers, C.J.: I do not think that you need argue that point.]

Then I can only submit that we are entitled to the order applied for.

De Villiers, C.J.: It is clear that Moss had received some information that an application was about to be made to a judge in Chambers for sequestration of his estate, and having got that information, he proceeded to withdraw the application he had previously made for renewal of his licence. This withdrawal took place within an hour before the judge actually made the order for the provisional sequestration of the estate. It is clear, therefore, that under such circumstances the *curator bonis*, who has been appointed to represent the estate, would have the power to take up the application for renewal of the licence. Moss ceased to have any interest in the estate; it is his creditors whose interest came in; and it is clear that it was for the purpose of defeating the rights of the creditors that he withdrew his application. The Court could not for a moment allow any debtor to defeat his creditors' rights by a trick of this kind. Upon the appointment of the applicant as *curator bonis* he obtained a *locus standi* to represent the estate for the purpose of obtaining a renewal of the licence, and the fact that the application had been withdrawn by the debtor, immediately before the application of the sequestration of his estate was actually made, would not deprive the petitioner of his rights as representing the estate. The only difficulty that I see in the case is in regard to the power of this Court to order a meeting of the Licensing Board to consider this application afresh. The Governor may, under the 26th section of the Act, order a Licensing Court to take steps for rectifying an error or omission, but the Act is silent as to the power of the Court to order a fresh meeting where a decision infringing on the legal rights of an individual has been arrived at. The question has, however, been decided by this Court in the affirmative, in the cases quoted. I took no part in the decision of those cases, but I do not question its correctness. The decision was arrived at after considerable argument and I consider that the Court would now be justified in ordering that a further meeting of the Licensing Board be called for the purpose of considering the application made by petitioner on behalf of the creditors. An order will be made in the following terms:—

The Court orders that the Magistrate be authorised and directed to convene a

meeting of the Licensing Board within ten days, for the purpose of considering an application for the renewal of the licence made by the petitioner as *curator bonis* of the estate of insolvent, or by any trustee who may be appointed to represent the estate.

[Applicant's Attorneys: Harsant and Harsant.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

BENNETT V. CAPE ESTATE & 1904.
SYNDICATE LIMITED. { Mar. 11th.

Judgment—Company—Voluntary winding up—Stay of execution.

The plaintiff obtained judgment against the defendant Company on a mortgage bond, but failed to inform the Court of the fact that the Company was being wound up voluntarily. Thereafter the defendant Company applied for a stay of execution.

Held, that a stay of execution should be granted, but on condition that the plaintiff's claim should be satisfied within a fixed period.

This was a motion on behalf of the defendant syndicate, for stay of execution of an order for provisional sentence upon a mortgage bond for £1,000, and for the property specially hypothecated to be declared executable.

The affidavit of the liquidators of the syndicate stated that on the 31st July, 1903, at a meeting of the shareholders, it was resolved that the syndicate should be voluntarily wound up, which resolution was confirmed at an extraordinary general meeting on the 18th August. Lot one of the landed property had been sold for £300, the proceeds having been devoted to payment of bank overdraft, and sundry expenses. None of the other properties had been sold, but the liquidators were negotiating for a large portion therein to be sold at a price which would more than cover

the plaintiff's claim. There were other liabilities against the syndicate of £1,350, £205, and £100, or thereabouts. The deponents added that the value of the assets was in excess of the liabilities. Stay of execution was sought on the ground of the voluntary winding up of the syndicate.

An affidavit by a clerk in the employ of Messrs Findlay and Tait stated that the respondents were in court when the application for provisional sentence was heard. From correspondence which took place between the attorneys of the parties, it appeared that no interest whatever had been paid to the plaintiff, and plaintiff also stated that no steps had been taken to realise the estate.

[De Villiers, C.J. (to Counsel for the respondent: Are you prepared to undertake that the distribution of the assets shall take place at once or within a very brief time?]

I don't know as to what terms I could give; my attorneys are not in court. I would point out that we say we think we shall be able to realise the property better if it is not necessary to cut it up for the purposes of this execution.

An answering affidavit by Mr. Riches, one of the liquidators of the syndicate, stated that he was in court on the day when the application for provisional sentence was to have been made, but it came on during his absence, and he had consequently no opportunity of explaining to the Court that the syndicate was in liquidation.

Mr. Buchanan (for applicants). In a matter like this of voluntary liquidation the creditors are entirely in the hands of the liquidators. Sections 207 and 141 of the Companies' Act (25 of 1892), both apply to a compulsory winding up. Under sec. 186 the liquidators may apply to the Court to determine any question arising out of the winding up, but here they have not done so. This case is quite different in principle to the case of *Hazell Liquidator, Bromley and Co. v. Shenker* (14 C.T.R.) where his lordship in his judgment laid stress on the fact that the liquidator had to rank and pay the claims in the legal order of preference, and that if an unsecured creditor were paid out of the regular order he would obtain a *pignus praetorium* over the other creditors. The present plaintiffs only come to take execution of property, which is secured to them, and upon which they are preferent to everybody else. The Court has granted an order declaring the property executable, and I submit that the applicants cannot now be allowed to stay execution. The respondents cannot by their execution interfere with the legal order of preference. The liquidators are not really waiting till they can find a purchaser, they can get a purchaser to-morrow, but they want to wait till

they can get a better price. The matter has been hanging over since August. I hope that if a restraint of execution be granted, the applicant will be put on a short term, and the respondent will not be required to pay costs.

Mr. Gardiner (for respondents), said he thought they might assume that the liquidators would do their duty and realise the estate as quickly as possible. If the liquidators did not do their duty the applicants had the right to apply to the Court for the syndicate to be compulsory wound up. The property market was not at present in a good state, and it might hitherto have been difficult for the applicants to obtain a satisfactory price for their property. He contended that the wrong procedure had been adopted by the respondents in proceeding for provisional sentence.

Mr. Buchanan, in reply, said that attachments, executions, distress, etc., were not void in voluntary windings-up, though, according to section 207, such proceedings were void in the event of compulsory windings-up. It had been held that there was no section expressly dealing with voluntary liquidations either in the Colonial Act or in the English Act.

Mr. Gardiner having been heard on the question of costs of the present application,

De Villiers, C.J.: It appears from the correspondence that the respondent was aware, at the time when he obtained judgment against the syndicate, that the syndicate was in course of being wound up. If the Court had been informed of that fact, I am satisfied that the Court would have stayed its hand and not have declared the property executable there and then. It is far better that where winding-up is once commenced, the whole of the assets should be realised by the liquidator. It is more economical, and in every way more satisfactory, that this should be done than that there should be separate executions against the estate, and therefore I consider that it was the duty of the plaintiff in that case to have informed the Court of a fact which was within his knowledge, that the estate was being voluntarily wound up. The syndicate now applies to the Court for an order that execution be stayed, and, in my opinion, this order should be granted upon the principles laid down in the previous case of *Shenker*. I think, however, that there should be a condition attached that the claim of the respondent's should be satisfied in its legal order of preference within six weeks from this date, because I consider that the fact that there is a voluntary winding up does not justify the liquidators in keeping the plaintiff, who may be in need of money, from having satisfaction of his claim. As for the costs, I am of opinion that the respondent should pay costs of this action.

Mr. Buchanan suggested that the costs should be limited to costs of opposition.

De Villiers, C.J., assented. The condition will be: "That the claim of the respondent shall be satisfied, so far as the legal order of preference will permit, within six weeks from this date." I may state that I have fixed the period of six weeks, because I am informed by the Acting Sheriff that that would be about the period in which, in the ordinary course of execution, the money would be paid.

[Applicant's Attorneys: Fairbridge, Ardern and Lawton; Respondents' Attorneys: Findlay and Tait.]

COURLAY, CAVANAGH AND } 1904.

CO. V. MOSS. { Mar. 16th.

Mr. P. S. T. Jones moved, as a matter of urgency, for the appointment of Gother Mann, *curator bonis* in the estate of George Alfred Moss, of the Cafe Royal, to be provisional trustee, with power to carry on the business.

Order granted appointing Mr. Mann provisional trustee, with power to carry on the business.

ANNEAR V. ANNEAR.

Mr. J. E. R. de Villiers, for the plaintiff, applied for leave for substituted service of citation. Leave to sue by edictal citation was granted in August last, and every effort had been made to find the defendant without success. It was believed, however, that he was in Johannesburg.

The order was granted as prayed, two publications to appear in the "Star," Johannesburg, to be returnable on the last day of next term.

HARRISON V. HARRISON.

This was an application on notice of motion, calling on the respondent to show cause why an order of personal attachment should not be issued, through his failure to comply with an order of Court. Mr. Benjamin was for the plaintiff, and Mr. Alexander was for the respondent.

Mr. Benjamin read the affidavit of the petitioner, Helen Harrison, wife of the respondent, which set out that on the 3rd December, 1903, the respondent was ordered to pay her £30 in order to proceed with an action, and £30 a month towards the maintenance of herself and children. The respondent had paid the initial £30 and the first monthly instalment, but he had neglected to pay on the 15th January and the 15th February. Acting on the suggestion of the Court, the petitioner had endeavoured to effect an amicable settlement, but, owing to the evasion of the respondent, she had been unsuccessful. She was wholly destitute of ready money.

Mr. Alexander read the affidavit of the respondent, which set out that the sum of £30 had been paid to the respondent on the 12th December, 1903, but she had taken no steps in the action. He had done his utmost to effect a settlement, but without success. Everything had been arranged at the office of the attorney of the petitioner, but because he had not got £15 ready money, the negotiations were broken off. The petitioner had unlimited credit, and respondent only had an income at present of £34. Counsel had a mass of correspondence, the effect of which would show that the respondent had been anxious to effect a settlement.

[De Villiers, C.J.: Can't these people settle their squabbles without wasting money in this way. It is simply a question of money now. Couldn't they agree to a voluntary separation, and have a receiver appointed to divide the estate?]

Mr. Benjamin said he thought that would meet the justice of the case. The petitioner had absolutely no means.

Mr. Alexander said that the correspondence would show that considerable efforts had been made by the respondent to effect a compromise. He thought if His Lordship would allow the matter to stand over, a settlement might be arrived at.

[De Villiers, C.J.: The matter has been constantly postponed, and we are getting no further?]

Mr. Benjamin said that the whole matter had been thrashed out before, when the defendant was ordered to pay the money in question.

De Villiers, C.J.: This is an application for committal for contempt of Court. There can be no contempt of Court unless there is wilful disobedience of the order. The respondent was ordered to pay £30 a month. This he paid for one or two months. Afterwards he says he is unable to continue payment. He alleges he is wholly unable, and if this is true there can be no contempt of Court. There is this to be said in his favour, that the Court has interdicted him from dealing with his property, and that interdict was granted on the application of the petitioner herself, so that she is to some extent responsible for the man having no means whatever with which to pay this £30. I think both parties are somewhat unreasonable. It would be very easy for them to come to terms, if they would only exercise a little reason in the matter, but they seem to be in a temper—in a state of conjugal disunion. I think the Court should not now grant an order for contempt of Court in the absence of any proof that there is a wilful disobedience of the order of Court. The application is refused. The question of costs will stand over. At the trial of the case, and when the merits have been heard, the Court will be in a better posi-

tion to judge as to who should pay the costs.

Ex parte SMITH.

Mr. W. P. Buchanan moved for an interdict restraining Messrs. Howard, Farrar, Robinson, and Co., of East London, from selling certain ploughs, manufactured by the Cockshut Co., of Canada, which were fitted with a patent to prevent friction, the property of the applicant.

An order was granted, calling on Messrs. Howard, Farrar, Robinson and Co., of East London, to show cause on the 1st June why an interdict should not be granted as prayed, the rule to be served personally and by registered letter on the Cockshut Company in Canada, the first respondents to keep account of all ploughs that might be sold by them.

HIDDINGH V. ESTATE HERTZOG.

This was an application on behalf of the defendants who are executors dative in the estate Hertzog, for the appointment of a commission to take the evidence of Thomas Henry Gurran, handwriting expert, London, and for the transmission to him of a document purporting to be the last will and testament of the late Mr. Hertzog. A certain document, purporting to be the will of Mr. Hertzog, was filed in the Master's Office; this alleged will did not dispose of the whole estate, and the defendants from the first refused to recognise it. The plaintiff commenced an action, but subsequently abandoned any claim that he had under the will, and paid the costs. He was then asked if he consented to judgment being signed in favour of the defendants, but he did not reply. The matter was again mentioned to the Court a little time ago, and was then ordered to stand over in order to ascertain whether the plaintiff would consent to judgment for the defendants. No reply had been received to a further letter, but the plaintiff's attorney, Mr. T. P. Peters, informed the defendant's attorneys that plaintiff would not consent to a judgment being signed in favour of the defendants, and that he would leave the matter entirely in the hands of the Court. The defendants desired to obtain finality in this case, and, unless the plaintiff consented to their signing judgment, it would be necessary for the defendants to have the case set down, and to expend a good deal of money in preparing for the trial. Mr. Schreiner, K.C., moved, and asked that the plaintiff should be ordered to pay the costs of the present applicant.

De Villiers, C.J., in granting an order as prayed, and directed that the alleged will should be transmitted by registered

letter, said: In making this order I would suggest to the plaintiff whether it is not advisable for him, if he does not intend to proceed with the action or withdraw, to consent to judgment, so that all this unnecessary expense may be saved.

ADMISSION. { 1904.
{ Mar. 16th.

Mr. Alexander moved for the admission of Wm. Percival Douglas as an attorney and notary.

Application granted, and oaths administered.

PROVISIONAL ROLL.

CAPE PRODUCE AGENCY V. PEAKE.

Mr. Rainsford moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £101 16s. 4d., and £15 12s. 8d., taxed costs.

The defendant appeared in person, and said he had no assets whatever. Formerly he had been an hotel manager, and he looked forward to a position next month.

De Villiers, C.J., said the Court would make no order at present, but there would be leave to apply again.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte VAN HEERDEN. { 1904.
{ Mar. 17th.

This matter was standing over from Wednesday for suggestion of name of *curator ad litem* to represent minors.

Mr. Schreiner, K.C., now brought before the Court the name of Mr. J. Griffith Harsant, attorney, Cape Town.

Order granted appointing Mr. Harsant *curator ad litem*.

Mr. Schreiner asked if the more general powers of curator could be vested in Mr. Harsant.

De Villiers, C.J., said that must be the subject of a separate application.

VAN DER BEEVER V. J 1904.
CLOETE. (Mar. 17th.

**Lease—Pledge—Cession—Rights
of cessionary.**

The applicant ceded a sheep lease to L. as security for a debt. L. ceded all his rights to the respondent. Thereafter the applicant tendered the amount of the debt to respondent, who refused to hand back the lease, claiming the right to retain it as security for a promissory note made by the applicant which was not yet due.

Held, that whatever rights the respondent might have had if the applicant had himself ceded the lease to the respondent, he had not, as cessionary, any greater rights in respect of the lease than L. had, and that, therefore, he was bound to hand the lease back to the applicant upon tender by the applicant of the debt due by him to L.

This was an application to have made absolute a rule nisi, operating as an interim interdict, restraining the respondent, Gideon Stephanus Cloete, attorney, Lady Grey, from parting with a certain sheep lease.

The petition of the applicant (verified by the usual affidavit), stated that he was a farmer resident in the district of Aliwal North, and that the respondent was an attorney resident near applicant. In or about October 1903 petitioner ceded a certain sheep lease entered into between petitioner and one Herman H. Zinn, of Lady Grey, in respect of 440 sheep, as collateral security for £16 10s., to A. W. Lilford, trading at Lady Grey as Lilford and Co. The lease took effect on March 5, 1902, and expires on March 4, 1904, and stipulates for a yearly rental of £33, payable half-yearly, either to petitioner in person, or at the office of respondent, who at the time the said lease was entered into acted likewise as applicant's attorney.

Applicant claimed payment of 12s. 6d. each for 340 of the sheep leased, and the return of the sheep. On February 5th, 1904, petitioner instructed his attorney, Arthur E. Dell, to tender the aforesaid sum of £16 10s., to A. W. Lilford, and to demand return of the said sheep lease with the cession duly cancelled. On being informed by John H. Diepnaar (Dell's clerk) of the alleged

transfer of the cession from the said A. W. Lilford to the respondent, petitioners made a similar tender and demand from the respondent. Petitioners verily believed that the respondent intended to reap and collect all the benefits accruing to the said lease, and to apply such benefits towards liquidating certain promissory notes, amounting to about £240. These promissory notes had not as yet fallen due. The petitioner had given the respondent collateral security for the aforesaid amount by ceding to him two policies on petitioner's life for £500. Respondent has never acquired any title from the petitioner to the said sheep lease nor was it ever intended that he should do so. The only purpose for which the cession was made was as collateral security, as aforesaid. The other party to the sheep lease (Herman H. Zinn), who has but recently returned from Johannesburg, has disposed of almost all his property at Lady Grey, including his farm, and the sheep leased under the aforesaid lease. Owing to respondent's illegal refusal to hand over the said lease on tender of £16 10s., petitioner will, in all probability, suffer irreparable loss. Wherefore the petitioner prayed for:

1. A rule nisi calling upon Gideon S. Cloete, or any other person who, since the commencement of this action, may have become possessed of the said lease, to show cause why it should not be ordered that the said sheep lease be handed over to the petitioner on payment of £16 10s.

2. That this rule may operate as a temporary interdict restraining the respondent, or any subsequent possessor, from disposing of, or alienating the said lease, until the rule nisi be confirmed or otherwise disposed of; and, that it may operate as a temporary interdict restraining the aforesaid H. H. Zinn from disposing of any sums due by virtue of the aforesaid lease until the rule nisi be made absolute or discharged.

The affidavit of Gideon S. Cloete (the respondent) stated that in March, 1902, the petitioner let his sheep to one Hermanus H. Zinn, making all amounts due under the lease payable at deponent's office. Deponent agreed to advance money to petitioner on the security of the sheep lease. Deponent advanced money and retained possession of the lease till the beginning of February, 1904. At petitioner's urgent request, deponent in April, 1902, drew up a deed of cession of the lease to petitioner's wife, after informing petitioner that such cessions between husband and wife were null and void. During September, 1903, Messrs. Lilford and Co., of Lady Grey, sued petitioner for £52 10s, which, with costs and interest, amounted to £60. Petitioner paid cash £25, gave a promissory note at six months

for £18 10s., and ceded the lease to Lilford and Co. for the balance of £16 10s. This cession was made on September 29th, 1903, simply by erasing Mrs. Van der Heever's name and substituting Lilford and Co.'s, but the original date was by inadvertence left unaltered. The cession was fined by the Magistrate when presented to him for a cancellation of the stamps. On January 26th, 1904, petitioner's promissory note to deponent for £231, fell due, and at petitioner's request deponent agreed to renew, provided the said lease was ceded to deponent as security. The arrangement was that deponent was to retain £175 on March 5th, 1904, when Zinn settled up with him, and pay out the balance to petitioner to settle with other creditors. Deponent, thereupon, had the lease ceded to him by Lilford and Co., and paid amounts due to them. Both the cession to Lilford and Co. and that by them to deponent was valid and *bona fide*.

There were various other supporting affidavits.

Mr. McGregor (who appeared for the respondent) said his submission was that this was a case where the petitioner for some time obtained loans of money and subsequently he endeavoured to extricate himself from any security which he had given to the respondent in the matter. Apparently the advances had been made from March, 1902, and Mr. Cloete's contention was that there was a certain lease entered into between the petitioner and one Zinn. The rents under that lease were payable in Cloete's office, and Mr. Cloete arranged with Mr. Van der Heever that as the petitioner would want loans of money, the lease was to be security protecting the respondent against loss in respect of such loans as he would make.

De Villiers, C.J., said that the cession of the lease to Cloete seemed to have been made on the 26th January.

Mr. McGregor said that was a cession by Lilford to Cloete, and Van der Heever was not a party to it. The figure seemed to have been disturbed it was true, but he submitted that to all appearances it was consistent with his submission as to the concession of the lease as security to Cloete. Counsel went on to say that the affidavits of the petitioner consisted mainly of a general allegation that the debts of about £200 arose out of the swelling of a small debt by interest in the course of two years. The Court would find on the facts that Van der Heever agreed to give cession of the lease as security.

Mr. Buchanan, replying to his lordship, said that there was an insurance policy for £500 ceded to Cloete as security for the promissory notes. That was clearly stated in the affidavits.

Mr. McGregor said that the respondent's explanation was that two policies

of £500 each were handed to him so that he should pay the premiums.

De Villiers, C.J., remarked that that seemed to be a most improbable explanation.

Mr. McGregor went on to say that the statements of Van der Heever were unsupported by anybody else, and his memory was not very clear. He submitted that £230 or £240 was owing now, and that the respondent was entitled to have the money paid. Counsel referred to *Trantman v. Imperial Fire Insurance Co.* (12 Juta, 38) and *Voet* (20-6-15).

Mr. Buchanan said that the petitioner admitted that he owed £201 18s. 6d., which was the last of a series of promissory notes that successively arose out of an account for £50. The difference between the respective amounts was really the interest on a continual series of renewals in the course of about a year. Petitioner's financial status had not changed during the past two years. At no time was any mention made of ceding the lease in question. On the 26th January, 1904, petitioner was not in possession of the lease in question, and thus it would have been an absurdity for him to re-cede as alleged by the respondent. Counsel also read affidavits to show that negotiations took place for the cession of the insurance policy, and that the cession was carried out. It seemed to him on reading through the affidavits that the case of the respondent was without foundation. It was not clear upon what basis the respondent rested his claim, and he must say, after hearing his learned friend, that the matter was not any clearer to him.

De Villiers, C.J., said that the date on the lease seemed to have been altered to the 26th January, and must originally have been either the 24th, 4th, or 14th.

Mr. McGregor, in reply.

De Villiers, C.J.: On the 5th March, 1902, the applicant executed a lease for certain sheep in favour of one Zinn. In the following month, that is on the 8th April, the applicant ceded his rights under the lease to his wife, in the following terms: "I, the undersigned Jan Daniel van der Heever, the within lessor, hereby cede, assign, and transfer and set over all my right, title, and interest in and to the within sheep lease to my wife, Maria Johanna Elizabeth van der Heever." This is signed by the applicant. Subsequently, there was a judgment obtained by Lilford and Co. against Van der Heever, and in settlement of the amount the applicant made a payment and entered into a separate arrangement for the rest of the judgment. Then, on the suggestion of the respondent himself, who had been acting throughout for applicant, the name of his wife was struck out and the name of Messrs. Lilford and Co.

substituted as the cessionaries of the lease, and the following words were added: "As collateral security for the amounts due by him to them." Now, it is admitted that £16 10s was the total amount then due. Then, apparently on the 26th January, 1904, but certainly at some other date, because it is an alteration—the 6 was not the figure—but some time, apparently in January, there is the cession by Lilford and Co. to the respondent in the following terms: "We, the undersigned Lilford and Co., do hereby cede, assign, transfer, and set over all our right, title, interest in and to the within lease to Gideon Stephanus Cloete, for value received, and without recurrence on ourselves." Upon these documents it is perfectly clear that the respondent had no greater rights than Lilford and Co. had upon the lease. It is only their right and title that they could cede, and the ordinary rule that a cessionary has no greater rights than the cedent himself must apply. Upon tender of the amount of £16 10s., he was bound to hand over the lease to Van der Heever, the applicant, but in answer to the applicant's claim, the respondent makes the following allegations: He says originally, when the lease was entered into, it was arranged that this lease was to be a security to him for debts owing to him. He makes the further statement—and a somewhat extraordinary statement—that it was proposed by Van der Heever to make a cession of this lease to his own wife. Respondent said: "It cannot be done, it is illegal; it would be utterly null and void," but ultimately he yielded, and apparently gave up all his rights which he said he had under this document as security. By allowing the cession to be made to Mrs. Van der Heever, he tacitly gives away any rights which he may have held in this as security for himself. Afterwards, when Lilford and Co. wanted to make the fresh arrangement, the rights of Mrs. Van der Heever were completely ignored. She is the cessionary; it does not appear that she was a party to the fresh arrangement. Her name was struck out and the name of Messrs. Lilford and Co. inserted. The respondent goes on to say that on the 26th January this year there was some arrangement between the parties by which the respondent's rights were to revive, and that cession of the lease was to be made in his favour. But then what is the cession? The only cession made is by Lilford and Co., and they could not cede to him greater rights than they themselves possessed. I am satisfied if the parties honestly intended there should be a cession of all the rights of Van der Heever in respect of this lease, and more rights than Lilford and Co. possess, the parties would have made an endorsement to that effect on this

document. There is considerable conflict of evidence as to what took place on the 26th January, 1904, and in this conflict of evidence I prefer to abide by the written documents before the Court, and upon these documents there is not a tittle of evidence to show any intention on the part of the applicant to grant his lease as security to the respondent for any debts that may be owing to the respondent. It would appear that at that time the respondent had security for the promissory note which was owing to him. The security consisted of two life policies, one of the applicant himself and one of the applicant's wife, in favour of the respondent. Unfortunately, these policies have not been produced. I suppose they are in possession of the respondent. He does not affix these policies to his affidavit so that the Court might see the nature of the cession of these policies to him. His statement is that the policies were ceded to him to enable him to pay the premiums—a somewhat extraordinary statement—for surely he could pay the premiums without a cession of the policies being made to him. There is proof of only one payment being made, if indeed, there was a premium paid by him. It is suggested that it was on some other policy, but supposing it was, there is only one payment of £9. Seeing these life policies are not produced I am inclined to believe the statement that the respondent had held these policies as security for the promissory note. I prefer to be guided by the documents before the Court, and upon these documents there is not a tittle of proof that there was any intention on the part of the applicant to cede the lease to the respondent. Mr. McGregor has quoted authorities to show that the pledgee is entitled to retain the article pledged in security, not only for the debts for which the pledge was given, but in security for other debts. It is not necessary to discuss that question, because the present is a case arising between the pledgee and a person who is not a party to the giving of the pledge. There is nothing to show that the respondent ever consented to the cession of the lease by Lilford and Co. to the application in security for their debt. When the applicant, as the original cedent, tendered the amount owing to the respondent by Lilford and Co. the respondent was bound to hand over the lease to the applicant. The promissory note was not yet due, and even if it had been due the lease could not have been legally retained as security for a debt with which it had no connection. For these reasons I am of opinion that the rule must be made absolute, with costs.

Mr. McGregor having addressed the Court further on the question of costs, De Villiers, C.J.: The rule will be

made absolute with costs, except the costs of Diapraem's affidavit.

[Applicant's Attorney: Hutton. Respondent's Attorney: P. M. Cloete.]

SCHWARTZ V. FICK AND { 1904.
WIFE. (Mar. 17th.

This was an application for an order authorising applicant to sell, surrender, or otherwise dispose of a certain policy of insurance on the life of the first-named respondent, Johannes Hendrick Fick, in favour of his wife, Maria S Fick, and ceded to the applicant by way of collateral security for a debt. The matter had previously been before the Court, but had been ordered to stand over to enable the first-named respondent, who is a leper confined on Robben Island, to file an affidavit. (14. C.T.R. 153).

Mr. Gardiner appeared for the applicant; Mrs. Fick was present for the respondents.

The affidavit of Johannes H. Fick stated that he had formerly been in business at Wellington, and that he had a property transaction with the applicant, that he was subsequently taken sick, and was sent to Robben Island. He acknowledged owing a certain amount, but said that he made arrangements with his attorney for meeting the applicant's claim, and he submitted that he was not responsible for this debt.

The applicant, in a replying affidavit, stated that the correct amount of the deficiency was £270 11s. 2d., and not £102 6s. 10d., as stated by the respondent, and there was also a further sum due of £61 16s. 8d. for insurance premiums paid by deponent. He had never been offered the full amount, or any part thereof. He was prepared to re-cede the policy on payment of £270 11s. 2d., plus £61 16s. 8d.

Mr. Gardiner submitted that the affidavit of the respondent disclosed no defence.

The second-named respondent, Mrs Fick, said that she did not know what she was really signing when the document of cession was put before her. Mr. Pentz (the Magistrate) told her to sign it. She did not understand English.

De Villiers, C.J., said that this was an asset of Mrs. Fick's, and he did not see how the applicant could take execution on the policy without first obtaining judgment against her. The plaintiff might ultimately succeed, but, at present, the application would be refused.

De Villiers, C.J., advised the old lady, the second-named respondent, that in case the applicant brought another action, she should take legal advice, in order to have her position placed before the Court.

LAW SOCIETY V. GREFFNING.

Attorney—Culpable insolvency—Suspension.

An attorney who had been convicted of culpable insolvency and sentenced to two months' imprisonment, with hard labour, was suspended from practice sine die: but with leave to apply for restoration after one year.

This was an application upon notice of motion calling upon the respondent, Robert Greening, to show cause why his name should not be removed from the roll of attorneys of this Court.

Mr. Benjamin appeared for the Incorporated Law Society; the respondent appeared in person.

The affidavit of the secretary of the Law Society stated that the ground of the application was that the respondent had been charged before the R.M. of Cape Town, on the 21st January last, with the crime of culpable insolvency, and found guilty and sentenced to two months' imprisonment with hard labour.

An affidavit by the respondent set forth that he admitted the conviction, and that he craved leave to refer to the points of his evidence before the Magistrate. He urged that the defence that he then raised did not warrant his removal from the roll of attorneys of this Court. He pleaded for the clemency of the Court, and promised that he would endeavour to justify such clemency as his lordship saw fit to extend to him. He intended to pay his creditors in full at the earliest possible date.

Mr. Benjamin (for the Law Society): The respondent was tried by the A.R.M., of Cape Town for culpable insolvency. He was convicted and sentenced to two months' imprisonment with hard labour. The respondent was convicted on three counts: (1) That he had absented himself from the third meeting of his creditors; (2) That he had failed to keep proper books; (3) That he had failed to account satisfactorily for his insolvency when called upon by his trustee to do so. The conviction on the third account was quashed on appeal, as respondent had been indicted under section 71 of the Insolvency Ordinance, instead of under section 10 of Act 38 of 1884. The appeal was disallowed on the other two counts.

The respondent (in person) denied that his absence from the third meeting of his creditors was intentional, and stated that a statement of his accounts could be made up. Respondent argued that the alleged misconduct was not professional, and was proceeding to argue on the merits of his case when he was

stopped by the Court. In conclusion he threw himself on the mercy of the Court. [De Villiers, C.J.: There is something, Mr. Benjamin, in what he says as to his misconduct not having been professional.]

No doubt, but the Law Society feel bound to bring the matter to the notice of the Court. I would suggest that your Lordship should follow the customary practice in such cases.

De Villiers, C.J. (to defendant): I am bound to remind you that you have had several warnings from the Court in regard to other cases for sailing very close to the wind, but that won't affect my judgment.

Mr. Benjamin: I will leave the matter in your lordship's hands to fix the period of suspension.

De Villiers, C.J.: The Court will order the respondent to be suspended from practice until a further order of the Court, with liberty to apply again in twelve months, after due notice to the Law Society, which may possibly obtain further information in the meantime. Meanwhile the respondent to hand over his certificate to the Registrar.

Ex parte MBULWANA.

Mr. Pyemont moved to make absolute the rule *nisi* granted on the 13th January calling upon all persons to show cause why the transfer of certain land should not be passed.

Rule made absolute.

LE ROUX V. THEUNISSEN.

Mr. Benjamin moved to make absolute a rule *nisi* granted on February 29th, restraining the respondent from transferring certain property pending an action. The rule had been duly served, and there was no opposition.

Rule made absolute.

Ex parte LORD AND ANOTHER.

This matter came before the Court on October 29th, 1903, when the Court granted leave to the petitioners in their capacity of executors in the estate of the late Thomas Benning, to raise £4,500 on mortgage for the purpose of rebuilding a hotel in Kingwilliamstown, which forms one of the chief assets in the estate. As it was found that, owing to the increased price of labour and of materials, this sum was insufficient for the purpose, the executors now applied for leave to raise a further sum of £2,000 on a second mortgage bond on the hotel, ground and premises.

The Master recommended that the application be granted.

On the motion of Mr. W. P. Buchanan, leave was granted as prayed.

Ex parte DYER.

Mr. W. P. Buchanan moved for an order authorising the passing of a certain transfer. Petitioner was executor in the estate of the late Thomas Dyer, of King William's Town. The deceased was a director in the firm of Dyer and Dyer, Ltd., for whom he had bought a certain property, which was by mistake transferred personally to the deceased instead of the firm.

His Lordship said that an order like that could not be made without the Government being represented.

Ex parte THE PORT ELIZABETH QUOIT CLUB.

Mr. W. P. Buchanan moved to make absolute the rule *nisi* granted on the 14th January calling on all persons to show cause why the petitioners should not be authorised to sell a certain piece of ground and divide the proceeds among the members of the club.

Rule made absolute.

ROBERTSON V. ROBERTSON.

Mr. Close, for the petitioner, John Alexander Robertson, moved for leave to sue the respondent, his wife, by edictal citation for restitution of conjugal rights, on account of her desertion.

Leave granted, to be returnable on the 14th May, personal service to be effected.

WILCOCKS V. BERNSTEIN.

Mr. P. Jones moved for an order to attach certain property of the respondent, and for leave to sue by edictal citation. The respondent was indebted to the applicant in the sum of £34 for professional services.

Order of attachment *ad fundandam jurisdictionem* granted, with leave to sue by edictal citation, personal service to be effected; returnable on the 14th May.

WISE V. WISE.

Mr. W. P. Buchanan applied for leave to sue in this matter by edictal citation for divorce.

Leave granted, personal service to be effected, returnable on the 1st June.

FOULDS V. FOULDS.

Mr. W. P. Buchanan applied for leave to sue the respondent by edictal citation. The parties were married in England in 1896, and thereafter they became domiciled in this country. Recently the respondent had developed a craving for drink, and had in consequence lost

his occupation. He had repeatedly been unfaithful to his wife, and had recently gone to Bloemfontein.

Leave was granted to sue by edictal citation, returnable on the 14th May. This, his Lordship said, would not prejudice any right the defendant had to object to the jurisdiction of the Court on the ground of want of domicile, personal service to be effected, and the intedit and notice of trial to be served with the citation.

SEKELINI V. SEKELINI. { 1904.
 { Mar. 18th.

Native territories—Suits between natives—Succession to intestate estates—Marriage between natives before 1879—Eldest son—Executor dative.

The applicant was the eldest son of a native who married a native woman before 1879 in Tembuland. The father died intestate in 1903, the respondent was appointed executor dative, and he proposed to distribute the estate according to the Colonial law of intestate succession.

Held, that the estate should be administered and distributed according to native law and custom, under which the eldest son was entitled to obtain possession of the whole estate, subject to certain onerous obligations in favour of the widow and other children of the deceased.

Held further, that an executor under Colonial law was not the proper person to administer and distribute the estate, and the appointment of the respondent as executor dative was accordingly set aside.

This was an application on behalf of Johannes Sekelini Hlubi, of Griqualand East, for an order declaring him to have succeeded to the estate of his father, who died intestate. The estate was valued at about £3,500.

The application arose out of proceedings which were before the Court last year, in which his lordship gave judgment on the 7th May. (See 12, C.T.R., 301). At that time the present first-named respondent brought an action, in his capacity of executor dative, against the

present applicant for an interdict to restrain him, Johannes Sekelini, from parting with the proceeds of the estate. His lordship at that time said it was to be regretted that the Court could not, on the facts then before it, finally dispose of the matter. The present application was upon notice of motion to Daniel Hulley, in his capacity as executor dative, and Elizabeth Sekelini, the widow, calling upon them to show cause why Johannes Sekelini should not be solely entitled to succeed to the estate of his father, or in the alternative, if the appointment of Daniel Hulley as executor dative was not set aside, why he should not be ordered to administer the estate according to native law.

Mr. Schreiner, K.C., was for the applicant, Johannes Sekelini, eldest son of the deceased, William Sekelini; Mr. Buchanan, as *curator ad litem*, was for the minor children; Mr. Gardiner was for the respondent, Daniel Hulley (executor dative), and Elizabeth Sekelini (widow of the deceased).

De Villiers, C.J., said that the first point on which counsel should address the Court was, it seemed to him, the statute law has it stood to-day.

Mr. Schreiner said that the statute law really was Proclamation 112 of 1879, which was made pursuant to the Annexation Act of the territory, No. 39 of 1877. If there had been no marriage in the present case with Christian rites, he would not really need, he submitted, to have argued before the Court for the contention that he had to advance. The only point that brought the matter into doubt was the fact that this marriage was with Christian rites in the time of Adam Kok, in 1873. The clauses of the proclamations showed how the Legislature modified the law of the Colony in relation to marriage questions. Certain regulations under the proclamation were framed. As the matter stood, marriage by Christian rites, he submitted, was not, for the purposes of these regulations (if it took place before the annexation and had not been registered), to be regarded as a marriage that was affected by these regulations. He submitted that the Master of the Supreme Court erred in not receiving and acting on the protest that was made to him, and saying to Mrs. Sekelini, "Produce to me the certificate of your marriage." Then, when she had said that she had no registration of the marriage, the Master would have seen that the regulations did not apply. If the construction that the Master had put on these clauses was a sound one, then that which was apparently left by the Legislature would be wholly swept away. There was no particular virtue in the fact that here was a marriage before a minister of religion in 1873 or 1874 (long before there was any law relative to such marriages), to found jurisdiction in the Master to give an executor dative appointment in such

a case more than there would be if that had been a marriage according to Hlubi customs. The case was one of the very first importance. He submitted that the Master had erred. There was a definite modification of the existing law of the Colony in its application to the present matter. The Native Succession Act had never been proclaimed in the territories, although the Act was in force in the Colony. The whole of the present trouble arose out of the Master having appointed an executor *dative*. Counsel urged that as regarded the native law, the point had been decided in the case of *Mahonga* (6 Juta, p. 317). Counsel contended that there was no legal virtue in being married before a minister beyond that it changed the state of those concerned from single blessedness to "double harness."

Mr. Buchanan said that this case was of far-reaching consequences, because the whole administration of estates in native territories would depend upon this decision.

[De Villiers, C.J.: Yes, to persons married before 1879].

Mr. Buchanan: Yes, my lord, or after 1879. My point is that the law regulating the succession to property depends upon the law of the place of the man's domicile at the time of his death. That must be looked at irrespective of his domicile of origin, and irrespective of where he was married or when he was married. "*Dicey on Conflict of Laws*," According to that authority, the law of the place at the time of the man's death must be followed. "*Storeg on Conflict of Laws*," brought up the views of the Continental jurists, and he submitted that the leading authorities agreed that the law of the domicile at the time of death must decide the succession. That brought him down to the law of East Griqualand in 1898, at the time of the man's death. The only point of difference between the law of the Colony and the law of the territories was to find out how far these proclamations had modified the law of the Colony. There was a doubt in the reading of the words "No Act passed or to be passed by the Parliament of this colony shall extend or be deemed to extend to such territories unless expressed in such words." Did that mean no Act passed that session or to be passed that session or hereafter, or did it mean any Act of the past?

[De Villiers, C.J.: I am inclined to think it means to be passed that session].

Mr. Buchanan said, that being accepted, he submitted that the rules did not modify the common law of the Colony. According to sections 37 and 38, he contended that it was the intention of the Legislature to keep questions of succession out of the Magistrate's Court, and regulate them by the law of the Colony.

[De Villiers, C.J.: I can't imagine that

the Legislature would leave it to Magistrates to select which law they were to apply.

Mr. Buchanan said it would have been quite simple to insert a clause in the Act to the effect that all questions of native succession should be decided according to native law, and if one or other of the parties were of European race then succession should be decided by colonial law. Sections 37 and 38 qualified section 25, and showed it was not the intention of the Legislature that succession should be tried according to native custom. The parties were Christians, of the Wesleyan community, specially married in a polygamist country, and counsel submitted that the question of registration had got nothing to do with the matter.

Mr. Gardiner agreed with his learned friend on the point that the law of a man's domicile at his death was the law applying to the succession of his estate. He submitted that section 34 could not apply to the validity of marriages previous to the date of the Proclamation, and that the appointment of the executor who would have to apply Colonial law to Mrs. Sekelini was valid. The Legislature, in framing these proclamations contemplated questions arising previous to the date of the proclamations; otherwise where did the necessity arise for making special provision in section 33 for native marriages before the date of the Proclamation. Though the parties were married in Griqualand East before the annexation, when the laws of the Colony were not in force, the subsequent annexation, he submitted, brought the laws into force with regard to that territory, and he contended that the Colonial law applied, and that community of property must be treated as existing between the spouses. If the law of Adam Kok's time applied, then he submitted that all the evidence went to show that these natives would be treated under Griqua law, and not under native law. The Griquas had a modified form of community, as was proved by the case of *Fortuin v. Abrahams*. (7 C.T.R. 30). If native laws were to be applied, then the son was not entitled to the powers he sought, because he had not complied with the obligations of native law, in that he would not support his mother since her widowhood, and supply her with with ploughing cattle.

De Villiers, C.J.: The laws of Transkeian territory, so far as they affect natives, are certainly in a most anomalous condition, and I do not think that the legislature of this country could be better employed than in placing those laws upon a sounder and more satisfied footing than they are at present. In every case which has come before the Court relating to natives in those territories it has been a most difficult matter to ascertain what the real rights of the natives are, and the

Court has had to find a solution as best it could out of a curious jumble of proclamations of the Governor and Acts of the Colonial Parliament. It would appear in the present case that the applicant, as the eldest son of William Sekelini, who was married about 1873 to a native woman, he being himself a native, a Hlubi, who was married by Christian rites. The applicant seems to have been born before 1879, when the Proclamation which is now in question was passed. Whether that be so or not, it is clear that the marriage of his parents took place long before that Proclamation was passed. He now, as the eldest son of his father, who had only been married once, claims the whole of the estate, and it is perfectly clear from the evidence that if this case is to be decided wholly upon, and according to native law and custom, the applicant would be entitled to obtain the estate. According to Mr. Walter Stanford, than whom there is no better authority as to native law and custom: "In the case of a native dying and leaving a widow or widows, such widow or widows would not, under native custom, inherit any of the deceased's property. A widow would, with her children, come under the guardianship of her eldest son. If such son were of age she would live with him, or at such place as he desired, and during the time that she recognised his authority it would be his place to provide her and her children with necessary maintenance in keeping with her position, land to cultivate, and to lend her cattle with which to plough. She and her children would have to render him, in return, such services as are usually rendered by a wife to her husband, and by children to their father. Failure on the part of the woman or the children to recognise the eldest son's authority would have the effect of depriving her or them of any claim for maintenance or support. But so long as they rendered him such services, and behaved dutifully to him, they are entitled to maintenance out of the estate of the deceased, and if the eldest son neglects to make sufficient provision for them, or otherwise ill-treats them, an independent chief, upon sufficient grounds being shown, might have allowed the mother to establish a separate kraal, with stock taken from the estate, for her maintenance, and under the guardianship of another guardian, usually a son or near relative. The woman would, therefore, only have the use of such stock, the ownership still to be vested in the son." Subject, to these obligations, it seems to me clear, not only from the evidence of Mr. Stanford, but from that of all the other expert witnesses on the subject, that the eldest son would be entitled to have the property left by his father. In many ways it is a very onerous inheritance, one might almost call it a *hereditas damnosa*, which descends upon the son, seeing that there are so

many obligations placed upon him. If this case, therefore, had to be decided according to native law, it seems to me perfectly clear what the decision of the magistrate would be. It would be that the eldest son, that is, the applicant, is entitled to this property, subject to the obligations imposed upon him by native law. If this case had to be decided by a magistrate, independently of the 30th to the 38th sections of the Proclamation of 1879, I am satisfied that it would be his duty to decide this case according to native law and custom. It is practically a suit between natives. It is a question raised by the applicant as to whether he is entitled to this property, subject to the obligations I have mentioned, or whether the respondent, the widow, and her children, are to have the property under Colonial law; and, although the words used in the 23rd section are that the magistrate "may decide the case according to native law;" yet it is practically certain that he would have read the Act as if the words had been "shall be dealt with according to native law." The only question, therefore, to be determined in this case is whether there is anything in the 30th to the 38th sections of the Proclamation which would necessitate a different construction. In my opinion, these sections were not intended to have a retrospective operation at all, and, therefore, a native claiming, by virtue of these sections to obtain other than native rights must show that the marriage by virtue of which he acquired these rights had been celebrated after the passing of the Act of 1879. If this view is correct, there is nothing in the Proclamation to affect the general principle that a case arising between natives should be decided according to native law. It is true that this case does not now originate before the magistrate, but that it really originates in this Court, but I am clearly of opinion that this Court should decide the matter as if the case had come in the first instance before a Magistrate. The Court will, therefore, make an order as prayed, namely that the applicant is entitled to succeed to the estate of his father, but subject to all the obligations of native law and custom. The Court will order that the appointment of the respondent, Daniel Hulley, as executor *duo* be set aside and that the applicant be declared entitled to succeed to the estate of his father, subject to all the obligations imposed upon him by native law and custom. In regard to the costs of this application, I consider that the costs should be borne by the estate.

Mr. Schreiner: The estate should not be further reduced by having to bear all the costs. If any costs are paid out of the estate, they should be confined to the costs of the *curator ad litem*.

Mr. Gardiner: The respondent should not be mulcted in costs.

De Villiers, C.J.: There is a good deal to be said for the view that Mr. Schreiner puts forward, but, on the other hand, it would be difficult to separate executor's costs from the costs of the widow. He seems to have done his duty, and there is no allegation or suggestion of want of good faith on his part in doing the best for the estate; and, as to the curator, he had to be appointed to represent the minors. One regrets that so large a portion of this estate should be exhausted in costs, but it was not avoidable under the circumstances. Upon the whole, I think that the costs should come out of the estate.

Applicant's Attorneys: Syfret, Godlonton and Low; Respondents' Attorneys: Faure and Zietsman.

Ex parte VYNER.

Removal of trial from Circuit Court to Criminal Sessions of Supreme Court — Postponement of trial.

Mr. Wilkinson moved, as a matter of urgency, upon notice of motion calling upon the Attorney-General to show cause why the trial of the applicant, Richard John Vyner, upon fourteen counts and three alternative counts, contained in an indictment served on the 12th March, 1904, which trial was set down for the Circuit Court of Victoria West, to be held on March 23, should not be postponed and set down for the next Criminal Sessions, to be held at Cape Town on May 15 next, or until such date as should enable applicant to bring, or cause to be brought, certain witnesses requisite and necessary for his defence.

In the course of the petition Vyner said that the charges made against him were that while an officer in command of the Remount Depot at Victoria West, in February, 1901, he defrauded His Majesty the King in his Imperial Government by representing he had paid more for horses and mules purchased by him for remounts than he actually had, and that he fraudulently applied the difference, £270, to his own use and benefit.

De Villiers, C.J., informed counsel that the Court could not make an order unless the Attorney-General had had notice of the application.

Mr. Wilkinson: Notice was served last night at five o'clock. Affidavit of service has not been filed, but it will be prepared without delay.

[De Villiers, C.J.: Under what rule of Court do you apply?]

I take it that this Court, as the Supreme Court of the Colony, has power to order postponement from a Circuit Court to the Criminal Sessions.

[De Villiers, C.J.: The Court has power, it is true, to remove cases.]

I take it that the power to remove involves the power to postpone.

[De Villiers, C.J.: Could not your application be made to the Circuit Court of Victoria West?]

No doubt it could be made at the Circuit Court, but very great expense will be incurred in going down there to have the trial removed to Cape Town.

Mr. P. S. T. Jones: I am instructed to appear at Victoria West for the prosecution, and I anticipated that application would be made at Victoria West for postponement; but I was also instructed to oppose. I have not been instructed in this matter as yet. Perhaps your lordship would allow me to communicate with the Attorney-General on the matter?

[De Villiers, C.J.: I think you should.]

The matter was ordered to stand over to enable the Attorney-General to be communicated with, and affidavit of service to be filed.

Postea (March 21st).

Mr. Wilkinson renewed the application. The affidavit of the petitioner stated that it would be necessary for him to bring witnesses from London and Sierra Leone, and that he had not sufficient time to prepare his defence. Until March 17 he did not know whether the Attorney-General would or would not indict him on these charges of misappropriating moneys of the Imperial military authorities in connection with the purchase of horses and mules during the late war. He added that he had not much money, and that in any event this trial meant financial ruin to him, but he was anxious to remain an honourable member of society and to retain his military rank, and he, therefore, desired to have full opportunity of preparing his defence.

Mr. Howel Jones (for the Crown), said that the Attorney-General had not sufficient notice on Friday to be represented at the original application. The position taken up now was that the Attorney-General opposed the postponement of this case to the next Circuit Court at Victoria West, which would be six months hence, but with regard to the removal of the case to the next sessions of the Supreme Court, he would put it to the Court, without strenuously opposing that part of the application, whether there was sufficient on the affidavit of Mr. Vyner to induce his lordship to remove the trial, and whether there was any reason to believe, on the affidavit and some correspondence that he would read, that these witnesses were material to the case, and if they were material, whether there was any guarantee that they would appear. The applicant had had ample time to get these witnesses from England

if he had really intended to get them. In the affidavit which he had made some of the statements were hardly correct, and others were manifestly incorrect. With regard to what he had said as to not having any knowledge that this case would come before the next Circuit Court at Victoria West until the 12th March, a letter was written by his attorney on the 23rd February, asking that the trial should be fixed for the next Circuit Court to be held at Victoria West. On the 26th February, the Law Department replied, saying that the trial would be fixed to take place at the Victoria West Circuit Court. The applicant had had ample time to produce his witnesses since then. Then again he said that he wanted to bring as witnesses Major Bakeman and Colonel Birkbeck. He (Mr. Jones) would submit to the Court that their evidence would be entirely immaterial to the issue. Vyner was charged at Bow-street Police Court, and certain evidence was taken on the warrant under the Fugitive Offenders Act. These officers made certain statements, and certainly the affidavit was quite incorrect when it said that Colonel Birkbeck's evidence would show that these receipts which were put in were genuine receipts. The question really was as to the genuineness or otherwise of these receipts; that was the question that the jury would have to decide.

[De Villiers, C.J.: I understand that the Attorney-General does not oppose the removal to the next Criminal Sessions.]

That is so.

[De Villiers, C.J.: The materiality of the witnesses need not therefore be considered at the present stage.]

Mr. Wilkinson replying to his lordship, said that he did not know whether the defendant could be ready for the next Criminal Sessions, but he would certainly be ready for the sessions following.

De Villiers, C.J., said that, on condition the applicant entered into a personal recognisance in the sum of £1,000, in addition to the present sureties of £250 each, the Court would remove the trial from the Circuit Court at Victoria West to the July Sessions of the Supreme Court.

SUPREME COURT

[Before the Chief Justice, the Right Honourable Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

GENERAL MOTIONS.

BRITISH S. A. ASPHALT CO. } 1904.
V. CAPE TOWN GAS CO. { Mar. 21st.

Interdict — Action — Notice to third persons interested.

On an application by motion to restrain the respondents from supplying goods to N. in breach of an undertaking not to supply such goods to others than the applicants, it appeared that no notice of the application had been given to N., and that the respondents were quite able to pay damages for the alleged breach.

Held, that the applicants should proceed by action, giving notice thereof to N., to enable him, if so advised, to intervene as co-defendant.

This was an application for an interdict, pending an action, restraining the respondent from supplying certain quantities of coal tar to Messrs. Nuttall and Co., and other persons under an agreement entered into with the applicant in August, 1903, for the supply of coal tar.

The affidavit of the secretary of the applicant company stated that in August, 1903, an agreement was entered into by which the Asphalte Company agreed to purchase coal tar from the defendant company, the applicants to take a minimum quantity of 80,000 gallons per annum, with the right to purchase the surplus, after small customers had been supplied, at the rate of 2d. per gallon. In January, 1904, the respondents failed to supply the applicants with the desired quantity, but in February they had supplied Messrs. E. Nuttall and Co., a competing firm, that had succeeded in obtaining a contract against the applicants, with larger quantities of coal tar than was contemplated in the agreement.

Correspondence was put in to show that repeated applications had unsuccessfully been made at Woodstock and Cape Town for coal tar, which the respondents failed to supply.

The answering affidavit of the manager of the gasworks stated that the applicants must be making a mistake, as

there was a large quantity of coal tar on hand during the month of January. The schedule put in showed that from Aug. 1903, to February, 1904, the applicants received during the seven months 45,110 gallons out of a total of 110,000 gallons. Messrs. Nuttall and Co. were being supplied with tar at the ordinary price of 4d. per gallon.

The replying affidavit of the secretary of the applicant company, stated that he had personally applied at the gas company's office in December, January, and February last, and was informed that there was no coal tar. Mr. Searle, K.C. (for the applicants) said that it seemed to him from the respondent's affidavit, that they took up a very different view of their obligations under the contract from that of the applicants. The respondents claimed that at any time they could show an average of 6,500 gallons a month, they were entitled to supply anyone in any quantity they liked at 4d. a gallon under the contract which they should supply to the applicants at 2d. a gallon. He contended that the applicants were entitled to get all the surplus coal tar after the small customers had been supplied. It was clear that the respondents were supplying Nuttall and Co. with considerable quantities, while the applicants were not even getting their minimum.

Mr. Schreiner, K.C. (for the respondents) said that clause 9 of the contract gave the applicants the first right to purchase from the Gas Company at the price of 2d. per gallon whenever there might be over 80,000 gallons not disposed of in the ordinary course. The whole point was one of largeness of quantity, and it would be proved that as far back as 1897, the Asphalt Company received as large a quantity as Messrs. Nuttall and Co. There was no evidence to show that Messrs. Nuttall and Co. were a competing firm. The case was not one for an interdict. Nuttall and Co. became customers after the contract was entered into, paying 4d. a gallon; and he contended that when the call came into the office the applicants were not entitled to say they would take the whole of the surplus at 2d. a gallon.

De Villiers, C.J.: The Court is asked to make an order interdicting the respondents from making further sales to Nuttall and Co., who have received no notice of this application. It is not suggested that the respondents would be unable to pay damages for any breach of contract on their part, and I consider that this is a case in which the applicants should proceed by action instead of motion. There are several questions of fact which could be more conveniently decided on oral evidence. The order therefore which the Court will make is that the applicants proceed by action, and that notice be given to Nuttall and Co. in order that they may inter-

vene if so advised. The notice of motion may stand in lieu of summons with leave to the plaintiffs to insert in their declaration a claim of damages.

[Applicants' Attorneys: Herold and Gie; Respondents' Attorneys: Van Zyl and Buissonne.]

Ex parte HAZELL AND ANOTHER.

Mr. Alexander moved as a matter of urgency for the appointment, in the interest of the creditors, of a provisional trustee in the insolvent estate of Wm. Askew Way. Petitioners were appointed as *curators bonis* in the estate of Way, and as assignees of the assigned estate of Wm. Preston Buchanan they found the latter was a creditor to the estate of Way. Rent was accruing in the latter estate, and, in order to prevent unnecessary expenditure, it was essential a provisional trustee should be appointed.

Application granted. Thos. Herbert Hazell to be provisional trustee.

CITY TRAMWAYS CO. V. CAPE TOWN TOWN COUNCIL.

Valuation Court Over valuation —Mistake—Review.

This was an application to amend a certain valuation on the applicants' property in Sir Lowry-road. The affidavit of John Edward Lloyd, manager of the Tramway Co., stated that on the 10th February last, at the Interim Valuation Court, held in Cape Town, £73,000 was placed on the applicants' landed property in Sir Lowry-road. The year previous the valuation was £36,100. It was stated in error at the Court that £37,000 had been spent on improvements, but the actual sum expended was about £17,383.

The minutes of the proceedings of the Valuation Court showed that Mr. Moller valued the property at £80,000, and Mr. R. E. Ball appeared before the Court on behalf of the company, and was understood to say that £37,000 had been spent on improvements. It was reduced to £73,000, and then Mr. Syfret appeared, and an application from him to have the matter reopened was refused. An affidavit from Henry Moller set out that if he had known that £17,000 had been spent on improvements it would not have affected his valuation.

Sir H. Juta, K.C., for applicants. Mr. Schreiner, K.C., for respondents.

Sir H. Juta contended that under the section Mr. Moller had made a mistake in revaluing the whole of the ground. What he should have done was to value the improvements, and not the whole of the property.

Mr. Schreiner urged that the Valuation Court's decision in this matter was final, and that there was really nothing before this Court to be reviewed. He admitted that if his learned friend had produced the affidavit that he now produced before the Valuation Court, there might have been great weight in it.

[De Villiers, C.J.: But does not it still further prove that there was an over-valuation, which is the question?]

Mr. Schreiner: I submit not. Your lordships do not sit in review of valuations in appeals where there is an over-valuation. If there is an irregularity in the proceedings, such as the Court would deal with in other cases—

[De Villiers, C.J.: But then an interim valuation can only be made of any buildings erected or improved?]

Mr. Schreiner: Yes.

[De Villiers, C.J.: They have valued other buildings than those erected or improved; isn't that a subject of review?]

That would be subject of review if it had been subject of first instance, but it must be subject of first instance before it can be reviewed.

De Villiers, C.J.: It is perfectly clear to me that the valuation was made by mistake. It was represented to the Valuation Court that since the last valuation £37,000 had been expended. The amount expended for three years had been £37,000. The amount expended since the last interim valuation was only £17,383, and if that fact had been brought to the notice of the Court, it would have reduced the amount of the valuation to £53,483, instead of £75,000, and on that ground I think that the reduction ought to be made.

[Applicant's Attorneys: Herold and Gie; Respondent's Attorneys: Van Zyl and Buissinne.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION.

{ 1904.
{ Mar. 22nd.

Mr. J. E. R. de Villiers moved for the admission of Johannes Wilhelmus Jacobus Wesel Roux as an advocate.

Application granted and oath administered.

GENERAL MOTIONS.

NIEUWOUDT V. REGISTRAR OF DEEDS.

Petition—Transfer—Act 19 of 1891.

A farm was owned by several proprietors in undivided shares, and a partition was effected by which the applicant and two other proprietors obtained a share, divided from the shares of the remaining proprietors, but the share thus obtained by the applicant and two proprietors remained undivided as between them.

Held, that the 12th section of Act 19 of 1891 was not applicable to the applicant's undivided portion.

This was an application on notice of motion to the Registrar of Deeds for an order authorising him in terms of section 12 of Act 19 of 1891, to allow transfer to be passed in favour of the petitioner of the share awarded to him along other owners of land in the division of Van Ryn's Dorp in substitution of the undivided share hitherto held by him, and upon which there was a mortgage of £1,300.

The petition of Gert Albertus P. Nieuwoudt was as follows:—

1. Petitioner is joint owner with Johannes A. J. Kotze and nine others in a certain quit-rent farm called "Melkboom," in the division of Van Ryn's Dorp.

2. Petitioner and the other co-owners of the said farm are now about to partition the same, and petitioner and Gessie M. Nieuwoudt, Albertus P. G. Nieuwoudt, Stephanus F. Nieuwoudt (a minor), and Sarah J. C. L. Nieuwoudt (a minor), will hold in joint ownership a certain defined portion of the said farm "Melkboom," being lot 5 called "Driefontein."

3. At the date of the original agreement of partition and survey, it was arranged and agreed between the co-owners of the farm "Melkboom," that this lot No. 5 aforesaid, should be awarded to the estate of the late Sarah J. Nieuwoudt, who was one of the co-owners.

4. Petitioner and the others referred to in par. 2, are heirs of the late Sarah J. Nieuwoudt, and having obtained transfer after actual survey and execution of the agreement, are compelled to take the share awarded by agreement to the estate of the late Sarah J. Nieuwoudt.

5. Petitioner has mortgaged his undivided share in the said farm as at present held by him to one Petrus B. Van Rhyn, of Van Rhyn's Dorp, for £1,300, and in connection with and under terms of sec. 12 of Act 19 of 1891, has obtained the consent of the mortgagee to a partition transfer of the said farm upon the consent of the mortgagee produced to him.

6. Petitioner is desirous that the Registrar should under terms of the said sec. 12 pass a partition transfer of the said farm endorsing upon his transfer deed the existence of his present bond.

Wherefore the petitioner prays that your Lordships may be pleased to grant an order authorising the Registrar of Deeds under terms of sec. 12 of Act 19 of 1891, to allow transfer to be passed to your petitioner of the share awarded him and the other co-owners of the said lot No. 5, called "Driesfontein," notwithstanding that the bond in favour of the said Petrus B. Van Rhyn remains uncanceled, and authorising the Registrar in terms of sec. 12 of Act 19 of 1891, to endorse on such bond that his one-fifth part of such divided share is in terms of the section substituted for the undivided share previously held by the owner; to make an entry of such substitution in the Debt Registry; and to endorse on the transfer of such divided share that in terms of this said section it is mortgaged by this bond.

The usual verifying affidavit was annexed, and the affidavit of the mortgagee stated that he consented to the granting of the petition.

The Acting Registrar of Deeds, in his report, strongly opposed the granting of the petition, chiefly on the ground that under section 12 of Act 19 of 1891, only, a divided, or defined share can be substituted for the undefined share previously mortgaged. (See *Foster's Practice of the Deeds Registry*, 2nd edition, p. 18). The Acting Registrar suggested that the simplest course open to the petitioner was to obtain the release of his one-half 4th share, conditional on his passing a bond for such sum as the mortgagee might require on the 5th share in lot 4, allotted to him on partition.

Mr. Benjamin, for applicant. Mr. H. Jones for respondent. Counsel having been heard in argument,

De Villiers, C.J.: The applicant does not appear to me to be the owner of a divided share, such as was contemplated by the 12th section of Act 19 of 1891. There has, it is true, been a partition of the land, but the share awarded to the applicant, and two other co-owners, still remains undivided as between them.

The applicant, therefore, does not separately hold a divided share, and it is only to such a separate holding that

the section is applicable. The application must, therefore, be refused, but as the practice of the Deeds Office has been somewhat inconsistent, there will be no order as to costs.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Attorneys for the Registrar of Deeds: Reid and Nephew.]

Ex parte KING BROS.

Mr. McGregor moved as a matter of urgency for an order restraining one Rowan from selling a certain farm at Durbanville, the property of the petitioners. The respondent had a lease of the property for two years, with an option of purchase for £1,750. The time expired on the 31st inst., and the respondent had now advertised the farm for sale, although he had never exercised his option.

An order was granted, calling on the respondent to show cause why he should not be interdicted from selling the property, unless he shall before the lease expires exercise his option mentioned, this rule to operate as an interdict in the meantime.

COHEN V. CARN.

This was a motion by the plaintiff in a certain action to be brought to fix a date for trial by jury, and by the defendant in the action calling on the plaintiff to furnish security for costs and removal of bar.

The application was on notice of motion calling on the plaintiff to show cause why he should not be ordered to furnish security for costs in the suit, and why the bar should not be removed, and an extension of time given to the defendant in which to plead. The action was one for £5,000 damages for defamation of character. In the summons plaintiff stated she was domiciled in Cape Town and Johannesburg, but in the declaration her residence was given at 61, Long-street, Cape Town, where the defendant was unable to find her. Her husband was at present working in Johannesburg.

The affidavit of Clara Cohen, the plaintiff, stated that her husband was only temporarily in the Transvaal, and this was further supported by the affidavit of Morris Cohen and his employer, William Patrick.

A replying affidavit stated that in a recent suit the plaintiff's daughter was described as domiciled in Johannesburg.

Counsel having been heard in argument,

De Villiers, J.C.: held that the plaintiff was not an *incola* of this country, and ordered that the plaintiff be barred from further proceeding with the suit until she furnishes security for costs to the extent

of £100, to the satisfaction of the Registrar of the Supreme Court, the bar against the defendant to be removed, and the extension of time to plead to be given until forty-eight hours after security for costs shall have been given, the plaintiff to pay the costs of the applications.

HILLS V. COLONIAL GOVERNMENT.

This was an application by the plaintiff and the defendant for leave to appeal to the Privy Council on a judgment of the Supreme Court, with respect to the disposal of certain moneys and securities.

Mr. Searle, K.C. (with him Mr. Close), was for the plaintiff in the action, and Mr. Schreiner, K.C. (with him Mr. McGregor), was for the defendants.

Leave was granted to the plaintiff and the defendants to appeal on the usual terms, in the meantime the judgment in favour of the plaintiff to be carried into effect, subject to security being given by him or on his behalf, costs to be costs in the cause.

RECEIVERS GRAND JUNCTION RAILWAYS
V. WALKER.

Mr. Schreiner, K.C., moved for leave to sue John Walker, and the firm of John Walker and Sons, London, by edictal citation in respect of a certain partnership in the Grand Junction Railways.

Leave granted, returnable 1st June, personal service to be effected in the case of John Walker, and service at the office of John Walker and Sons, London, the property to be attached *ad fundandam jurisdictionem*.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte EDWARDES. { 1904.
Mar. 23rd.

Attorney and Notary—Appointment of extra Colonial examiners.

Mr. Benjamin moved, on behalf of petitioner, for leave to be examined at Bloemfontein, O.R.C., for admission as an attorney and notary of this Court by

such persons as the Court may deem fit, the petitioner suggesting Mr. Advocate Blayne, Mr. Attorney Fisher, and Mr. Attorney Van Zyl as examiners. Mr. Gardiner appeared for the Law Society to oppose.

Mr. Gardiner said he understood that the application for the appointment of the petitioner as a notary was to be dropped.

Mr. Benjamin: I have no instructions upon the point.

Mr. Gardiner submitted that there had been no good ground shown for extending to the applicant the privilege of examination outside the Colony. Indeed, in his alternative prayer, the petitioner asked, in case he could not be examined in Bloemfontein, that he should be examined by the examiners appointed in Cape Town for the purpose. As to the examination of a notary outside the Colony, counsel said he was not aware of any case where that privilege had been extended.

De Villiers, C.J., said that the gentlemen all seemed to be practitioners of this Court, and, on the whole, he thought that the application should be acceded to for the appointment of these gentlemen as examiners. Still, he thought that the Law Society was justified in appearing, so that the application should not be granted with costs. There would be no order as to costs.

Ex parte VICE.

This was an application for leave to raise £300 on mortgage on a certain farm of which petitioner has the life usufruct. The money was stated to be required for fencing and for a complete outfit of farming implements, as the applicant, after having let the farm for several years, now proposed to work it herself, with the help of her son.

The Master recommended that the applicant be allowed to raise such sum as may be actually necessary for the above purposes; such sum not to exceed £300.

On the motion of Mr. W. P. Buchanan the Court granted an order in terms of the Master's report.

Ex parte STEYTLER AND OTHERS.

Mr. W. P. Buchanan moved, on behalf of the executors, for an order confirming the sale to him of certain property in the estate. The price paid was £880, and the Divisional Council's valuation was £665.

Order granted as prayed.

CRAWFORD V. CRAWFORD.

Mr. W. P. Buchanan moved to make absolute the rule *nisi* allowing petitioner to sue *in forma pauperis*.

Rule made absolute accordingly, counsel accepting the appointment, and Messrs. Findlay and Tait being appointed attorneys.

Ex parte THE CONSISTORY OF THE
UITENHAGE DUTCH REFORMED
CHURCH.

Mr. Gardiner moved for an order authorising the transfer of certain property.

[De Villiers, C.J.: Why could not this application have been made to a judge in Chambers in the usual way?]

Mr. Gardiner said he was not aware of the reason.

[De Villiers, C.J.: It may be doubtful whether it falls under the denomination of a sale. However, a rule will be granted, to be published once in a Uitenhage newspaper, and once in a Port Elizabeth newspaper, and to be returnable on the 15th April.

VAN DER HEEVER V. VAN DER HEEVER.

This was an application for a contribution towards prosecuting an action for divorce and for alimony. The matter had practically been arranged between the parties, respondent agreeing to pay the sum of £50 towards alimony and the expenses of an action to be brought by the petitioner. Mr. Close moved for an order in these terms, costs of the application to be costs in the cause.

Mr. Benjamin (for the respondent) consented.

Order granted by consent, directing the respondent to pay to the applicant's attorneys the sum of £50 towards expenses of action and for alimony.

Ex parte VAN DER WESTHUYSEN.

Mr. W. P. Buchanan moved for an order authorising the registration of certain property in the name of petitioner, who was executor in the estate, from whom he had purchased at public auction. The purchase price was £3,005, and the Divisional Council's valuation was £1,400.

Order granted.

Ex parte JAMNECK.

Mr. Benjamin moved for an order sanctioning the sale of certain property to petitioner in an estate of which he was executor *dativo*.

Order granted.

ESTATE RIX V. ESTATE CLEMENTS.

Mr. W. P. Buchanan moved for an order authorising the sale of certain pro-

perty. Petitioner had a mortgage bond on the property of the respondent estate for £450, and there was an allegation that the executor of the property would not take action in the matter. Petitioner obtained judgment, and had the property hypothecated declared executable. The defendant property was put up to public auction by order of the Sheriff, but no bid was received, and a private offer of £460 had now been received, which it was desired to accept; also for the sum of £60, which the executor had paid into the Guardians' Fund, to be paid out again.

After hearing the Master, who did not oppose,

De Villiers, C.J., granted an order authorising the sale of the property privately, and payment of the sum of £60 out of the Guardians' Fund by the Master.

Ex parte ODENDAAL.

Mr. W. P. Buchanan moved for an order authorising the signature of certain documents on behalf of a minor.

Order granted.

Ex parte THE CAPE MARINE SUBURBS,
LTD.

Mr. W. P. Buchanan moved for the cancellation of certain sales. The respondents bought at public auction from the applicants two lots of property at Camp's Bay for £715 and £330 respectively, and had failed to comply with the conditions of sale, having made no payment towards the purchase price. The whereabouts of the respondents were unknown. Counsel applied for a rule *nisi*, calling upon the respondents to show cause why the sales should not be cancelled.

A rule *nisi* was granted, calling upon the respondents to show cause why the sale should not be cancelled, rule to be published once in each of the three Cape Town daily newspapers, and to be returnable on the 15th April.

Ex parte BOUWER.

Mr. Benjamin moved for an order authorising petitioner to join in the subdivision of certain property in which minors were interested. Petitioner was married in community, and the property in question was situate in the division of Somerset East.

Order granted, the final sub-division to be subject to the approval of the Master.

Ex parte VENTER.

Mr. W. P. Buchanan moved for leave to pass a mortgage bond upon certain

property bequeathed to a minor. The minor was entitled to a fourth share in certain property, subject to the payment of his quota of the sum of £1,256, and a sum of £200 beyond the money already standing to his credit would be required to enable him to take up his portion of the property. Petitioner, as guardian, asked leave to raise that sum on mortgage on the property bequeathed.

The Master's report was favourable. Order granted in terms of the Master's report.

Ex parte WILLIAMS AND WIFE.

Mr. Benjamin moved, on behalf of petitioners, for an order authorising the registration of a contract to exclude community of property, giving the same privileges as if the parties had had the same registered prior to marriage. The parties, it appeared, were married in England, but the first-named applicant was domiciled in the colony. Prior to the marriage, arrangements were entered into for an ante-nuptial contract, and a deed of settlement.

Order granted as prayed.

Ex parte LE ROES.

This was an application for an order authorising the cancellation of a mortgage bond on the estate of the petitioner. Mr. J. E. R. de Villiers appeared for the applicant. Petitioner was a farmer residing in the division of Prince Albert. In May, 1900, he instructed one Daniel Jacobus De Wet to raise a loan of £200 on his farm. The said De Wet raised the money in June, and petitioner passed a mortgage bond in favour of De Wet's minor son. In the beginning of 1901 he received notice from De Wet, senior, to pay the £200, together with interest, which was done, and the bond was handed over for cancellation. Since then, another loan of £400 had been raised, but petitioner was unable to pass the bond, the Registrar refusing to do so because the one for £200 was still open. The affidavit of J. M. Theunissen, who acted for the petitioner in the first matter, set out that the money was paid to the father *bona fide*.

Order granted as prayed.

Ex parte HILDEBRANDT.

Mr. Alexander moved for leave to sue the respondent, Eugene Hildebrandt, husband of the applicant, by edictal citation, for restitution of conjugal rights, failing that a decree of divorce, with custody of the minor children. On the 15th April, respondent, who was employed at Wynberg Gaol, received a letter from Germany that his mother was seriously ill. He drew all his money

from the bank, obtained six months' leave of absence, and proceeded, *via* Natal, to Germany. Petitioner had received letters from Natal, but for eleven months she had never heard from him, and she was unable to obtain any information about him. Previous to leaving, respondent had become very intimate with the assistant-matron of the gaol, and he had openly avowed his affection for her. She had surreptitiously left her home for Natal, and petitioner believed that respondent and she were living together.

Leave granted, the citation to be returnable on the 1st June, and to be served personally with the notice of trial.

SEDGWICK V. SEDGWICK.

This was an application for the cancellation of respondent's appointment as trustee under a certain ante-nuptial contract. Mr. Van Zyl appeared for the petitioners. The parties were married without community of property in Cape Town in 1879, and the respondent had been appointed to fulfil a certain trust under the ante-nuptial contract. In December, 1903, the partnership in the firm of Sedgwick and Co. was dissolved, and owing to a certain amount of friction with Charles Frederick Sedgwick, it was desirable that another person should be appointed as trustee. The name of Harry Gibson had been suggested.

Order granted, Mr. Gibson to act as trustee.

COLEMAN AND CO. V. COLONIAL GOVERNMENT.

This was an argument on exceptions. The declaration filed by the plaintiffs set forth that on 23rd, 24th, and 25th September they entered into certain contracts with the defendants, whereby the latter undertook to convey certain cases of butter, sausages, fruit, and tinned meat at tariff rates. The plaintiffs duly carried out their part of the contract, but the defendants wrongfully and unlawfully failed to deliver the goods to their consignee at Kimberley. The goods were valued at £264 10s. The exception was taken under Rule 330, that the declaration was embarrassing and bad in law, inasmuch as the several distinct claims had not been specified, nor was the name of the consignee given.

Mr. Schreiner, K.C. (with him Mr. Howel Jones), was for the applicants (defendants), and Mr. Gardiner was for the respondents.

Counsel having been heard in argument,

De Villiers, C.J.: In the consideration of this exception, the Court will be justi-

fied in looking at the pleadings which precede the present declaration. I find there was a declaration in exactly similar terms to the present declaration, with the exception that in the former declaration the dates are fixed at the 23rd January, 1901, and the 28th December, 1902. Then an exception was taken in exactly similar terms to the present. The validity of the exception was recognised, because the declaration was withdrawn, but a fresh declaration was filed in exactly the same terms, except that the dates are altered, the 23rd September, 24th September, and 25th September, 1901, being substituted for 23rd January, 1901, and 22nd December, 1902. That affords some reason for supposing that the plaintiffs themselves do not know what they are suing for. In considering this great discrepancy between the dates, the defendants are justified in pleading this section, and asking for something more specific. I think, therefore, that the exception should be allowed, with costs, with leave granted to the plaintiffs to amend their declaration.

LEVY AND ANOTHER V. } 1904.
COLIWAS. } Mar. 23rd

Rent—Breach of condition by
lessor—Cancellation of lease
—Damages—Rent.

In an action for rent the defendant filed a counter claim for damages alleged to have been sustained by him by reason of the plaintiff having let adjoining premises to a fruiterer in breach of a condition of the lease. The counter claim, however, was withdrawn, but the Magistrate gave judgment for the defendant, on the ground that the plaintiff having broken a condition of the lease, was not entitled to rent.

Held, that as the defendant remained in occupation, and did not claim a cancellation of the lease and had withdrawn the counter claim for damages, the Magistrate ought to have given judgment for the amount of the rent.

This was an appeal against a decision of the Resident Magistrate of Wynberg, by which the plaintiffs' (now appellants') claim for a month's rent was dismissed, with costs.

The defendant was sued by Morris Levy for £10 10s., being the amount of a month's rent for certain premises

situated on the Main-road, Wynberg. The defendant put in a counter-claim for £20 damages for breach of contract, by reason of the plaintiffs allowing another fruit shop to be opened in the same block. This claim, however, was withdrawn, and the Magistrate found that there had been a breach of agreement, and gave a verdict for the defendants, with costs.

Mr. W. P. Buchanan (for the appellant) argued that as the counter claim had been withdrawn the Magistrate could not take that into consideration. The respondent had occupied appellant's premises and was clearly bound to pay rent for them.

Mr. Benjamin (for the respondent) argued that the appellant had broken his contract by letting the neighbouring shop. He had put an end to the contract and therefore could not claim rent under it.

De Villiers, C.J.: This was an action for rent by the lessor in respect of his premises, under written contract of lease, the rent payable being £10 10s. a month. The lessor thus sues the lessee for the month's rent, and there is a claim in reconvention for damages by reason of the lessor having broken a covenant of the lease, which is in the following terms: "The lessor agrees not to let any of the three shops as fruit shops, or general dealers' shops." Unfortunately, the defendant withdrew his counter-claim, and there is nothing left for the Magistrate to act upon. He was bound to give judgment for the amount, the counter-claim being withdrawn. Nothing was said about the abatement of rent on the ground that this fruit shop was carried on in the premises near it. There were only two ways of raising this question. The defendant could have claimed a cancellation of the lease on the ground that the lessor broke a covenant of the lease, or else he could claim damages. He remained in occupation of the premises and adopted the second course, but withdrew the claim. Then there was nothing left for the Magistrate but to give judgment for the plaintiff for the £10 rent. I am afraid I must reverse the judgment, and alter it into one for £10, with leave to the defendant to bring his action for the damages, or for the cancellation of the lease. It is suggested that the Magistrate practically in his judgment gives £10 damages, but I don't think that can be held, because upon the record there is nothing to prevent the defendant from bringing his action at any time. Judgment will be entered for the plaintiff for the sum of £10 10s., it being clearly understood that the defendant is entitled to bring his action against the plaintiff for breach of covenant. The appeal is allowed, judgment for the plaintiff for £10 10s., with costs in this court, and the court below, with-

out prejudicing any right the defendant may have either to have the lease cancelled or to claim damages by reason of the plaintiff having broken one of the conditions of the lease.

[Appellant's Attorneys: G. J. O'Reilly;
Respondent's Attorneys: F. B. Andrews.]

SWARTZ V. OELOFSE.

This was an appeal against a decision of the A.R.M. of Sterkstroom, by which the defendant (now the appellant) was ordered to return a certain cow and bull calf, the property of the respondent, or to pay the value thereof, £20.

The evidence for the plaintiff showed that the defendant came to his farm to look for the cow, and said he had lost it twelve months. He said nothing about the bull, and took both away. Defendant's evidence went to prove that he had given the cow to one Tom Baaba, a witness of the plaintiff, who was not produced at the trial, to keep for him for a certain time. The Magistrate in his reasons said the plaintiff's evidence, that he bought the cattle from Baaba, was corroborated by his brother. The defendant did not press Baaba to return the cattle, and the defendant's evidence was contradicted by another witness. He held there was spoliation, and not sufficient evidence to establish the defendant as owner of the cattle.

Mr. Gardiner was for the appellant, and Mr. W. P. Buchanan was for the respondent.

Counsel having been heard in argument,

De Villiers, C.J.: The Court must remit the case to the Resident Magistrate's Court to take the evidence of Tom Baaba, either orally, or by means of interrogatories, costs to be costs in the cause.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

APPEAL CASES.

MURRAY V. FINDLAY { 1904.
AND CO. { Mar. 24th
" 25th

Partnership—Principal and agent
—Plea in abatement—Liability of partner for goods supplied to firm.

In an action against two members of a firm, the defendant,

one of the members, took the objection that he was not liable, as the plaintiff had in the first instance debited the other member alone in their books. It appeared from the evidence that the goods had been ordered on behalf of the firm, that they had been delivered to the firm for the purpose of a contract entered into by the firm, that the firm had received the amount of the contract and that the defendant had himself written to the plaintiff on behalf of the firm, promising to pay the amount claimed.

Held, that the fact of the plaintiff's having in the first instance debited the defendant's partner alone did not prevent them from rectifying the mistake and afterwards suing the defendant also.

Guardian Insurance Company
v. Lovemore's Executors distinguished.

This was an appeal from a decision of the Acting Assistant Resident Magistrate of the Cape.

In the court below respondents sued Reid and Murray for the sum of £71s. 4d. for goods sold and delivered. The exception was then raised by the defendants that there was no partnership between them in respect of the purpose for which the goods were supplied, the goods being supplied to Reid personally. Evidence was taken in the court below on this exception. Plaintiffs, however, stated that Mr. Murray had never ordered goods personally, but when an account in the name of Reid and Murray was sent to him he did not dispute it, but only observed that he could not attend to the matter then. Plaintiff alleged that the goods were ordered by Reid, who stated that they were to be charged to Reid and Murray.

The Magistrate, in his reasons for judgment, stated that exception was taken to the summons on the ground that the estate of the late Andrew Reid was solely responsible for the debt. After hearing the evidence and defendant's own admissions, the Magistrate had no doubt that the contract for the work—for which the goods were supplied—was a partnership transaction, and the goods were supplied for the partnership, and therefore he gave judgment for plaintiffs.

Mr. J. H. De Villiers for appellant;
Mr. Benjamin for respondents.

Mr. De Villiers argued that the contract of sale and purchase was between the respondents and Reid. They debited the goods to Reid, and knew nothing whatever of Murray in the transaction. Counsel referred to the cases of the *Guardian Insurance Co. v. Lovemore's Executors* (5 Juta 205), and *Sellar Bros. v. Clark* (10 Juta 168), to show that in such a case only the partners who were known to the vendor to be partners, and who dealt directly with him would be liable for firm debts.

Mr. Benjamin submitted that the sole question was whether a partnership existed between Reid and Murray or not. That such a partnership did exist was not seriously denied. Then again these goods had been ordered and used for partnership purposes, and surely the mistake of the respondents in debiting them to one partner would not relieve the other partner from all responsibility. The cases cited for the appellant are by no means similar to this case, and, therefore, are not in point.

Cur. Adv. Vult.

Postea (March 25th.)

De Villiers, C.J.: I have carefully read the evidence, and I see no reason to alter the opinion I formed on the argument. This is an action for goods sold and delivered, brought by the plaintiffs against members of the firm of Reid and Murray, of which firm the defendant Murray is one of the partners. The exception was taken that the defendant was not liable, and evidence was taken by the Court in support of that exception. The evidence clearly showed that a contract was entered into by the firm of Reid and Murray with the Mowbray Municipality for the construction of certain works. The defendant was a member of that firm; Reid gave the order to the plaintiffs for the goods which were ordered for the execution of the contract. The orders, apparently, were given in the name of the firm; the slips which have been produced show that the goods were really ordered for the firm of Reid and Murray, but the plaintiffs in their books debited Reid alone for the amount and not the firm, apparently believing at the time that Reid alone constituted the firm of Reid and Murray. But whatever the reasons of the plaintiffs may have been, it is undoubtedly true that they debited Reid alone with the amount. Subsequently, however, the mistake was discovered, and the account was sent by the plaintiffs to the firm of Reid and Murray. An answer was written on behalf of the firm by the defendant Murray himself. It is headed: "Reid and Murray, contractors, 14, Constitution-street, Cape Town." It proceeds: "Dear Sir,—We shall be able to let you have a cheque at the end of the present month.—Yours truly, Reid and Murray." It is admitted that this was written by the defendant himself, but he said that

Reid was ill at the time, and that it was merely in order to keep the plaintiffs quiet; at all events it had the effect of keeping the plaintiffs quiet for some time, because, although this letter was written in July, the action was not brought until some time in November. In support of the exception, reliance has been placed upon the decision of this Court in the case of the *Guardian Insurance Co. v. Lovemore's Executors* (5 Juta 205.) In that case there was no evidence that the defendant had been debited by the plaintiffs. It was a case in which credit had been given to another party, not to the defendant, and the Court upon the authority of Pothier and others, held that, "according to the principles of law, a creditor has only an action against him with whom he has contracted, and not against those who have profited by the contract." That view of the law was subsequently confirmed in the case of *Sellar Bros. v. Clark*, which is reported in 10 Juta, p. 168, where goods having been supplied by the plaintiff to one M. upon his credit alone, and in ignorance of the fact that the defendant was a dormant partner, it was held that the bare fact of such partnership existing in the business did not entitle the plaintiffs to recover the price of the goods from the defendant. In the present case, it is not the bare fact of a partnership that the plaintiffs rely upon; there is the undoubted fact that the order was given to the plaintiffs on behalf of the firm. There are the further facts that the goods were supplied to the firm, that payment was made to the firm, and that when the firm was called upon to pay, the defendant wrote on behalf of the firm acknowledging liability. These are facts which take the case entirely out of the principles laid down in the two cases which have been cited. Although there was a mistake on the part of the plaintiffs in debiting one of the members of the firm alone, they were justified, on subsequently discovering their mistake, in rectifying it, and in suing both the persons on whose behalf the contract was properly made by one of the persons. The appeal must, therefore, be dismissed, with costs.

[Appellant's Attorneys: C. E. P. Hughes; Respondents Attorneys: Findlay and Tait.]

BEWBEW V. DENNIS. 1904.
Mar. 24th.

Native law—Custody of illegitimate child.

The plaintiff, a native woman in the Transkeian Territory, had an illegitimate child by the defendant, who was also a

native, and she afterwards married another native. Her father gave the custody of the child to the defendant, who paid for its education.

Held on appeal from the Chief Magistrate, that as the case was between natives, native law was applicable, and that the Court below had properly dismissed an action by the plaintiff, claiming the custody of the child.

This was an appeal from a decision of the Chief Magistrate of Tembuland, by which the plaintiff (now appellant) failed to obtain possession of her illegitimate female child, of which the respondent was the father.

The defendant was called upon in the first instance to show cause why he should not deliver the child up to her mother. The child was now twelve years old, and had lived with her mother up to 1902, when the defendant obtained possession of her without consent of the mother.

Mr. W. P. Buchanan was for the appellant, and Mr. Benjamin was for the respondent.

Counsel having been heard in argument,

De Villiers, C.J.: In this case it would appear that the child in question was the illegitimate child of an unmarried female, who is undoubtedly a native, and her father was, of course, also a native. She afterwards married, and this illegitimate child was given by the mother's father to the defendant, Dennis, who is the father of the child. The question has arisen as to whether Dennis is also a native, but I gather from the judgment of the Magistrate, who heard the case in the first instance that he considered Dennis was also a native, but by this settlement the real question is one between the father and the daughter, because it was by the father's direction that the child was handed over to Dennis. It is proved according to native law, that it is not the mother of the illegitimate child who would be entitled to the custody of the child, but it is the father of the mother who is entitled to the custody. In itself I do not think that is contrary to morality or public policy. In point of fact, the child was handed over to Dennis. He forthwith proceeded to give the child a proper education, and, according to the Chief Magistrate, this was the object with which the child was handed over by the mother's father to Frank Dennis. This in itself is no improper thing to do, and, un-

less it is clear that the mother is entitled to the custody of the child, I consider that the Court should not interfere with what was done by the parties. It is quite true that by our law the mother would be the only person entitled to the custody of an illegitimate child, and that the father could have no claim to its custody, but the Magistrate treated the question as entirely between natives and the principal persons concerned in the child and in the decision of this question were undoubtedly natives. This Court should not, therefore, disturb the judgment of the Court below, and the appeal must be dismissed with costs.

[Appellant's Attorneys: Syfret, God-lonton and Low; Respondent's Attorneys: Van Zyl and Buissinné]

KING BROS. V. ROWAN. { 1901.
{ Mar. 24th.

Option of purchase — Sale by auction—Interdict.

The respondent held an option to purchase a farm belonging to the applicant at a certain price. Without exercising such option, the respondent advertised the farm for sale by public auction.

Held, that the respondent should be interdicted from proceeding with such sale unless and until he should exercise his option.

This was an application to make absolute a rule nisi granted against the respondent, restraining him from proceeding with the sale of certain land on which he held an option from the applicants.

The affidavit of the respondent, set out that when he offered the property by public auction, he knew of an intending purchaser. At present he was not in a position to exercise his option, and by the stoppage of the sale, he had suffered damages.

The answering affidavit of the applicants stated that on the morning of the sale there were only three persons present, and none of them were intending purchasers.

Mr. McGregor, for applicants; Mr. Burton, for respondent.

Counsel having been heard in argument,

De Villiers, C.J.: In giving the respondent an option of purchase I am clearly of opinion that the applicant should never have intended that before that option was exercised the respondent should be allowed to go

about hawking this property for sale, or, as he proposed to do, sell the property by public auction. I find an advertisement of a public sale of houses and land at Durbanville on Wednesday, 23rd March, by Messrs. Stamper and Zoutendyk, who are said to have been "favoured with instructions," but the person giving the instructions is not named in the advertisement. It is clear, however, that it is the respondent that gave the instructions. Clearly this advertisement may greatly prejudice the owner of the land. It was not part of his bargain that the property should be hawked about and exposed for public sale. It has been urged that a person may sell property not belonging to him, but it does not follow that he may publicly announce that he will sell such property by auction. The fact that the respondent has the option of purchase does not give him greater rights in this respect. It is quite possible in the present case, that the land may not realise the amount of the option price, in which case the respondent will not exercise his option. In the meantime, however, the applicant might be greatly prejudiced by the respondent's delays with the property. Before announcing the sale the respondent should have exercised his option. The rule calling on the respondent to show cause why he should not be restrained from proceeding with the auction sale unless he should exercise his option, must be made absolute with costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Harold and Gie.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.)]

CIVIL APPEALS.

RAPOO V. MAHOMED. { 1904.
{ Mar. 25th.

Interpleader—Lessor and lessee—
Rent—Hypothec—Delivery.

A lessee of premises, while indebted to the plaintiff as lessor for arrears of rent, entered into an arrangement, by which he sold to the claimant all his goods in the pre-

mises, but the sale was on long credit, and the lessee remained in occupation of the premises. The lessor obtained judgment, but upon proceeding to execution, the claimant claimed the goods as his. There was evidence to shew that the sale was a colourable arrangement to defeat the lessor's hypothec.

Held, that the Magistrate erred in giving judgment for the claimant, inasmuch as the plaintiff's hypothec could not be defeated by the arrangement, and that even if the arrangement had been made bona fide, the claimant ought not to have succeeded in the absence of proof of delivery of the goods to him.

This was an appeal from a judgment of the Court of the Resident Magistrate of Mafeking.

From the record in the Court below it appeared that the appellant, Rapoo, obtained judgment in the R.M.'s Court, Mafeking, against one Abrahams for £18 6s. 6d., rent due. A writ of execution was taken out, and under that writ certain property was attached, that property was subsequently claimed by the present respondent in an interpleader action, and the Magistrate found in favour of the respondent Mahomed. Counsel submitted that the goods in question were subject to execution at the suit of the lessor. All the circumstances of the case seemed to point to this, that the transaction between the respondent and Abrahams was not a *bona fide* transaction, but a transaction for the purpose of defeating appellant's claim, and of depriving the landlord of his hypothec. The demand was sent for the rent on the 31st October, and the alleged sale took place two days afterwards. Mr. Benjamin (for the appellant) contended that even if the transaction were *bona fide* there was not sufficient delivery to take the property out of the lien of the landlord. He quoted the case of *Hulisch v. Hulisch's trustees* (2, Sup. Ct. cases, p. 39). He urged that it was significant, that the judgment debtor Abrahams continued to reside on the premises after the alleged sale, and that the purchase price of the goods was to be paid in instalments of £5 a month.

De Villiers, C.J.: While the goods were on the premises in question they were subject to the lessor's hypothec. Notice was given by the landlord to his tenant claiming his rent, and thereafter arrangements were made between

the lessee and the claimant, the present respondent, by which all the goods on the premises were transferred to the claimant. It is important in a matter of this kind to notice what the consideration was. The price was £120, to be paid by the purchaser to the seller. It was not, however, an immediate payment, but such payment was to be made in monthly instalments of £5 each, the first of which instalments to be paid on the 31st October, 1903, and continue to be paid at the end of each and every month, until the whole sum of £120 has been paid. For a further contract the purchaser agrees to take over and become responsible for certain debts due to a person in Bechuanaland of £200. The lessee, however, remained in possession of the premises. It seems to have been a kind of understanding between them that the claimant was to take over the sub-lease of the property, but there is evidence which is not contradicted that it was a condition of the lease that the lessee was not to be allowed to sub-let, and it is impossible, therefore, to consider this a *bona fide* arrangement, that there was to be a sub-lease. I confess I can come to no other conclusion than that this was an arrangement between the lessee and the claimant to deprive the lessor of his hypothecary rights as the landlord. The whole thing seems to me a colourable arrangement. The lessee remained on the premises, and I am by no means satisfied that there was a real agreement that this property was to be sold, but, even if there was, I am by no means satisfied that there was delivery. The tenant really remained in possession, and, as far as one can judge, he continued to exercise control over the property. The whole transaction appears to be a colourable arrangement to deprive the landlord of his rights, and the Magistrate ought, in my opinion, to have found accordingly. The appeal must be allowed, and judgment entered that the property claimed by the claimant is liable to attachment at the suit of the judgment creditor. The appeal is allowed, with costs in this Court and the Court below.

{Applicant's Attorneys: Findlay and Tait; Respondent in default.

NGILI V. MCLEOD. { 1904.
 { Mar. 26th.

Municipal regulations—Kafir beer
—Act 28 of 1896.

The defendant, Municipal inspector, purporting to act under the regulations of the Municipality of A., entered the hut of the plaintiff, a native woman, by force, on the ground that he

suspected Kafir beer to be concealed in the hut, but no beer was found. The regulation authorized any person thereto authorized by the Council to enter any hut upon reasonable suspicion of an infringement of any regulation, but there was no regulation relating to Kafir beer. The 8th section of Act 28 of 1898 enacts that any owner of land, upon being satisfied that there is reason to suspect the existence of Kafir beer within any hut, may give written authority to any other person to search such hut, but the defendant had no such written authority from any one.

Held, that the entrance was illegal, and that the plaintiff was entitled to damages for the trespass.

This was an appeal from a judgment of the R.M.'s Court at Aliwal North in an action brought by the appellant to recover damages from the respondent, who is superintendent of the native location at Aliwal North, for alleged forcible entry of her hut or house in the location. The claim was dismissed by the Magistrate. Mr. Schreiner, K.C., was for the appellant; Mr. Searle, K.C., was for the respondent.

Mr. Schreiner (for appellant), said that the appellant sought to recover £20 for damage done by the defendant in breaking into her hut or house, and for excluding her from possession of the hut or house. The actual damage was not considerable, but the case was of very great importance to the plaintiff, and the other inhabitants of the native location at Aliwal North, and the appeal had been brought rather in the way of a test. This man McLeod, who was the Municipal Inspector, it appeared, entered the plaintiff's house without any written authority or any warrant. Section 12 of the Municipal regulations gave certain powers of entry in the event of any infringement of the Municipal regulations in case of reasonable suspicion, but those regulations said nothing as to suspicion of the existence of Kafir beer in the location or a Kafir hut.

[De Villiers, C.J.: Was not any Act in force?]

No, not under the regulation.

[De Villiers, C.J.: Are there no by-laws about Kafir beer?]

Not one. Kafir beer is dealt with under the Act of 1898, known as the Innes Liquor Licensing Act: Coun-

disputed items which had been referred to arbitration.

Held, that the Magistrate had properly disallowed the exception, on the ground that the claim was too uncertain to be capable of being set off.

The defendant, moreover, filed a counter-claim for £57, consisting of items clearly owing to him, which had not been included in the reference to arbitration.

Held, that although the amount exceeded the Magistrate's ordinary jurisdiction, yet as it did not exceed the amount of the plaintiff's claim, the Magistrate had erred in not allowing the counter-claim.

This was an appeal from a judgment of the Resident Magistrate of Stutterheim, in an action brought against the appellant by respondent for payment of £63, with interest, due upon a certain promissory note made on the 27th August, 1903, and due on the 27th November, 1903, which had been presented for payment, and of which the plaintiff was the legal holder. Mr. W. P. Buchanan was for the appellant; Mr. McGregor was for the respondent.

Mr. Buchanan said that certain exceptions were taken by the defendant at the trial, but the principal point was a ruling by the Magistrate that the defendant was not to cross-examine the plaintiff to show that the latter really owed to the defendant a liquidated amount above the Magistrate's jurisdiction, and, as the result, that the Magistrate could not try the case. The Magistrate practically said that the arbitration was pending, that the award had not been made, and that they should not touch that at all while trying the present case. The Magistrate (counsel contended) should not have tried the case. An arbitration had been sitting, and although the time within which the award should be given had expired, the award had not yet been made known. If the award had been given, then the matter would be settled at once. The whole dispute arose out of certain rights between them as to the Kabousie water right scheme. The parties were brothers. The appellant said he had paid certain sums on behalf of the respondent, and had performed certain work.

Mr. McGregor said he did not know what the appellant's claim really was. On the evidence as it stood, he contended that the Magistrate had acted quite rightly. He put it that the initial

error was the defendant's. If the arbitrators should have been more expeditious, he ought not to have used the Magistrate's Court to move them, but he should have moved the Arbitration Court. Other parties were concerned in the arbitration besides the appellant and respondent.

It was quite clear that the debt now sued for was one, the cause of action in respect of which originated after the submission to arbitration, and it is not, therefore, a matter of which the arbitrators could take cognisance if they wished. Counsel also submitted that there was no claim on the part of the defendant before the Magistrate. He contended that the Magistrate was quite justified in holding that the defendant could not bring in any reference to the larger claim that he alleged he had against the plaintiff, and which was the subject of the arbitration. There was, it was important to note, no evidence in support of the defendant's pleas; the accounts were not even sworn to.

Mr. Buchanan said that the question was whether there was a liquidated amount due to the defendant over and above the plaintiff's claim, or at all events, whether the Magistrate was not wrong in overruling the claim in re-convention. The claim in re-convention amounted to £57 6s. 2d., and the claim in convention was £63; so that the claim in re-convention was almost up to the amount of the claim in convention.

[De Villiers, C.J.: But does this claim of £57 6s. 2d. form any part of the arbitration?]

Mr. Buchanan replied that it did not. One could not understand, he observed, how the Magistrate could possibly have disallowed, in face of the evidence given by the defendant, the counter-claim.

Mr. McGregor, in answer to his lordship, said that the plaintiff's position in regard to the counter claim was that the Magistrate found against the counter-claim, and granted absolution from the instance in respect to it.

Mr. Buchanan, in further argument, said that the whole difficulty had arisen because first of all the accounts between the parties had been split up between the arbitration court and the Magistrate's Court, and secondly, the Magistrate would not allow any question relative to the arbitration to be touched at all. He submitted that the parties made the initial mistake, and the Magistrate made the second mistake. The Magistrate, at any rate, ought to have given judgment for the defendant on the counter-claim.

De Villiers, C.J.: The plaintiff sued the defendant in the Court below on a promissory note for £63, made by him in favour of the plaintiff. There is no dispute about this amount being owing, the note had been discounted, and the plain-

FAIRBAIRN V. PEPPER. { 1904.
Mar. 25th.

Principal and agent—Contract on behalf of principal.

The defendant, acting as the agent of a principal, let certain premises to the plaintiff, but the lease could not be carried into effect, and thereupon the plaintiff claimed damages from the agent. The plaintiff was aware at the time he hired the premises that the defendant was acting for another.

Held, that the plaintiff was not entitled to succeed in the action.

This was an appeal from a judgment of the Resident Magistrate's Court at East London, in an action brought by the respondent, David Pepper, to recover £20 damages for alleged breach of agreement from the appellant, William Fairbairn. Proof of service upon the respondent at his employ in Cape Town was given.

From the record in the Court below it appeared that the plaintiff's ground of action was that the defendant, through his agent acting in his behalf, one Deery, let certain premises, 49, Union-street, East London, as a hairdresser's saloon, for six months at £7 per month, possession to be given on the 1st December, 1903. Defendant, in breach of the agreement, refused to give possession on the 1st December or any other date, and plaintiff had been prevented from carrying on his business, being unable to get other premises. Judgment was given by the Magistrate for the plaintiff. Against this judgment the defendant now appealed.

Mr. Schreiner, K.C., for appellant. Respondent in default.

Counsel said that the appellant Fairbairn was simply the agent of the owner. It was known to the plaintiff when he negotiated with Deery that Deery was only acting as sub-agent, and that Fairbairn himself was merely the agent. Deery at the time was not aware that in another case there was a restrictive clause in favour of another barber (Schultz), which specified that these particular rooms should not be let for a barber's shop. As soon as it came to the notice of Fairbairn, the other lease was pointed out, in which the restrictive clause was contained, and it was impossible therefore to confirm on behalf of the owner the contract which Pepper had provisionally made with Deery. Counsel submitted that the case of *Wright v. Williams* (8 Jut. p. 166) clearly showed that there was no

action against Fairbairn, but that the principal ought to have been sued. Fairbairn, it seemed, was acting for executors in England, and the plaintiff had no doubt been ill-advised in not proceeding against the principal. There had been no refusal of disclosure of the name of the principal.

De Villiers, C.J.: It is clear that the plaintiff knew at the time when the alleged contract was entered into that he was contracting with the agent of the principal; he knew that the defendant was the agent. The contract was made with Deery, who was acting as sub-agent to the defendant to the knowledge of the plaintiff. After the lease had been entered into, it was discovered that there were other occupants of the premises who were carrying on the same business as the plaintiff, and, as the other tenant would object to the plaintiff coming in, the lease could not be carried out. The plaintiff then sought to recover damages from the defendant as agent of the person with whom he contracted. In my opinion, the principle laid down in the case of *Wright v. Williams* should be applied in the present case. The general rule was laid down that the principal alone, and not the agent, is liable, except in three cases, viz., firstly, where the contract was entered into with the agent of the owner upon the faith of his being the principal (the plaintiff in this case knew that the defendant was not the principal); secondly, where the agent professing to act for his principal had no authority so to act (that exception does not apply); and, thirdly, where the agent expressly bound himself on behalf of his principal (nothing of that kind was done in this case). As none of these exceptions applied, I am of opinion that the Magistrate was not justified in holding that the plaintiff was entitled to succeed. The appeal must, therefore, be allowed, and judgment entered for the defendant, with costs in this Court and the Court below.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent in default.]

HUMPHREYS V. HUMPHREYS. { 1904.
Mar. 25th.
" 28th.

Magistrate's jurisdiction—Set off—Liquidated claim.

The plaintiff sued the defendant on a promissory note for £63, and the defendant excepted to the jurisdiction, on the ground that he had a valid claim for an amount exceeding £63, but his claim consisted of a number of uncertain and

disputed items which had been referred to arbitration.

Held, that the Magistrate had properly disallowed the exception, on the ground that the claim was too uncertain to be capable of being set off.

The defendant, moreover, filed a counter-claim for £57, consisting of items clearly owing to him, which had not been included in the reference to arbitration.

Held, that although the amount exceeded the Magistrate's ordinary jurisdiction, yet as it did not exceed the amount of the plaintiff's claim, the Magistrate had erred in not allowing the counter-claim.

This was an appeal from a judgment of the Resident Magistrate of Stutterheim, in an action brought against the appellant by respondent for payment of £63, with interest, due upon a certain promissory note made on the 27th August, 1903, and due on the 27th November, 1903, which had been presented for payment, and of which the plaintiff was the legal holder. Mr. W. P. Buchanan was for the appellant; Mr. McGregor was for the respondent.

Mr. Buchanan said that certain exceptions were taken by the defendant at the trial, but the principal point was a ruling by the Magistrate that the defendant was not to cross-examine the plaintiff to show that the latter really owed to the defendant a liquidated amount above the Magistrate's jurisdiction, and, as the result, that the Magistrate could not try the case. The Magistrate practically said that the arbitration was pending, that the award had not been made, and that they should not touch that at all while trying the present case. The Magistrate (counsel contended) should not have tried the case. An arbitration had been sitting, and although the time within which the award should be given had expired, the award had not yet been made known. If the award had been given, then the matter would be settled at once. The whole dispute arose out of certain rights between them as to the Kabousie water right scheme. The parties were brothers. The appellant said he had paid certain sums on behalf of the respondent, and had performed certain work.

Mr. McGregor said he did not know what the appellant's claim really was. On the evidence as it stood, he contended that the Magistrate had acted quite rightly. He put it that the initial

error was the defendant's. If the arbitrators should have been more expeditious, he ought not to have used the Magistrate's Court to move them, but he should have moved the Arbitration Court. Other parties were concerned in the arbitration besides the appellant and respondent.

It was quite clear that the debt now sued for was one, the cause of action in respect of which originated after the submission to arbitration, and it is not, therefore, a matter of which the arbitrators could take cognisance if they wished. Counsel also submitted that there was no claim on the part of the defendant before the Magistrate. He contended that the Magistrate was quite justified in holding that the defendant could not bring in any reference to the larger claim that he alleged he had against the plaintiff, and which was the subject of the arbitration. There was, it was important to note, no evidence in support of the defendant's pleas; the accounts were not even sworn to.

Mr. Buchanan said that the question was whether there was a liquidated amount due to the defendant over and above the plaintiff's claim, or at all events, whether the Magistrate was not wrong in overruling the claim in reconvention. The claim in reconvention amounted to £57 6s. 2d., and the claim in convention was £63; so that the claim in reconvention was almost up to the amount of the claim in convention.

[De Villiers, C.J.: But does this claim of £57 6s. 2d. form any part of the arbitration?]

Mr. Buchanan replied that it did not. One could not understand, he observed, how the Magistrate could possibly have disallowed, in face of the evidence given by the defendant, the counter-claim.

Mr. McGregor, in answer to his lordship, said that the plaintiff's position in regard to the counter claim was that the Magistrate found against the counter-claim, and granted absolution from the instance in respect to it.

Mr. Buchanan, in further argument, said that the whole difficulty had arisen because first of all the accounts between the parties had been split up between the arbitration court and the Magistrate's Court, and secondly, the Magistrate would not allow any question relative to the arbitration to be touched at all. He submitted that the parties made the initial mistake, and the Magistrate made the second mistake. The Magistrate, at any rate, ought to have given judgment for the defendant on the counter-claim.

De Villiers, C.J.: The plaintiff sued the defendant in the Court below on a promissory note for £63, made by him in favour of the plaintiff. There is no dispute about this amount being owing, the note had been discounted, and the plain-

tiff was entitled to recover this amount from the defendant. A series of pleas were put in, which really amount to this, that the defendant denies the jurisdiction of the Magistrate, inasmuch as the defendant had counter-claims against the plaintiff in excess of the amount claimed by him. It has been repeatedly decided in this Court that if there are such counter-claims, they are capable of being set off, and would oust the Magistrate's jurisdiction. The difficulty is continually arising, however, as to when a debt can be said to be liquidated, and when it is of such a nature that it cannot be set off. The matter has been so fully discussed that I need not cite all the authorities, but I would simply read what I said in the case of *Krug v. Van Vuuren* (5 Juta 162) as to what is the best test as to whether a debt is liquidated or not. It was there said: "A debt is liquidated when it is evident that it is due and to what amount, *cum certum est an et quantum debeatur*. A disputed debt, then, is not liquidated, and cannot be opposed in compensation unless the person who opposed it has proof at hand, and is in a situation to justify his claim promptly, and summarily." So far I have quoted from Pothier, but in the judgment of *Krug v. Van Vuuren* I added that "until every element of uncertainty has been removed as to the amount opposed in compensation, set off is not allowed." In the present case, it is impossible to say that every element of uncertainty has been removed in regard to the counter-claim of the defendant. It was so uncertain that the parties themselves had to refer it to arbitration, and the whole matter is still under the consideration of arbitrators, and I am by no means certain that the Magistrate was wrong in holding that, so long as that matter was submitted to the arbitrators, he could not enter into any discussion as to any debts included in that claim before arbitrators. But, then, there is a further counter-claim by the defendant. If that counter-claim formed part of the matters submitted to the arbitrators, then it is quite clear that it should be excluded. It appears, however, from the evidence given on behalf of the defendant, that it had no connection whatever with the arbitration, and the plaintiff himself in his evidence admits that these accounts were placed before the arbitrators, and that they refused to consider them. I take it, therefore, that these accounts were not before the arbitrators, and that the defendant, was entitled to set up this counter-claim quite independently of any exceptions which he had raised before. It is treated quite separately from the rest, and if the defendant should succeed in proving this counter-claim of £57 6s. 2d., I am of opinion that the Magistrate ought to allow it. Well, he produced the counter-claim, he produced the vouchers, and

it appears to me that the plaintiff's answer to the counter-claim was a very feeble one. He made a general statement of denial, but he did not give such specific denial as to counter-balance the clear evidence given on behalf of the defendant of the existence of this counter-claim. It seems in every respect a valid claim, and the Magistrate erred, in my opinion, in refusing that counter-claim. It is true that it is in excess of the Magistrate's ordinary jurisdiction, but where a plaintiff sues on a liquid claim exceeding £20, it has continually been held that the defendant is entitled to make a counter claim not exceeding the amount of the plaintiff's claim. The plaintiff's claim in the present case was £63, and the counter claim was £57. I am of opinion therefore, that the appeal should be dismissed so far as the question of jurisdiction is concerned, but that the appeal should be allowed to this extent that instead of absolution from the instance on the claim in reconvention, viz.: £57 6s. 2d. The effect of that decision in the Court below would have been that there would still have been judgment for a balance in favour of the plaintiff, and, therefore, the order as to costs in the Court below will have to stand, but the respondent will have to pay the costs of the appeal.

[Appellant's Attorneys: Reid and Nephew; Respondent's Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

GENERAL MOTION.

S.A. BREWERIES V. ESTATE } 1904.
MARTIENSSSEN. } Mar. 28th,

Mr. Schreiner, K.C., moved, as a matter of urgency, for an order to authorise the Registrar of this Court to transmit to the Registrar of the Privy Council a certified copy of the original endorsement made on the 1st November, 1899, by C. W. Corlett, in favour of W. Gourlay and Co., on the lease of the Princess Royal Hotel, entered into on the 8th April, 1899, by the then owner, Ernst Heinrich Martienssen, and the said Corlett, and whereby the rights of the lessee were

assigned to the said Gourlay to amend the erroneous copy of the said assignment filed of record as exhibit No. 1 in the suit, *S.A. Breweries v. Martienssen* (12 C.T.R. 465), so as to conform with the original; and to transmit, correct, a duly certified copy of the Privy Council, in order to be included in the record of the proceedings, concerning which an appeal is now imminent. Counsel explained that there were certain discrepancies between the original endorsement, and the endorsement as printed in the Privy Council record.

He added that notice had been given to the respondents, who, however, did not appear to oppose.

Order granted as prayed.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte HADIE.

{ 1904.
{ Mar. 29th.

Mr. Alexander moved, as a matter of urgency, for an amendment of an order of Court, in the matter of *Hadie v. Hadie*, appointing Messrs. W. A. Currey and J. E. P. Close as receivers in the joint estate, in the room of Mr. Rous (secretary of the Board of Executors), who declined to act. The plaintiff's attorney, Mr. Steer, agreed to the appointment.

Order granted as prayed, costs to come out of the estate.

HIDDINGH V. ESTATE HERTZOG.

Mr. Schreiner, K.C. (with him Mr. Upington), said that he appeared for the defendants, but there was no appearance, he believed, for the plaintiff. When the matter was last before the Court, his lordship made a suggestion that the plaintiff should consent to judgment, and thus save the unnecessary expense of a commission. He had now a consent from the plaintiff to final judgment being entered for the defendants in the action. Notice of the present application for final judgment for the defendants had been given to the plaintiff's attorney, Mr. Peters.

Judgment was ordered to be entered accordingly.

ABEL V. ELLIOT BROS.

Mr. Upington moved as a matter of urgency for the appointment of a commission to take the evidence of John B. Ries, who was about to leave for England by the mail steamer to-morrow (Wednesday). Mr. M. de Villiers appeared for the plaintiff in the action to oppose.

The affidavit of James B. Ries said that he had been managing the defendant's business in Wynberg, and was so acting when the dispute between defendants and plaintiff arose. Owing to important business he was compelled to leave for England on Wednesday, the 30th inst.

The affidavit of Gideon B. van Zyl, attorney for the defendants, said that Ries was a very material witness for the defence, and that he was not aware until that day (Monday) that Ries was going to England.

The replying affidavit of David Tennant, attorney for the plaintiff, said that on Monday afternoon, the 28th inst., he was served with copy of notice of the proposed application. This was a case in which the plaintiff claimed payment of £715 7s. 6d., being purchase price of certain sheep sold by him to the defendants. In the defendant's plea they raised an allegation that the money was paid to one Storey, who acted for and on behalf of the plaintiff. The issue in this case was whether Storey was or was not the duly-qualified agent. The plaintiff was at present resident at Hopefield, and it was important that he should be present at the Commission. Deponent had no objection to the Commission, provided it sat on a later date, so as to enable the plaintiff to be present. It would be quite possible to have the witness's passage transferred to the next mail steamer or an intermediate boat.

Mr. Upington said that the plaintiff knew what the nature of the witness's evidence would be, because he gave evidence at the Criminal Sessions for the prisoner Storey.

Mr. De Villiers urged that it would be no hardship upon the witness to postpone his departure for a few days.

De Villiers, C.J.: It would be a greater hardship to the defendant if the Court were to refuse to allow this witness to be examined before he leaves than it would be to the plaintiff if he were examined upon imperfect information. After all, if the plaintiff's counsel is unable, owing to the defendants' knowledge of certain facts to cross-examine the witness, that is a matter that may be brought to the notice of the Court when the trial takes place. For the present, I think that the better course will be to make the order as prayed. The costs will be costs in the cause. The Court will appoint Mr. Percy Jones as commissioner, as suggested by Mr. Upington.

RANER V. COLONIAL SECRETARY. 1904.
TARY. { Mar. 30th

Alien—Right of land—Act 47 of 1902—Certificate of Agent-General.

The applicant entered into a contract in England with one S., an alien, under which S. engaged to serve him on arrival in the Colony at an adequate remuneration and for a reasonable period, and a certificate to that effect was given to S. by the Agent-General in terms of the 3rd section of Act 47 of 1902. On his arrival in the Colony, the Government refused to allow him to land, whereupon the applicant moved for an order, compelling the Colonial Secretary to authorize such landing.

Held, that as, independently of the Act, an alien has no legal right enforceable by action to enter British territory, and that as the Act confers no such legal right on aliens, the applicant, as employer of S., was not entitled to the order prayed for.

This was an application by Nathan Raner, of Woodstock, calling upon the Colonial Secretary to show cause why one Von Sever, an immigrant, detained on the S.S. Guelph, should not be allowed to land. The petition stated that Raner was a naturalised British subject, resident at Woodstock, and had been resident in this colony for the past six years. He was an owner of landed property both in Cape Town and Woodstock. On the 9th February, 1904, petitioner entered into a contract of service with one B. M. von Sever, of London. This contract was duly signed by petitioner in Cape Town, and by the said Von Sever at Westminster, before the Assistant Secretary for the Cape Government Agency on the 4th March, 1904. In pursuance of the said contract, Von Sever booked his passage to Cape Town by the steamer Guelph, which arrived here on the 28th inst. Petitioner was informed at his interview with the said Von Sever that, notwithstanding that he had a certificate under section 3 of Act 47 of 1902 from the Agent-General, which he handed up to the authorities here, he had been prohibited from landing in Cape Town by order of the Head Medical Officer. On inquiring for the grounds of such pro-

hibition, he was informed by Mr. Millard, chief clerk in the office, that he was not authorised to state the grounds. Petitioner was informed by the Union-Castle Steamship Co. that the Guelph was returning to England that (Wednesday) afternoon, and that the said company had been ordered to carry Von Sever back to England by the said boat. Petitioner was anxious that Von Sever should be allowed to land in Cape Town, in order that he might carry out the terms of the said contract, especially as petitioner had paid his passage money.

Mr. Van Zyl for Applicant; Mr. Evans for the Colonial Government.

Mr. Evans, replying to his lordship, said they hadn't had time to prepare an affidavit, but the Chief Medical Officer of the Colony (Dr. Gregory) was in court.

De Villiers, C.J., said that perhaps Dr. Gregory would be able to inform them what were the grounds for refusing permission to land.

Mr. Evans said that his submission was that the applicant had no *locus standi*. The matter was really not before the Court, because the immigrant himself did not make the application. It had been held by the Privy Council that an agent had no *locus standi* in a matter of this sort. Counsel also quoted the case of *Mugrove v. Chun Teong Toy* (A.C. 1891, p. 272) and said that it was clear from the judgment of the Privy Council in that matter that a foreign Government had the power to prevent any alien from coming into their territory, just as a private individual had. The Colonial Government were merely exercising the prerogative which was vested in them. He contended that this was really an attempt to get round constitutional law on the part of an employer who *a fortiori* had no *locus standi*.

Mr. Van Zyl said that he had not seen the case mentioned by his learned friend, but in the present application, it must be remembered that the person was at the time living in London.

Mr. Evans: He was not naturalised.

Mr. Van Zyl: But in coming here, he was not entering British territory for the first time. Counsel went on to say that he took it that in matters of this kind the conduct of the Colonial Government was entirely regulated by Act 47 of 1902, under which restrictions were imposed against certain persons. This Act enumerated the people whom the Crown had the power to exclude, and Von Sever would not be excluded by its provisions.

Mr. Evans: This is not a question of the Crown; it is a question of prerogative.

Mr. Van Zyl said that, if the Act applied, he took it that all the things required by the Act had been complied

with. If this Act had not been passed he could understand that they should fall back on the common law.

De Villiers, C.J.: But in that case there was a Chinese Act, and a Chinaman was excluded, and it was held, quite independently of the Act, that he had no *locus standi* in any British colony.

Dr. Gregory, in answer to His Lordship, said that Von Sever was a Russian Jew.

Mr. Evans said that Von Sever came out in the early part of the year, but was refused permission to land. He then went back to England, and now apparently this bogus contract had been prepared, and he was again seeking permission to land. The man could only write his name, and even then only in Yiddish.

Dr. Gregory said that Von Sever arrived on the 29th of December, and was refused permission to land.

Mr. Evans said that the applicant, with whom Von Sever had entered into this contract, was Von Sever's uncle.

D. Villiers, C.J.: This is an application made by Raner, of Woodstock, calling upon the Colonial Secretary to show cause why this Court should not grant an order authorising one Von Sever to land from a ship in Cape Town. The ship is about to return to England, and it is necessary that an order on the matter should be made at once. The petitioner does not state in precise terms that Von Sever is an alien, but the case has been argued upon the assumption that he is an alien, and the documents put in support the assumption. The contention of the petitioners Counsel is that inasmuch as Von Sever can produce a certificate signed by the Agent-General in London to the effect that he has been engaged to serve on arrival in this colony an employer therein of repute and at a suitable remuneration, therefore the Government is bound to admit him, and the Court is now bound to grant the order asked for. But the third section of the Act 47 of 1902 which is relied upon only provides that this Act shall not apply to persons of the class described in that section. There is nothing in the Act to show that the ordinary law relating to the admission of aliens is repealed, and that the provisions of this Act take its place. The fact that Von Sever has a certificate might be a reason for his escaping the penalties which are provided by this Act in case he should land in this colony, but it is no reason for applying to him different rules from those which would have been applied if this Act had never been in force.

In the case of *Musgrove v. Chun Tcong Toy* (A.C. 1891, p. 272), there was an Act under which a Chinese immigrant had no legal right to land in

the Colony of Victoria until a sum of £10 had been paid for him. It was held by the Judicial Committee of the Privy Council that the Collector of Customs was under no legal obligation to accept payment tendered on behalf of any individual immigrant and that, apart from this Act, an alien has not a legal right enforceable by action to enter British territory. "Their Lordships," said the Lord Chancellor, "cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action." In that case it was the alien himself who brought the action. In the present case it is not even the alien who applies to the Court, but the person who has employed him, and he has no *locus standi*. Therefore, quite independently of the merits of the case, I am of opinion that this application could not be acceded to. At the same time I am glad to find that there is no intention on the part of the respondent to exclude everyone who is an alien merely on the ground that he is an alien. It would appear that, rightly or wrongly, the respondent considers that he has good grounds for excluding Von Sever. It is said that he is an illiterate. There is no evidence generally, in regard to his qualifications, but certainly as to illiteracy, I find that in the very contract which is before the Court, he has only signed his name in Yiddish. I don't think that it has ever been decided that Yiddish is one of the European languages contemplated by the 22nd section of the Act. The present application must be refused, with costs.

[Applicants' Attorneys: Michan and De Villiers.]

APPENDIX.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

LOBASCHER V. COHEN AND { 1904.
CARN. { Feb. 18th
May 7th.

Partnership — Condition — Account.

The plaintiff signed two promissory notes in favour of L., the consideration alleged being that the plaintiff should become a partner with L. in the purchase and sale of certain Government blankets. The notes were discounted and afterwards paid by L., who handed the notes back to the plaintiff and treated the arrangement as to a partnership as being at an end and sold all his interest in the matter to the defendants. The price of the blankets was paid by the defendants, who employed the plaintiff to supervise the packing and export of the blankets at a salary, which was duly paid. All the expenses of the enterprise were paid by the defendants. There was further evidence that the partnership with L. was to be conditional on the plaintiff's contributing his share of the capital and that the defendants, when they bought the interest of L., were not aware of his previous arrangement with the plaintiff.

Held, that the plaintiff was not entitled to claim an account of profits from the defendants.

This was an action to recover a certain share of partnership profits; or in the alternative, for a partnership account.

The plaintiff is a Wynberg auctioneer, and the defendants are a city firm of turf commission agents. The suit arose out of the purchase of a large quantity of Army stores, which

were sent to England to be sold, and which were there alleged to be infected with enteric germs. The plaintiff claimed to be a partner in the transaction and to be entitled to a third share of the profits, and he sought, by this action, to have it declared that he was entitled to a third, and to have the defendants ordered to furnish him with a partnership account.

The plaintiff, in his declaration, stated that about October, 1902, plaintiff and one Sinclair entered into an undertaking to purchase 20,000 Army blankets and other military stores for £250. The plaintiff provided £25, and, in consideration of this and his services, it was agreed with Sinclair that plaintiff was to receive half of the profits of the sale. About November, 1902, plaintiff and Sinclair purchased 60,000 Army blankets for £960, and plaintiff contributed £418 to the purchase price. It was then agreed that they should take in another party, and that the net profits should be equally divided between the three. Thereupon plaintiff and Sinclair entered into an arrangement with the defendants, and it was agreed that on defendants supplying the balance of the capital they should participate in both the transactions to the extent of one-third share. Plaintiff alleged that he was kept for six months attending to the management and despatch of the stores. The stores were all sent to England, and many were seized there by the medical authorities. In June, 1903, the defendants acquired all the rights of Sinclair, and had refused to recognise plaintiff as a participant in the profits and to render him an account. Plaintiff prayed for an order declaring him to be entitled to one-third share of the profits and for an order compelling defendants to furnish him with an account. He claimed alternatively for judgment for the £483 he had paid in and £800 as remuneration for his services.

The defendants pleaded that they had no knowledge of the transactions between plaintiff and Sinclair. They alleged that about October, 1902, it was agreed between them and Sinclair that if they lent him £250 Sinclair would pay them a third share of the profits. They advanced the money. Subsequently a further agreement was arrived at whereby Sinclair, for consideration, made over to them the whole of his interest in the transaction. They engaged the plaintiff to pack the blankets, and agreed to pay him £100 for his services. The last lot of blankets was shipped by the steamer Goorkha in January, 1903, and, in consequence of enteric germs found in them, the stock was seized by the medical authorities in London, in whose possession it now was. They alleged that there were no profits, and never would be.

Mr. Burton (with him Mr. J. E. R. De Villiers), for plaintiff; Sir H. Juta, K.C. (with him Mr. Close), for the defendants.

Mr. Burton said that the declaration alleged that all the stores were sold in England, but it had now come to the plaintiff's knowledge that a considerable portion of the stores were sold here. He asked, therefore, that the declaration should be amended accordingly.

Sir H. Juta said the defendants knew nothing about any sales here, and were not prepared with evidence on the point.

De Villiers, C.J., said he did not see how defendants could be prejudiced by the amendment, and he would allow it. Defendants would, if necessary, be allowed an opportunity of calling evidence on the point.

Sir H. Juta asked for leave to amend the plea, so as to include the statement that none of the stores had been disposed of in the Colony, to the defendants' knowledge.

The amendment was allowed.

Leopold Lobascher, the plaintiff, said that in October, 1902, he had transactions with Sinclair with regard to certain Army stores. Sinclair and witness agreed to put in a tender for stores for £250, the tender being sent in in Sinclair's name. The tender of £250 was accepted, and witness gave Sinclair £40 in cash and a diamond ring of the value of £25. It was arranged that witness should manage the whole affair, and that the profits should be divided equally. Witness engaged a foreman, and supervised the work of receiving the stores and storing them. Sinclair came down occasionally to see the work being done. Subsequently witness heard that another lot was to be sold. He saw Sinclair, and they tendered for 200,000. The military allowed them to take 60,000 military blankets. Witness arranged with Sinclair with regard to these to pay two promissory notes for £209 each. He gave these to Sinclair. These notes had been met through his bank. Sinclair said it would be necessary, on account of the heavy expense, to get more capital, and he said he would see about getting another partner, who would share in the profits to the extent of a third. Sinclair gave witness two documents, stating that he (witness) was entitled to a half-share of the profits. These documents were put in at the Commission. Sinclair subsequently went to Kimberley, having told him before he left that he was to go to defendants for any money he wanted. On Sinclair's return a month later, witness heard of the arrangement to take Cohen and Carn into the venture. Sinclair told Carn that witness should manage the business alike. He also read certain documents to Carn. Witness told Carn he

was short of money, and Carn gave him a cheque for £100. It was arranged that witness should manage the business and send the stores to London to Cohen's brother. Witness engaged a number of men to work. He received money from defendants to pay wages. Witness had to employ a man to look after his business in Wynberg. Some of the stores were sold in the Colony, some to Dalgleish, Port Elizabeth, to a man named Collinson, and Douglas and others. The rest of the stores were sent to London. Witness thought 15,000 or 16,000 blankets were sold in the Colony. Carn paid him the £100 in January. Witness was working from October until March, and this sum would be absolutely inadequate as wages for his work. Witness had asked Sinclair and defendants for his share of the profits. After Sinclair left, witness went to the defendants' office, and Cohen said that the £100 was a sufficient remuneration for his services, and that he ought to be satisfied with what he had got. Witness's attorneys sent a letter of demand, replying to which defendants said they were surprised at the demand, as they had never had any dealings with plaintiff. As regarded the payment of the promissory notes, Sinclair himself discharged the notes, as he owed witness money. When witness gave the notes, Sinclair said the money for the stores would be back from England before the notes fell due. Witness insured his interests in the goods while stored here. The date of the policy was the 5th November, 1902. If witness were only engaged to superintend the packing, he considered a fair remuneration would be £100 to £110 a month.

Cross-examined by Sir H. Juta: Witness did not go halves with Sinclair in any betting transactions. Witness had paid £40 into Sinclair's banking account on his behalf as a loan, and had also paid an officer £62, which Sinclair owed. Further, he sold Sinclair a ring worth £25, for which he had not received payment.

How was it you did not ask Sinclair a word about this when Sinclair gave his evidence on commission?—No answer.

You claim to be a partner in this business?—Yes.

Therefore, if the transaction has resulted in a heavy loss, you are quite prepared to pay your part of the loss, and to give back the £100 which you have?—Yes.

You are perfectly well aware that there is a very heavy loss on the transaction?—I am aware that there is a big profit. Mr. Sinclair told me so.

You are aware that these goods were seized in England owing to their containing fever germs?—Yes; but before that, many thousands were sold.

And are you aware that the people to whom they were sold refused to pay for them?—No.

[De Villiers, C. J. (to Sir H. Juta): Are you prepared now to take him in?]

If Mr. Lobascher will show us from his account in the bank that he can pay us a share in the losses, we shall be only too glad to take him in. I am afraid we shall have to bear the loss ourselves.

[De Villiers, C. J.: You mean he won't be able to pay?]

No, he won't, my lord.

In further cross-examination, the witness said the last lot of stores were sent to England on the 30th January. Witness and the men were employed for about four weeks after that putting the place in order. Witness got his own men to do this. Defendants did not pay anything for this.

So that, although you say the arrangement was that Cohen and Carn should pay all these expenses, you generously paid the men out of your own pocket for four weeks' work?—They were my own men.

Lieutenant Fuller deposed that Lobascher and Sinclair came to see him before the latter tendered for the blankets. Lobascher, on one occasion, paid witness a sum of money on Sinclair's behalf. This was in about the beginning or middle of March.

Henry Francis Langenhoven, formerly office boy in the employ of Sinclair, said he copied the notes given by Lobascher to Sinclair, and the documents given by the latter to plaintiff into the letter-book. He remembered seeing Carn, Sinclair, and the plaintiff in the office on one occasion. Sinclair asked witness to get the book into which the documents had been copied, and Sinclair read them over to Carn. He heard Sinclair tell Carn that each one of them should have a third of the profits, that Carn was to pay the expenses, and that plaintiff was to do the work. Witness knew some of these blankets were sold in the Colony.

Cross-examined by Sir H. Juta: Sinclair read out to Carn two promissory notes which he had given to Lobascher, and two other notes, the terms of which witness did not remember. He also read another note about a partnership in blankets. Witness had not the faintest idea when this occurred. On all occasions, with this one exception, Carn used to send witness out when he, Sinclair, and Lobascher talked in the office.

Joseph Howell, formerly foreman under plaintiff in dealing with the stores, said he was working on the stores for six or seven months. Plaintiff was in charge of the work in the store. Sinclair and Carn used to come to the store, and witness understood from the conversations that these two

and Lobascher were equally interested in the venture.

Jacob Shauban said he let a store in Woodstock to plaintiff on the 10th October, 1902, and he kept it until March. Sinclair paid witness the rent.

Cross-examined by Sir H. Juta: Sinclair only paid up to the 10th February.

Claude Norman Morton, clerk in the Bank of Africa, produced certain deposit slips, showing payments made by plaintiff on behalf of Sinclair. There were four in all—one for £40 and the others for £35, £20, and £5.

Mr. Burton closed his case.

Sir H. Juta called

James Wallace, clerk in the employ of the Union-Castle Co., who said that certain goods were shipped by Sinclair. There were no shipments after the 31st January. The goods were consigned to Mr. Cohen, of London.

Israel Carn, one of the defendants, deposed that in the beginning of October, Sinclair came to him with a view to his going into a speculation in connection with the purchase of Army blankets. The arrangement was that witness was to take a third of the profits in consideration of his paying £250 for the purchase of the blankets. Sinclair gave witness a promissory note for £256 13s. 4d., on witness giving him a cheque for that amount, which was the price of the blankets. The goods first purchased were put into a store in Woodstock. At this time Mr. Cohen was in England; he had nothing to do with this transaction. Subsequently witness gave Sinclair a cheque for £960, the amount of the purchase price of the second lot. It was agreed that witness should advance the money, and that he should take a third share. It was not until this time that plaintiff came on the scene, being introduced to witness as a man who was used to packing, and who would attend to the packing for a remuneration of £100. Witness agreed to pay this amount on the work being done satisfactorily. In January witness gave Lobascher a cheque for £100, Mr. Sinclair writing out the cheque. Witness made payment to Lobascher from time to time to pay the wages of the men. After the 31st January, witness made no further payments. In November, it was agreed by Sinclair to make over half of the whole profits in consideration of the payment by defendants of £300. Mr. Cohen paid this sum to Sinclair. In April a further transaction took place between witness's firm and Sinclair. They then gave him a further £550, this being made up of a cheque for £250, and the cancelling of a debt for £300, which Sinclair owed the firm. In consideration of this Sinclair made over the whole of the profits

to the firm. The witness denied the evidence of plaintiff, and of the office boy. He had never seen the documents showing that Lobascher had a share. Witness did not know of any of the stores being sold in Cape Town; he had received none of the proceeds of such sales if they took place. Before the letter of demand, Lobascher never alleged to witness that he was interested as a partner. Witness was bought out of the business by Mr. Cohen in May last, and had nothing to do with the affair now.

Cross-examined by Mr. Burton: Lobascher did about 2½ months' work.

Elias Cohen said that in 1902 he was in partnership with the last witness in various transactions. He was not here on the occasion of the first purchase, but took part in the second. In November Sinclair, when in Kimberley, was in financial difficulties, and on witness advancing him money he made over a half share on the profits to the firm. Witness did not know Lobascher in the matter excepting that he was engaged to superintend the packing. Witness would not think of advancing £100 on account of prospective profits, though he did not mind standing security. Witness heard nothing about any claim of plaintiff as a partner until the letter of demand was sent. In April there was an announcement that the blankets had been seized in England owing to their being infected. Lobascher did not then come to inquire about the matter. Witness had bought Mr. Carn out of the business. There was a great scare about the blankets, and there was now no market for them. People who bought them refused to pay for them until their claims on the War Office had been settled.

Sir H. Juta: You also put in a big claim on the War Office.

Witness: Yes.

But you are not going to get it.—No.

There are no profits?—No.

And there are not likely to be any?—I don't think so.

In cross-examination by Mr. Burton, the witness said that he claimed on the War Office on the 21st November for 120,000 blankets. He did not know how many blankets went Home; witness believed there were 120,000. They were all blankets in which witness was interested with Sinclair. Witness asked the War Office to take the goods back, to receive from him what he had been paid on account of purchases, and to pay him back the money he had expended together with a little profit to cover expenses. He had received about £350 from the War Office to cover his expenses in connection with the seizure of the blankets. He had been advised that the process of disinfecting the blankets did them no harm. He had received all the blankets back, and the Government had

promised him £350 for damage done to the blankets.

Johns, clerk, in the National Bank, gave evidence to show that at the time of the transactions, plaintiff had only a few pounds in the bank.

Mr. Close read the evidence taken on commission for the defence. The evidence of Sinclair was to the effect that he signed the documents given Lobascher a third interest in the profits, but that as he failed to meet the promissory notes given in consideration of this, he told Lobascher that he (Lobascher) would cease to have an interest in the transaction. The payment of £100 was for work done. He made over his share to Cohen and Carn, on the understanding that plaintiff had ceased to have any interest in the affair. In cross-examination Sinclair said that the promissory notes were given by Lobascher in order that the latter should acquire an interest in the transaction. No money was paid by Lobascher to meet these notes. There had been payments made in connection with other matters, of which he could not give details, as they occurred so long ago.

De Villiers, C.J., intimated that a day would be subsequently fixed for the hearing of the argument.

Postea (May 7th).

Mr. Burton (for plaintiff): In October, 1902, Sinclair and plaintiff purchased certain army blankets for £250. Thereafter there was another transaction in which a third partner was taken in. Now, the defendant's case is that the plaintiff had no interest in the matter. But it is clear that Sinclair and the plaintiff acted together. Fuller is quite clear that Lobascher was a party to the purchase of the first lot of blankets. In October they bought other 60,000. Cohen and Carn were then taken in to finance the business, as Sinclair and Lobascher did not think that they could carry the matter through. The agreement was that the defendants were to take one-third of the profits, Lobascher one-third, and Sinclair one-third. Sinclair says that he gave the defendants two documents from Lobascher, and he holds that the second of these cancels the first. Lobascher gave these two promissory notes to Sinclair, and Sinclair now says that he paid them.

[De Villiers, C.J.: Who is Davidson?]

He discounted the notes for Sinclair. But it is clear that Lobascher paid £157 out of £418.

[Counsel here referred to the evidence of Sinclair to show that the plaintiff gave his services in addition to contributing money.]

I submit that the plaintiff had an interest in this venture, and that he had this interest in November, 1902. Defendants take up the position that the plaintiff was only a packer, engaged at certain wages.

The office boy's evidence is contrary to this contention, and so is Carn's. The £100 paid to the plaintiff on January 15 was simply money paid on account. The evidence of the plaintiff and of the office boy is corroborated by that of Sinclair himself, and directly contradicts Carn's story. He would have us believe that all Lobascher was entitled to was £100 for his services. Clearly the plaintiff's notes had not matured on January 15 when this £100 was paid, and therefore the fact that he had not then met these notes could not have caused him to forfeit his interest in the joint venture. Sinclair's own letter of August 20, 1903, to his wife states that he was suing Cohen and Carn, and that he had paid up for plaintiff in order to preserve plaintiff's interest in the venture. That interest was never forfeited.

[De Villiers, C.J.: Were the defendants aware that the plaintiff was a partner?]

They say they were not, but the evidence as to the interview in November shows that they were fully aware of this.

[De Villiers, C.J.: But what consideration do you say that the plaintiff has given?]

First of all £157 in cash; secondly, his work and labour; thirdly, his promissory notes, though in point of fact they were no part of the consideration, since he had an interest before giving them.

[De Villiers, C.J.: What share do you say that the plaintiff had in the business?]

One-third, and Sinclair and the defendants had the remaining two-thirds. This was a partnership in a particular venture, and no partner could expel another therefrom, save by dissolution of the partnership. See *Lindley on Companies*.

[De Villiers, C.J.: The partnership may have been conditional on the payment of certain moneys.]

If that was so, it would have to be very clearly proved, and there is no evidence on that point. Part of the consideration was the rendering of services by plaintiff, as Sinclair's evidence shows. He admits that plaintiff had an interest till March 3, but says that this interest was thereafter cancelled. It must, however, be remembered that the plaintiff did work, and gave up his auctioneer's business at Wynberg from October till March 3, and it is not credible that he would have done this for £100.

As to the value of plaintiff's interest. Cohen admits that the War Office has paid £350, and promised other £350; and he has all the blankets, which are none the worse for the disinfecting process. Looking at plaintiff's claim merely as a *quantum meruit*, £100 would be

most inadequate as a price for his interest.

Sir H. Juta (for defendants): The declaration shows that this action is not founded upon partnership. The blankets, full as they are of enteric germs, cannot be put upon the market for many years. Much expense is being incurred in respect of these blankets, and plaintiff took good care to say nothing about a partnership till the score about them was over. There was no partnership; the whole transaction was merely a joint venture.

[De Villiers, C.J.: Is not that the same thing?]

No; he claims half-profits in December, but he does not make himself liable for losses. In case of a joint venture, a man is liable only for his share of the capital. Then there is no privity between the plaintiff and defendants. The plaintiff dealt with Sinclair, not with us. Plaintiff's whole story is most improbable. His original declaration said nothing about any blankets having been sold here.

[De Villiers, C.J.: But when he claims one-third of the profits, surely he admits the partnership?]

But he says nothing about losses.

[De Villiers, C.J.: People do not claim losses.]

But the pleader never intended this as an acknowledgment of partnership. He might easily have used the word if he meant it. Plaintiff never regarded himself as a partner, nor did Sinclair consider him one. Sinclair in his letter to his wife speaks of suing Cohen and Carn, after he had handed over everything to them, and he says: "I am going to sue Carn, and if Lobascher does not take care, he will get nothing." The declaration, the conduct of the parties, and all the circumstances show that there never was a partnership. There is certainly no privity of contract as between the plaintiff and ourselves. We have received no consideration from him; and if Sinclair owes him anything, let him sue Sinclair. But the plaintiff does not prove that he paid even to Sinclair the whole sum he was bound to pay.

[De Villiers, C.J.: You admit that he rendered himself liable for the money?]

But he did not pay it; and payment was a condition precedent. It will not do for a man to promise to put £1,000 into a business, and not do so until a large profit has been made, and then to say, "Now I will pay, and want my share of the profits."

[De Villiers, C.J.: How much did the defendants pay?]

Over £1,000 more than the value of the goods bought. The plaintiff cannot succeed even as against Sinclair, and *a fortiori* not against us; we have received no consideration. Lobascher says he paid certain moneys, but he produces no receipts. As to the £100 transaction, he

says he worked for six months. The wages-sheet shows that no wages were paid after January 31st, and the evidence shows that Lobascher was paid in January, although he says that he finished his work in April. If the cheque for £100 had been on account of profits, either that would have been stated in the cheque or the defendants would have taken a receipt.

[De Villiers, C.J.: If Sinclair paid, where was his consideration?]

Mr. Burton: Part of the consideration was the rendering of services.

[De Villiers, C.J.: But surely the money was a very important part of the consideration?]

Sinclair got the money.

[De Villiers, C.J.: Yes; by discounting the bills and then providing funds to meet them.]

De Villiers, C.J.: This case must be considered first of all as between the plaintiff and Sinclair, and then between the plaintiff and defendants. As between plaintiff and Sinclair there may originally have been an intention to enter into a partnership for the purpose of purchasing the blankets, which were sent to England, and there condemned. As to the payment of the first instalment the evidence is not perfectly clear as to how or when it was made, but Sinclair denied that they were made in respect of the joint venture. When the subsequent purchase was made two promissory notes for £209 each were given by plaintiff to Sinclair, and some documents were given by Sinclair, the first of which was to show that Lobascher was entitled to one-third of the profits, and the second stated that in consideration of two promissory notes, valued for £418, Lobascher was entitled to one-third of the nett profits of the sale of the Government stores bought by Sinclair. I have a very strong impression, that the two documents were really given as security for the two notes. The plaintiff, becoming liable as the maker of the notes, wanted some security, so that in case he were obliged to meet the notes, he could show that he had an interest in the blankets. In point of fact, he never was called on to pay the notes. The whole amount seems to have been paid by Sinclair. Although that took place the notes were allowed to go back into Lobascher's hands. If there was to be a continuing partnership, it seems to me that it would have been proper business on

the part of Sinclair to retain the notes, or get fresh notes from Lobascher. But by the dealings between the parties it is clear that there was a complete release by Sinclair of Lobascher of any liability. Well, if there was such a release, it is very difficult to see how any Court could hold that there should be a continuing partnership. The declaration states that the full amount of £483 has been paid by the plaintiff to Sinclair, the evidence shows that this is wholly incorrect, and it has been admitted on behalf of plaintiff that if any money had been paid it was only the sum of £157. Even with regard to that sum the evidence seems to be very unsatisfactory, as to whether any portion of the £157 was intended to be paid in respect of the alleged partnership or not. The plaintiff has been unable to produce any books in support of that. He seems to have kept no books. He is not able to produce any books to show that it was money paid on the alleged partnership. Part of this amount was accounted for by a diamond ring valued at £25. That seems a most peculiar arrangement. The evidence given by the plaintiff is on the whole unsatisfactory, and does not satisfy me that any portion of the £157 has been paid in respect of the partnership. As between the plaintiff and the defendants the evidence of partnership is still more defective. It is true that the defendants paid the plaintiff £100, but that was by way of remuneration for his services in the export of the blankets. Had that amount been paid as share of the profit of the blankets the receipts would have shown that. Cohen and Carn were not such fools that they would not look after themselves and protect themselves if such a partnership existed. I do not think the defendants for a moment thought they were entering into a partnership with Lobascher. Some evidence has been given by a boy as to hearing some discussion about a partnership, but it is very difficult for a boy who hears a chance conversation to rehearse the particular words months after, and I do not place any reliance on that evidence. It appears to me that if there was to be a partnership at all, it was conditional on the plaintiff contributing his share of the capital, his he never did and consequently there will have to be absolution from the instance with costs.

[Plaintiff's Attorney: C. Brady; Defendants' Attorneys: Moore and Son.]



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS. { 1904.
 { Apr. 15th.

Mr. Gardiner moved for the admission of Philip Mason Passawer Percival as an advocate.

Application granted, and oath administered.

Mr. J. E. R. de Villiers moved for the admission of Jacobus Johannes Malherbe as an attorney and notary.

Application granted, and oath administered.

Mr. Searle, K.C., moved for the admission of John Joseph McGrath as an attorney.

Application granted, and oath administered.

Mr. Gardiner moved for the admission of William Kilfoil as an attorney. Counsel said that applicant had served the further period required by Court.

Application granted, oath to be taken before the Magistrate of Incobo.

Mr. W. P. Buchanan moved for the admission of William Charles Leonard Hedding as an attorney. Applicant was a Transvaal attorney, and the point was raised at the first application whether there had been any interval between service and admission in the Transvaal. An affidavit had now been sworn.

Mr. Gardiner said he had no instructions to appear at present on behalf of the Law Society.

The case was ordered to stand over till Thursday next, so that due notice may be given to the Law Society.

Mr. W. P. Buchanan moved for the admission of John Charles Ries as an attorney-at-law, notary public, and conveyancer.

Application granted, and oath administered.

Mr. Van Zyl moved for the admission of Johan Neppen as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Dordrecht.

Mr. Alexander moved for the admission of George Herbert Wilson as an attorney.

Application granted, and oath administered.

Mr. Rainsford moved for the admission of Cornelius Beneke, as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of Middeburg, C.C.

Mr. Rainsford moved for the admission of James Noel Fichat as an attorney and notary.

Counsel said there had been a break of three months in service on account of applicant being away on military service, but this had been more than made up.

Application granted, and oath administered.

Mr. Sutton moved for the admission of Vivian Lionel Kitton Murray as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of King William's Town.

Mr. Buchanan moved for the admission of Colin Alexander Malcomson as an attorney. Applicant was an attorney of the Courts at Dublin, Ireland, and now sought admission under the 19th section of the Charter of Justice.

Mr. Justice Buchanan remarked that a photograph of the applicant was attached to the papers, so that he supposed they would be able to identify the applicant.

Application granted, and oath administered.

Mr. Sutton moved for the admission of Charles Richardson Hime as a notary.

Application granted, oath to be taken before the Resident Magistrate of Butterworth.

Mr. W. P. Buchanan moved for the admission of Richard Davis Gately as a conveyancer.

Application granted, oath to be taken before the Resident Magistrate of East London.

PROVISIONAL ROLL.

PRITCHARD V. NEWMAN. } 1904
Apr. 15th.

Mr. Close moved for provisional sentence on a mortgage bond for £1,500, and also applied for judgment on a promissory note.

Judgment as prayed, the property declared executable, with only one set of costs.

HARRIES AND CO. V. HANIBALL.

Mr. Gardiner moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Circuit Court at Riversdale.

Order granted.

DIEPNAAM V. NEL.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond, and that the property specially hypothecated be declared executable.

Order granted.

ESTATE TAIT V. HRESEN.

Mr. Rainsford moved for provisional sentence on a mortgage bond for the sum of £700, with interest at the rate of 6 per cent. per annum from 26th January, 1903, and that the property specially hypothecated be declared executable.

Order granted.

SCHOEMAN V. POTGIETER.

Mr. Rainsford moved for provisional sentence on an agreement of sale for the sum of £300, with interest at the rate of 5 per cent. from November, 1903.

Order granted, subject to a stamp being affixed to the transfer form if necessary.

ANTESOOSKE AND OTHERS V. STEPHAN.

Mr. J. E. R. de Villiers moved for a decree of civil imprisonment upon an unsatisfied judgment for £156 and £7 2s. 3d. taxed costs, less £50 paid on account.

Mr. McGregor said he appeared in a similar application by one Wentzel against Stephan for £47 and costs.

Mr. D. Buchanan said he also appeared in a similar application by one Townsend against Stephan.

Defendant said he acknowledged the debts. He was a broker. He was prepared to pay £15 a month to each applicant. He had landed properties, but all were now under execution. He paid £5,250 for one property and for others he paid £3,150, £475, and £20 respectively. The bonds against the properties were about £8,000. He had no movable property. He had made £600 or £700 a year by brokering, but he had been ill, and had made nothing during the last six months.

Decree granted in each case, to be suspended upon payment of £15 per month to each plaintiff, first payment to be made on the 6th May, and further payments on the 6th of each month until capital and costs be paid.

ESTATE TAIT V. CILLIERS.

Mr. Rainsford moved for provisional sentence on two mortgage bonds for £250 and £1,750 (less £250 paid on account), due by reason of non-payment of interest; and for the property specially hypothecated to be declared executable, and costs.

Order granted.

BORMAN V. KETS.

Mr. P. S. T. Jones moved for provisional sentence on a deed of sale for £1,000, entered into between the plaintiff and the defendant, representing himself and two others. Plaintiff tendered transfer. There were three defendants, and one was called. Counsel asked for judgment against Kets to be postponed *sine die*, and for judgment against the other two for their *pro rata* shares.

Order granted as prayed.

JONES V. HEROLD.

Mr. Rainsford moved for provisional sentence on a mortgage bond for £500, together with interest and costs, and for the property specially hypothecated to be declared executable.

Order granted.

BUBB V. WEST INDIAN BUILDING ASSOCIATION.

Mr. D. Buchanan moved for provisional sentence upon a mortgage bond for £300, with interest, and for the property specially hypothecated to be declared executable, the bond having become due by reason of non-payment of interest.

Order granted.

NAUDE V. ROBERTS.

Mr. Struben moved for provisional sentence on a mortgage bond for £100, which had become due by reason of non-payment of interest, and for the property hypothecated to be declared executable.

Order granted.

SELLAR BROS. V. JACKSON.

Mr. Close moved that the provisional order of sequestration against the defendant be made final.

Order granted.

VAN ZYL AND BUISSINNE V. HARDY.

Mr. Upington moved for provisional sentence on a promissory note for the sum of £41 4s. 6d.

Order granted.

WIENAND V. DAVIDS.

Mr. Alexander moved for the final adjudication of defendant's estate as insolvent. The provisional order was granted on the 2nd April.

Order granted.

STEER V. VIVIERS.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for £25 14s.

Order granted.

HAMILTON V. ALBERT.

Mr. Close moved for provisional sentence on a certain cheque made out by the defendant in favour of the plaintiff, on which the bank had declined payment.

Order granted.

DE VILLIERS V. HONIKELSKY AND ANOTHER.

Mr. De Waal moved for the final adjudication of the defendants' estate. The order of provisional sequestration was granted on the 17th March.

Order granted, to apply only to the partnership estate.

WILEY AND CO. V. VAN DER SPUY.

Mr. M. Bisset moved for provisional sentence on a promissory note for £42 1s., together with interest and costs.

Order granted.

MORSEER AND CO. V. MORRIS AND CO.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for interest and costs, capital (£32 12s.) having been paid.

Order granted.

FRANK V. MELLON.

Mr. W. P. Buchanan moved for the discharge of a provisional order of sequestration.

Provisional order discharged.

GARLICK V. ZACKON.

Mr. J. E. R. de Villiers moved for a provisional order of sequestration to be discharged.

Provisional order discharged.

ZENDERBERG AND DUNCAN V. WEINTROB.

Mr. D. Buchanan moved for a decree of civil imprisonment upon unpaid costs amounting to £2 15s. 6d.

Decree granted.

SILBERBAUER, WAHL AND FULLER V. CAPES.

Mr. W. P. Buchanan moved for a decree of civil imprisonment upon an unsatisfied balance of judgment amounting to £55.

Decree granted.

ESTATE MARKS V. PENKIN.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Defendant appeared, but said he had no statement to make.

Order granted.

Mr. Buchanan then moved, on the petition of Mr. E. R. Syfret, in his capacity of trustee in the estate of Marks, for the appointment of a provisional trustee in Penkin's estate, with power to dispose of the perishable goods.

Order granted, Mr. Cilliers, of Somerset West, auctioneer, being appointed provisional trustee.

WEGE V. ALLY.

Mr. Le Roux moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

DUMINY V. GAMBA.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £1,000, less £340 paid on account, with interest, and for the property remaining under hypothecation to be declared executable, the bond having become due by reason of non-payment of interest.

Order granted.

WERSELS V. KYLE.

Mr. De Waal moved for provisional sentence on a mortgage bond for £800, also for the property specially hypothecated to be declared executable, and costs of suit, the bond having become due and payable by virtue of non-payment of interest.

Order granted.

DE BREYN V. LOXTON.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

METROPOLITAN ADVERTISING COMPANY V. TAYLOR.

Mr. Russel moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £17 5s. and £4 10s. costs. The defendant had approached the plaintiff and offered to pay the amount in four monthly instalments.

Order granted, but execution to be stayed on condition that the amount be paid in four monthly instalments.

ARDEENE V. BERMAN.

Mr. P. Jones moved for judgment on a mortgage bond for £455, and that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of interest.

Order granted.

ROUF BIR S. V. ZIN.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £2,000 and that the property be declared executable.

Order granted.

EVERETT AND ANOTHER V. ELLEN-BORGEN.

Mr. Upington moved for the discharge of the provisional order of sequestration.

Order granted.

**SYNKER V. ESTATE WESTER-
MAN.** { 1901.
{ Apr. 15th.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

CAVANAGH V. HANSEN.

Mr. Gardiner moved for the final adjudication of the defendant's estate.

Mr. P. S. T. Jones said he appeared as *curator ad litem* for the defendant, who was an inmate of the Valkenberg Asylum. There was a dispute in regard to certain property as to whether it belonged to the defendant or his son.

Buchanan, J., said that the defendant's estate would be adjudicated insolvent as prayed. The ownership of the property could be settled in the course of the insolvency.

Mr. Jones said that the defendant was wishful to go to Johannesburg, where he would be cared for by his sister. Counsel thought an expression of opinion from the Court would be of assistance to the medical superintendent.

Buchanan, J.: Defendant appears to be detained in the Asylum on a judge's order until the superintendent discharges him. The question of discharge seems to be left in the hands of the superintendent and the Colonial Secretary. It is far better for him to go to his relative if possible.

FREIDMAN V. BELLMAN.

Mr. W. P. Buchanan moved for a decree of civil imprisonment upon an unsatisfied judgment of £550, less £195 paid, and for £7 8s. 2d. costs.

The debtor said that he had paid until recently. The debt was a very old one. Things were bad. The business was carried on by his wife, who was a wholesale jeweller, and for whom he acted as manager. The matter arose out of a business he bought, and which had borne some bad debts. He gave a promissory note, and had paid £150 in interest. The promissory note was now being sued upon. He offered £5 a month.

Hopley, J. (to defendant): What is your estate?

Defendant: I have no estate.

Hopley, J.: Then if they send you to prison you can surrender that estate.

Decree granted, execution to be suspended on payment of £7 10s. per month, first payment to be made on the 15th May, plaintiff to have leave at any time to apply again.

STUTTAFORD AND OTHERS V. HENSON.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

Mr. De Villiers moved for the appointment of a provisional trustee in the interests of the creditors. The name of Mr. Thos. Herbert Hasell was suggested.

Order granted, Mr. T. H. Hasell being appointed provisional trustee.

**DISTRIBUTING SYNDICATE AND OTHERS
V. FRANK AND SHARP.**

Mr. Gutsche moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

STEYN V. VINK.

Mr. De Waal moved for provisional sentence on a mortgage bond for £450, and that the property specially hypothecated be declared executable.

Order granted.

HOTZ V. DU PLESSIS.

Mr. De Waal moved for provisional sentence on a promissory note for £110.

Order granted.

ESTATE SEDGWICK V. NORDEN.

Mr. M. Bisset moved for provisional sentence on a promissory note for £347 18s.

Order granted.

ARDERNE V. BOYCE

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £1,000, with interest at the rate of 6 per cent. from the 1st July, 1903.

Order granted.

ESTATE WISHART V. VAN MUREN.

Mr. W. P. Buchanan moved for provisional sentence upon a mortgage bond for £150 and £1 3s. 11d., being the amount of a premium paid by the plaintiff, and the property to be declared executable.

Order granted.

PRIEST V. HEAVEN.

Mr. M. Bimet moved for the final order of adjudication of the defendant's estate.

Order granted.

DE WAAL V. ANBERG. { 1904.
{ Apr. 15th.

Mr. De Waal moved for provisional sentence on a promissory note for £24 17s. 7d.

Order granted.

PLATE WALL SYNDICATE V. LIPMAN.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate.

Order granted.

KOSHER SUPPLY CO. V. GOLDBERG BROS.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendants' estate.

Order granted.

VERMAAK V. BUTCHUNSKY.

Mr. De Waal moved for provisional sentence on a mortgage bond for £650, and that the property specially hypothecated be declared executable.

Order granted.

ZEEDEBERG AND OTHERS V. MARGALIS.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate.

Order granted.

BOSMAN V. ROYSTOWSKI.

Mr. Le Roux moved for the final adjudication of the defendant's estate.

The defendant appeared in person, and said that he was willing to pay monthly instalments.

The matter was postponed for a week, the defendant in the meantime to try and arrange matters with the plaintiff.

WINNER AND CO. V. OMAR AND ANOTHER.

Mr. P. S. T. Jones moved for provisional sentence on a judgment of the Magistrate's Court for £55 4s. 1d. and costs £4 13s. 7d. The object of the present application, it was explained, was to have certain property mentioned in the summons declared executable.

Order granted, and the property declared executable.

NOODTSKOP V. TWINE.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £1,500, with interest, the bond having become due by virtue of non-paying of interest; counsel also asked for property hypothecated to be declared executable.

Order granted.

ALLY V. MOHAMED.

Mr. Le Roux moved for provisional sentence on a promissory note for £19 1s. 6d., with interest and costs of suit.
Order granted.

PORTER AND MAASDORP V. ALICE AND OTHERS.

Mr. Alexander moved for provisional sentence on a mortgage bond for £800, with interest, bond having become due by virtue of non-payment of interest; counsel also asked for hypothecated property to be declared executable.
Order granted.

HACKENBERG V. HACKENBERG.

Dr. Greer moved for provisional sentence on certain conditions of sale for £700, plaintiff tendering transfer, and also for interest and costs of suit.
Order granted.

ILLIQUID ROLL.

S.A. BREWERIES V. } 1901.
BLONSON. { Apr. 15th.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, on an account for goods supplied.
Order granted.

VAN DER BYL AND CO. V. BARNARD.

Dr. Greer moved for judgment, under Rule 319, sub-section (d) for £484 17s. 8d., for goods sold and delivered, with interest *a tempore morae* and costs.
Order granted.

EMBERSON V. MITCHELMORE.

Mr. M. Bisset moved for judgment by default, under Rule 330, for £105 for work and labour done, and costs.
Order granted.

TOWNSEND V. STEPHEN.

Mr. M. Bisset moved for judgment, under Rule 329d, for £525, less £25, money lent, with interest *a tempore morae* and costs.
Order granted.

LONGLANDS V. BUSCH.

Mr. Rainsford moved for judgment, under Rule 329d, for £33 4s., with interest *a tempore morae* and costs.
Order granted.

OHLMANSON'S LTD. V. WEINTMOB.

Mr. Gutsche moved for judgment, under Rule 329d, for £29 5s., for goods sold and delivered, with costs.
Order granted.

GORDON MITCHELL AND CO. V. VIVIERS

Mr. Sutton moved for judgment, under Rule 329d, for £921 on certain promissory notes, with costs.
Order granted.

PAROTT AND CO. V. PIERPOINT.

Mr. Sutton moved for judgment, under Rule 329d, for £42 4s. 2d., for goods sold and delivered, with interest *a tempore morae* and costs.
Order granted.

LE ROUX V. THEUNISSEN.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £25, due to the plaintiff under a deed of sale.
Order granted.

MILLS AND SONS V. VAN DER SPUIT.

Mr. Close moved for judgment, under Rule 319, for £152 2s. 9d., with costs.
Order granted.

GRAY AND SON V. STEPHAN.

Mr. Upington moved for judgment, under Rule 329d, for £84 18s. 6d., for work and labour done, with interest and costs.
Order granted.

TALANDA V. ABON.

Mr. W. Buchanan moved for judgment, under Rule 329d, for £18 2s. 1d., the amount of account rendered for goods supplied.
Order granted.

TABLE BAY HARBOUR BOARD V. MCKENZIE AND CO.

Mr. P. Jones moved for judgment, under Rule 329d, for £1,244 18s. 1d., outstanding account, and costs.
Order granted.

BUTLER V. O'DOWD.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £51, rent due, and costs.
Order granted.

KUCH AND DIXIE V. ROSS.

Mr. Close moved for judgment, under Rule 319, for £66 8s. 6d., with costs. Order granted.

LONDON COOKED HAM CO. V. SCHOLTZ.

Mr. W. Buchanan moved for judgment, under Rule 329d, for £51 8s. 8d., for goods sold and delivered, with costs. Order granted.

CAPE DIVISIONAL COUNCIL V. WALSH.

Mr. Russell moved for judgment in default of plea. The plaintiff's affidavit had been filed. Order granted.

ESTATE VAN RENEN V. VICKAR.

Mr. De Waal moved for judgment, under Rule 329d, for the purchase price of certain land at Plumstead. Order granted.

ARGUS CO. V. TAYLOR.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £50 10s., for work and labour done, with interest *a tempore morae* and costs. Order granted.

CITY FLOUR MILLS V. WURTH.

Mr. Alexander moved for judgment, under Rule 329d, for £161 16s. 11d., for goods supplied, with costs. Order granted.

COHEN V. CRAMER.

Dr. Greer moved for judgment in default of plea, under Rule 319, for £18 9s., money lent and advanced, and interest *a tempore morae* and costs of suit. Order granted, subject to the production of an affidavit of service.

GOLDBERG V. ODDIS.

Mr. De Waal moved for judgment, under Rule 329d, for £29 10s., for goods sold and delivered, with interest *a tempore morae* and costs of suit. Order granted.

ESTATE HUDSON V. WURTH.

Mr. Alexander moved for judgment, under Rule 329d, for £55, for rent, with interest *a tempore morae* and costs. Order granted.

WESTERN WINE, ETC., CO. V. McDONALD BROS.

Mr. Le Roux moved for judgment, under Rule 329d, for £113 10s., for goods sold and delivered, and £414 11s., balance of account for goods sold and delivered, with interest *a tempore morae* and costs. Order granted.

LENNON, LTD. V. LEWIS.

Mr. Close moved for judgment, under Rule 329d, for £46 1s. 5d. for goods sold and delivered, with costs. Order granted.

DE WAAL AND CO. V. BURGER.

Mr. De Waal moved for judgment, under Rule 329d, for £35 1s., for goods sold and delivered, with interest *a tempore morae* and costs.

SCOTT, LTD. V. HEINEMANN.

Mr. P. Jones moved for judgment, under Rule 329d, for £64 2s. 3d., for goods sold and delivered, with interest and costs. Order granted.

GRAAFF V. SYDOW.

Mr. M. Bisset moved for judgment, under Rule 329d, for £25, rent due, with interest *a tempore morae* and costs. Order granted.

REVIEW CASE.

REX V. GRIMAN.

1904
1 Apr. 15th.

Act 19 of 1861—Railway bye-laws.

Where a man was convicted of having been found intoxicated on Railway premises, having been previously convicted of drunkenness some six times within the previous year, and had thereupon been sentenced to twelve months' imprisonment: the sentence was reduced, on review, to one of 30 days' imprisonment or 40s.

Hopley, J.: A case has come before me for review, in which John Griman was charged before the Assistant Resident Magistrate of Cape Town with contravening the 9th section of

the Cape Government Railway bye-laws on the 4th inst. The said John Griman was found in a state of intoxication. That was clearly proved, and then some half dozen previous convictions within the previous year were proved against him. The Acting R.M. was under the impression—a wrong impression—that he was being charged with contravening section 9 of the Police Offences Act, and sec. 28 of Act 25 of 1891, and sentenced him to twelve months' imprisonment with hard labour. He, however, noticed that the charge had not been under the Police Offences Act, and he called my attention to it. It is clear that the bye-law in question only gives him the right to fine an offender in 40s. or send him to prison for thirty days' with hard labour. If the man had been charged under the Police Offences Act the conviction would have been a proper one; but he was not charged under that Act, and the sentence must be reduced to one of a fine of 40s., or thirty days' imprisonment with hard labour.

REHABILITATIONS.

{ 1904.
{ Apr. 15th.

Mr. W. Buchanan moved for the rehabilitation of Andries Stephanus Viviers. The applicant's estate was compulsorily sequestrated in June, 1899, and the deficiency was £993 15s. 10d. The trustee reported that owing to the deliberate false statements of the applicant, and the state he had kept his books in, it was difficult to know the exact position.

The application was refused, in face of the strong remarks in the trustee's report, the insolvent to apply again in twelve months.

Mr. De Waal moved for the rehabilitation of Hermanus Stephanus Bosman. The estate was surrendered in July, 1896, and there was a deficiency of £718. There was nothing in the trustee's report against the rehabilitation.

Granted.

Application was made for the rehabilitation of George Stephanus de Beer. The estate was voluntarily surrendered in February, 1883.

The matter was ordered to stand over *sine die*, for the production of a balance sheet.

GENERAL MOTIONS.

Ex parte LOTZ.

Mr. De Waal moved to make absolute a rule granted under the Derelict Lands Act.

Rule made absolute.

Ex parte DAVIDS.

Mr. W. Buchanan moved to make absolute a rule granted under the Derelict Lands Act on the 6th February.

Rule made absolute.

Ex parte DU TOIT.

Mr. J. E. K. de Villiers moved to make absolute a rule granted under the Derelict Lands Act on 16th March.

Rule made absolute.

Ex parte BEZUIDENHOUT.

Mr. W. Buchanan moved to make absolute a rule granted under the Derelict Lands Act on 2nd March.

Rule made absolute.

BUTLER V. BUTLER.

Mr. Gutache moved for leave to sue the defendant by edictal citation for a decree of divorce. The parties were married in London in June, 1886, and after being domiciled in this country, the defendant went to England, and took with her an only daughter, and the applicant had not seen her since 1897. He had reasons to believe that the defendant was at present in Chicago.

Leave granted, personal service to be effected, returnable on 18th July, and notice of trial to be served with the citation.

INSOLVENT ESTATE ELFERT AND CO.
AND OTHERS V. ELFERT.

This was an application for an order declaring the applicants entitled to the possession of certain premises situated near Humansdorp. Mr. Schreuer, K.C., was for the trustee; Mr. Upington appeared for the respondent, and Mr. Searle, K.C., for the other co-respondent, the London Missionary Society.

An order was granted as between the trustee and the insolvent, the trustee being declared entitled to the lease entered into on the 10th February, 1902, as an asset of the insolvent estate, without prejudice to any rights the insolvent may have to crops growing on that land. The charges entailed in recovering this asset to be a first charge on the estate, and the costs of the London Missionary Society to come out of the insolvent estate.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

MOORE V. MOORE. { 1904.
Apr. 18th.

This was an action brought by May Charlotte Moore, of Cape Town, against her husband for restitution of conjugal rights, failing which divorce.

The declaration stated that the parties were married by ante-nuptial contract, but there had been no issue of the marriage, and that the defendant in June, 1901, wilfully and maliciously deserted plaintiff.

Mr. J. E. De Villiers for plaintiff. Defendant in default.

Charles W. H. Smith, clerk in the office of the Colonial Secretary, produced the register of the marriage on the 20th June, 1899.

The plaintiff, May Charlotte Moore, said that she was a minor at the time of the marriage. She had some money, which she settled in the ante-nuptial contract with the General Estate and Orphan Chamber upon herself and afterwards any children of the marriage. After the marriage defendant left his employ in the Post-office. He was of intemperate habits, and ill-treated witness. In July, 1901, the defendant left for the front, and she lost all trace of his whereabouts for a while. She saw him again in January of last year, but he declined to acknowledge her. Her brother had informed her that the defendant was in Johannesburg. There was no issue of the marriage.

By the Court: The defendant was a draughtsman and surveyor.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th June, failing which the defendant to show cause on the last day of next term why a decree of divorce should not be granted, with forfeiture of the benefits under the ante-nuptial contract, and costs of service to be similar to citation.

Postea (July 14th.)

The rule was made absolute.

ACKERMANN V. ACKERMANN AND ANOTHER.

This was an action brought by B. E. Ackermann, of Stellenbosch, against his wife, for divorce by reason of her adultery with one Walter Loch, for forfeiture of the benefits of the marriage, and cus-

tody of the four children of the marriage. Mr. J. E. R. de Villiers appeared for the plaintiff; the defendant was not represented.

Chas. W. H. Smith, clerk in the Colonial Office, produced the register of the marriage.

B. Edouard Ackermann (the plaintiff) said that there had been nine children of the marriage, of whom four survived, all daughters. During the marriage the defendant had always been opposed to him; she was always accusing him of bad conduct with coloured women. In August last they agreed to separate. His wife kept a boarding-house. He went to live in the Transvaal and elsewhere. He had not lived with his wife since August last. He had been to ask her to come back to him, but she told him he must not put his foot on her stoep. She told him that she would either shoot or poison him if he did, and that if she did not do it herself she would get others to do it.

Johanna Katherina Ackermann, daughter of the plaintiff, said that she remained at the boarding-house with her mother between August and December last. She then left, and went to live with her father. The reason was that she did not think her mother was setting a proper example to her. Her mother frequently visited the room occupied by a boarder named Loch, and witness had seen her there under compromising circumstances.

Another daughter of the plaintiff also gave corroborative evidence as to the relations of the defendant and Loch.

Order granted in terms of declaration.

GLASS V. GLASS.

This was an action brought by Agnes Glass, of Cape Town, against her husband, Herman Glass, of no fixed address, for restitution of conjugal rights, failing which divorce.

The plaintiff's declaration said she was married to the defendant in London in 1887. In 1896 they came out here together. They were not happy together in this country. In November, 1903, the defendant wilfully and maliciously deserted her.

Mr. Buchanan for plaintiff; Defendant in default.

Plaintiff stated in evidence that she was keeping a boarding-house at that time. When he left her he said he was going away, and would never come back. She received a letter from him at Aliwal North. The letter was in German, and said that the writer (the defendant) had met with an accident, and was lying in the train with fractured ribs. She afterwards heard from him at Steynsburg and Port Elizabeth. The defendant was travelling with Texas Jack's Circus. The defendant in certain letters alleged that witness

was living in bad company. This she denied entirely. They had saved up together and purchased property. He had sold the property, but witness had received no share of the proceeds. There was one child of the marriage, a girl aged 15 years.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th June, failing which a rule granted calling upon the defendant to show cause on the last day of next term why a decree of divorce should not issue, with costs, and with forfeiture by defendant of the benefits of the marriage, and why plaintiff should not have custody of the child, rule to be served personally on the defendant.

Postea (August 25th). The rule was made absolute.

HENDRICKS V. HENDRICKS. { 1904.
Apr. 18th.
22nd.

This was an action brought by John Hendricks, of Wynberg, against his wife for restitution of conjugal rights, failing which, divorce. Mr. Alexander was for the plaintiff; Mr. Rainsford was for the defendant.

Mr. Rainsford applied for a postponement on the ground of the absence of material witnesses. The defendant, in reconvention, claimed for divorce on the ground of plaintiff's adultery with one Jacoba Wessels. Plaintiff had been convicted in the Magistrate's Court at Wynberg of abducting the said Jacoba Wessels. The bar was only removed on Friday last, and counsel had been unable to receive full instructions.

Mr. Alexander urged that it would be inadvisable to pile up unnecessary expense. Defendant was suing *in forma pauperis*.

De Villiers, C.J., said that he would hear the plaintiff's witnesses, and any others who might be in Court.

The declaration set out that the plaintiff was married to the defendant at Trinity Church, Cape Town, in 1882, in community of property. There had been three children of the marriage. In May, 1903, the defendant maliciously deserted plaintiff, and had not returned to him.

Defendant, in her plea, admitted having left the plaintiff, and said that the reason why she did so was on account of his cruelty and insobriety. She claimed in reconvention a divorce by reason of his adultery with Jacoba Wessels, in July, 1903, and divers other persons.

Plaintiff, in his replication, denied the allegations of cruelty, insobriety, and adultery.

John Hendricks, the plaintiff, an employee at the Salt River Works, said they were married in 1882 at Trinity Church, Cape Town. There had been

three children. Two of them (girls) were now married. Witness spoke of the differences which occurred between himself and his wife. He denied the charges of insobriety. Witness's attorney had received a letter from the defendant, in which she said that the plaintiff had been a curse to her ever since she had been married to him, that she did not intend to live with him again, and that no law in the world would compel her to do so. He denied the alleged adultery with Jacoba Wessels.

Cross-examined: He was fined £10 in July last year, in the Magistrate's Court at Wynberg, for abducting one Jacoba Wessels. He denied the girl's story that she slept with him on two nights. He had not assaulted his wife. She had not left him because of his cruelty towards her. His wife kept the doings of the children from him, and she could not bear to be spoken to.

Re-examined: With regard to Jacoba Wessels, he took her as a servant without her parents' consent.

Mrs. Byfield, a nurse, repudiated an allegation that the plaintiff had committed intimacy with her while she was living at his house along with her mother.

Mrs. Winkie, mother of the last witness, gave corroborative evidence.

Mr. Alexander closed his case.

The defendant, Helen Hendricks, said she left her husband on the 6th May last year, on account of his unkindness and cruelty towards her. He came home in a drunken condition, and assaulted her. She went away to Port Elizabeth by the following mail. She had left plaintiff on previous occasions, on account of his insobriety. She declined to return to him on account of the case in the Magistrate's Court. She had had to complain previously about the relations of her husband and Jacoba Wessels. She denied that there had been any trouble between her husband and herself with regard to one Clarke paying attentions to her daughter Frances.

Cross-examined: She admitted writing a letter to Clarke, in which she asked him to tell some untruths in regard to his courtship with her daughter. She had made up her mind that she would live no longer with the plaintiff after her daughters were married.

By the Court: Witness was at present in service as a housemaid.

Mr. Rainsford said he proposed to call Jacoba Wessels and another witness, but they were not at present in attendance.

The case was postponed until Friday, pending production of further evidence for the defendant.

Postea (April 22nd).

Jacobus Johannes Wessels, clerk in the Resident Magistrate's Court at Wynberg, produced the record of the abduction case of Rex v. John Hen-

dricks, tried in the said Court in July last.

Jacoba Wessels, a single girl, of Good Hope-road, Wynberg, said she knew plaintiff. She remembered one Saturday night in July last. She met the defendant. That night she went to his house and stayed until Monday. She slept with the defendant. Improper relations took place. He did not ask her to be his servant, though he told her that if she was asked she must say she was his servant. Defendant did not let her go on Sunday.

Cross-examined: She had had a quarrel with her mother that night.

George Hunt, police constable, Wynberg, also gave evidence as to arresting the plaintiff on the charge of abduction, and finding the clothing of the girl Jacoba Wessels in his room.

George Vyness deposed that about two months ago he had a conversation with plaintiff at his (witness's) house. Plaintiff, referring to the case, said, "I am in a hole—of a hole with another female." A few days later plaintiff brought up the subject again. He said he had a good mind to sell up and clear out. He also said he had bought a bottle of gin for a married woman, with whom he stated that he had misconducted himself.

Cross-examined: Witness could not remember the exact day on which this conversation took place. The statement was made in front of witness's wife.

Mrs. Clara Vyness stated that witness spoke to her husband in her presence about his being in trouble with a certain woman.

The plaintiff, questioned by his Lordship, stated that he had no property.

Counsel having been heard in argument on the facts,

De Villiers, C.J., said he thought that the plaintiff required a considerable amount of assurance to bring this action. Taking all the circumstances into consideration, he felt certain that the adultery with Jacoba Wessels had been proved. Judgment would be for the defendant (Mrs. Hendricks) on the claim in convention, as well as on the claim in re-convention, plaintiff to pay costs of suit.

PHILPOTT V. PHILPOTT AND ANOTHER.

This was an action brought by Alpheus Charles Philpott, of Observatory-road, against his wife for divorce, on the ground of her adultery with one Holzrichter, against whom damages were claimed in the sum of £1,000.

The declaration set out that the plaintiff was married in community to the first-named defendant, who was domiciled in this colony on the 29th August, 1902, in the county of Gloucester, England, that they subsequently came out to this colony, that the first-named defendant left the plaintiff in July, 1903,

at the instigation of the second-named defendant, that the defendants had committed adultery at Cape Town, East London, Woodstock, and diverse other places, and that they were now living and cohabiting at 33, Kloof-street, Gardens, Cape Town. Plaintiff claimed as against the first defendant a decree of divorce, forfeiture of the benefits of the marriage in community, and alternative relief, and as against the second-named defendant, £1,000 damages and costs of suit.

The second-named defendant, in his plea, said that the plaintiff failed to support his wife, and caused her to maintain herself. The plaintiff grossly and brutally ill-treated the first-named defendant, used coarse and violent language towards her, threatened her with a razor, and as a consequence it was dangerous and impossible for her to live with him. In December, 1903, the second-named defendant cohabited with the plaintiff's wife. He tendered £50, together with taxed costs, as and for damages sustained by the plaintiff. In reconvention, he claimed £500 damages from the plaintiff for a scandalous and defamatory libel committed by the plaintiff in saying that he (the second-named defendant) married the first-named defendant at East London. The plaintiff, in replication, said the tender was not sufficient, and denied the allegations in the plea, and having made use of the words set out in the claim in reconvention.

Mr. Buchanan for plaintiff; Defendant in default; Co-defendant in person.

Mr. Buchanan said that a commission was granted to take the evidence of the people in whose hearing the libel was said to have been uttered, but at the last moment the second defendant did not proceed with the commission. He, therefore, supposed that the claim in reconvention would practically fall to the ground.

Alpheus Charles Philpott, the plaintiff, said that he and defendant were married in August, 1902, in the county of Gloucester, England. He came out to the Colony, and went back and married the first defendant. He brought her out with him, and they arrived here in September, 1902. Witness was a fitter and mechanical engineer. They lived at Observatory-road. His wife went out to business in Salt River. He earned between four and five guineas a week. She afterwards went as a barmaid at the Metropole Hotel against his wish. The second defendant (Holzrichter) apparently met her there. He wished to make friends with witness, but witness declined. Witness supported his wife; he denied that he had used violent or threatening language towards her. After his wife had been at the Metropole about a week, he found that the second defendant was waiting for her. His wife subsequently said she was going

away. His wife told him that Holzrichter had given her money to go to Johannesburg. She went away to Worcester by the ten o'clock train. Witness went also to Worcester, and prevailed upon her to come back to Cape Town. She afterwards went to the Metropole again, and Holzrichter came into association with her again. He afterwards received a letter from her when she was going away to East London with the second defendant.

His Lordship: What is Holzrichter's occupation?

Witness: As far as I can see, he is a remittance man. I am told he is getting between £50 and £60 a month. Continuing his evidence, witness said that he had been to 33, Kloof-street. He saw the second defendant there. He saw the two defendants come out of the house together on Friday, Saturday, and Sunday.

Alfred Ernest Rix, of Claremont, formerly of Rochester-road, Observatory, said that Mr. and Mrs. Philpott formerly lodged with him. The plaintiff paid his way along. He did not notice any ill-treatment by the plaintiff of his wife; in fact, plaintiff seemed to be very fond of her.

Maria Valman, servant, employed at 33, Kloof-street, Gardens, said that the second defendant lived with a lady in one room in the house.

The Court directed the witness to go to the Fountain Hotel along with the plaintiff to ascertain whether the plaintiff's wife, who was employed there, was the lady who was staying with the second defendant in Kloof-street.

Holzrichter said that intimacy began a fortnight after the plaintiff's wife returned from East London. He was a single man. He had about £1,800, which he received about eight months ago. He speculated rather heavily, and had lost everything. He did not receive a remittance from Home. He admitted giving the plaintiff's wife a ticket to Johannesburg and £5, so that she should procure a situation in Johannesburg.

Cross-examined: He also gave a ticket for Johannesburg and £5 to another lady, Mrs. Kental. Witness did not go to Johannesburg; he did not intend to do so. He believed the first defendant was a good girl. She complained bitterly to him about her husband's treatment, and implored him to help her.

The witness Valman (re-called) said that Mrs. Philpott was the lady living with the second defendant.

The plaintiff (recalled) said he lived happily with his wife until she made the acquaintance of Holzrichter.

Decree of divorce granted against the first defendant, and judgment given for the plaintiff for £200 and costs against the second defendant (Holzrichter).

COHEN V. RAWBONE. { 1904.
Apr. 18th.

Agency—Broker—Remuneration —Net price.

The plaintiff, a broker, learning that the defendant had a property for sale, inquired for what price he would sell, and was informed that the price was £12,000 net. The plaintiff introduced to the defendant a seller, who had, however, been previously introduced by L., another broker, and the sale was ultimately effected through the agency of L. for £12,000.

Held, that even if the plaintiff could be regarded as the defendant's agent, and as the person, through whose agency the sale was brought about, he could not claim any remuneration, inasmuch as the only authorized price was £12,000 net.

This was an action brought by Abram Cohen, broker, Cape Town, against William Rawbone, gun maker, Cape Town, for £300, brokerage upon the sale of certain property situated in Somerset-road.

The declaration was to the effect that in April, 1902, the defendant placed certain landed property in Somerset-road, Cape Town, in plaintiff's hands for sale for £12,000. Thereafter plaintiff introduced one Kraemar, of the Castle Wine and Brandy Company, to the defendant as a probable purchaser, and in September, 1902, the property was sold to Kraemar for £12,000. Plaintiff claimed 2½ per cent. brokerage on the purchase price, as the sale was effected as a result, and in consequence of his introducing Kraemar to the defendant.

The defendant, in his plea, denied that the plaintiff introduced Kraemar to him, and said that the sale was effected by a broker who had negotiated with Kraemar prior to April, 1902, when the plaintiff alleged he introduced Kraemar to the property. He denied that the sale took place as a result of and in consequence of the plaintiff's introduction.

Mr. Searle, K.C. (with him Mr. Alexander) for plaintiff. Sir H. Juta, K.C. (with him Mr. Russell) for the defendant.

Abram Cohen, broker, Cape Town, said that he went over the property with Mr. Kraemar, who offered £10,500 for it. He saw Kraemar, who afterwards offered £11,000. Witness saw Mr. Rawbone, who said he would not take less than £12,000. He went backward and for-

ward to see if he could do the business between them. Mr. Rawbone, when he disclosed the name of his client, said he did not know those people. The negotiations continued until August, when Mr. Rawbone told him he had sold the property, and he was sorry that he could not pay his brokerage, and that he must fight Kraemar for that. He induced Kraemar to buy the property at £12,000. He was not informed about any other broker being engaged in the matter. Subsequently Rawbone informed him that if there was any trouble about it he would cancel the whole thing. Rawbone also told him that if he went into court he (Rawbone) was not concerned, because he was secured by Kraemar.

By the Court: The reason why the case had not been brought earlier was that they were extremely busy with brokerages during the boom, and then the defendant went away to Europe.

Cross-examined by Sir H. Juta: Times had become bad recently, and he was then able to proceed with the action. The property was known as Kimberley Villa. He would be surprised to hear that two other people took Mr. Kraemar over the property before he (witness) appeared on the scene. Kraemar told him that he had never seen the property before. The highest offer witness elicited from Kraemar was £11,000. Rawbone distinctly told him that his price for the property would be £12,000, less 2½ per cent. brokerage. If other people introduced Kraemar to the property before witness did, they would be entitled to the brokerage.

Wm. Rawbone, defendant, stated that prior to 1902 he was the owner of Kimberley Villa. Originally his price was £10,000 net, and several brokers had seen him about the property. In the early part of 1902 he wanted £12,000 net, and Cohen understood that if he got £12,500, he was quite welcome to take the balance. It was after he had seen Lewis that Cohen came to see him. Cohen never made an offer of £11,000. The position he took up was that his terms were net.

Cross-examined by Mr. Alexander: He might have shown Cohen over the property in April, but he never knew that he was a broker. Mr. Kraemar would really be responsible for the defence in the case. Cohen was the only man to mention Kraemar's name to him.

This closed the case for the defendant, and Mr. Alexander having been heard in argument,

De Villiers, C.J.: In order to entitle the plaintiff to the commission claimed, he must prove first that he had been employed by the defendant as his agent to sell the property; secondly, that the sale was effected through his agency; and thirdly, that the sale was effected under such cir-

cumstances as entitled him to remuneration for his services. In regard to the first point, it is by no means clear to me that the plaintiff had been employed as the agent of the defendant to sell the property. If a person, knowing that another person has property for sale, goes to him on behalf of an intending purchaser, and asks him whether the property is for sale, and then purchases it, surely he could not obtain a commission for having acted as the agent to the seller? In the present case I am not satisfied that the agent was more than the agent for the purchaser. On the 2nd April he says: "I hear my client, Mr. Kraemar, of the Castle Wine and Brandy Company, for whom I made the offer yesterday." He does not say he is the agent of the defendant, but he speaks of himself as the agent of the purchaser. It is doubtful whether the plaintiff was the agent of the defendant at all, but for the purposes of this case I will assume that the plaintiff, along with other brokers, had received the general authority to sell the property on behalf of the defendant. The second point is, was the sale effected through the agency of the plaintiff? It has been argued that there was an introduction by the plaintiff of Kraemar, and that it was after that the sale took place; but before the plaintiff approached Kraemar another broker had introduced a purchaser, namely Lewis, and ultimately the sale was effected, not through the immediate agency of the plaintiff, but through the agency of Lewis. It is clear from the evidence that if the plaintiff had never appeared upon the scene the sale would have been effected, because Lewis had first introduced the purchaser, and ultimately Lewis did effect the sale. It is impossible, therefore, to say that in consequence of the introduction by the plaintiff the sale took place. But then, there is the third point still, and it is this: Did the sale take place under such circumstances as entitled the plaintiff to his commission? Now, I quite agree with Mr. Alexander that under ordinary circumstances a broker when nothing else is said is entitled to the ordinary and usual commission, which, in cases of this kind, is 2½ per cent. But where the vendor at the time makes it clearly understood that he will only sell if he gets a definite price free from any commission the agent clearly cannot claim a commission. The defendant said he wanted £12,000 nett. The question of remuneration was not expressly mentioned but it was understood that as the defendant required £12,000 nett the plaintiff could only earn a remuneration by selling at a higher price. If he obtained a buyer at all it was for £12,000 and this amount he knew the defendant required in full and therefore even if the plaintiff had succeeded on the two first grounds he would have failed on

the third. The judgment of the Court must be for the defendant with costs. [Plaintiff's Attorneys: Van Zyl and Buisainé; Defendant's Attorneys: Moore and Son.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

RIVAS V. BLACK. { 1904.
Apr. 18th.
" 19th.
" 20th.

Architect—Levels—Neglige ice.

This was an action brought by Philip Anthony Rivas, of Sea Point, against William Black, architect, Cape Town, to recover £421, for negligence or want of professional skill in connection with certain plans for the erection of an iron railing round the plaintiff's property.

The declaration set out that in the month of November, 1902, plaintiff instructed the defendant to prepare plans for the erection of a wall round his property, Bellevue, Sea Point. The defendant furnished the plans, showing the levels at which the wall was to be erected. Later it was decided to erect an iron fencing instead, and the plans were taken to England by the plaintiff to have the fence constructed. The railing was constructed, and a competent contractor was employed to erect it. It was then discovered that the levels supplied by the defendant were incorrect, and the work was useless, and it was necessary to take down and readjust the fence at a cost of £321. The inconvenience and loss to the plaintiff amounted to £100.

The plea denied that there had been any instructions with regard to a railing or fence. The defendant admitted that he had instructions for a certain brick wall and entrance gates. Defendant took approximate levels for the iron railing, and plaintiff was well aware that they were only approximate. Defendant denied that the fence was constructed according to the plans. The readjustment was caused through the work being performed by an incompetent contractor, and the railings not being constructed with adjustable joints. The defendant tendered to superintend the work by a competent contractor free of charge.

Mr. Searle, K.C. (with him Mr. Upington) for plaintiff: Mr. Gardiner (with him Mr. Van Zyl) for defendant.

Philip Anthony Rivas, plaintiff, stated that his house Bellevue was between the High Level-road and the Main-road. The

house was really between four roads, two of which were not yet made. In November, 1902, he asked the defendant to prepare specifications for a brick wall to go round the property, with the exception of the High Level-road. The defendant called for tenders, which were very high on account of the high price of material. Witness decided not to have the wall, but to have an iron fence, and defendant, in reply, said that the plans for the former would suit when he sent a man out to give the proper levels, so that he could not make a mistake. The fence was constructed in England to suit the hillside. Witness took the plans to England, and had the iron railing constructed and shipped there by one of the best firms for the sum of £400 approximately. Witness came back to South Africa in March, and the railing, with the construction plans, had already arrived. Mr. Wight was employed to erect the fencing. The defendant never told him that the plans were approximate, nor did he say anything about adjustable joints. Witness had no contract with Mr. Wight, who was paid so much a day. The work was commenced from the Bellevue-road, where a concrete foundation was laid with graduated steps for the reception of the iron railings. Witness went to England again, and returned about December, but in the meantime he heard that the work had been stopped. When he came back, about two-thirds of the work had been done, but he found that portions of the fence were buried, and then he heard that the defendant's levels were entirely wrong in comparison with the Municipal levels. For a considerable distance they were out between two and three feet, and in one instance over five feet. The defendant had stated that he had never seen the man who took the levels. He had been put to a great loss by the delay, as he could not proceed with the development of his property.

Cross-examined by Mr. Gardiner: He could not say whether the pencil marks were on the plans when the defendant handed them to him. The defendant said that the first plans for the wall were approximate levels. He had got an idea of how to take levels, but he did not tell Mr. Black that he could take them himself. The defendant never mentioned anything about municipal levels, or that he would have to get adjustable joints, as the municipal levels had not been taken. Wight was more of a workman than a contractor, and although he was competent to construct a billiard-room, witness would not say that he was able to erect the stone wall. He had found that, although Wight's levels were correct, he encroached on the roadway with the foundation. It would have been absolutely impossible to readjust the whole fence by reboring. Wight did not start the construction from the wrong point.

Re-examined by Mr. Searle: He had tried to get the iron railing altered, but he found it would cost him such a considerable sum that he decided to abandon it in favour of a brick wall.

Richard Henry Heward, Municipal Engineer at Sea Point, stated that in August, 1903, he visited Bellevue, Sea Point. The work was not properly done, the entrance gate being 2 feet 6 under the ground. There was a difference between the existing levels he had taken and those of the defendant. Within a couple of days of the discovery of the error he had the road surveyed for a municipal level. The defendant would have had no difficulty in November in getting a plan from the Municipality. Mr. Wight was a very conscientious worker, and, as a rule, was very correct. The new wall had been set back. So long as the concrete foundation was underground, there would have been no objection on the part of the Municipality to it encroaching on the roadway.

Cross-examined by Mr. Gardiner: He had about twenty-eight years' practice as an engineer. He was not a member of the Institute of Civil Engineers, but he had served his time as an architect. Witness had taken the levels from the middle of the road, but there would have been very little difference between these and those taken by the defendant along the boundary.

James Just Riven stated that he saw the plans of Messrs. Bayliss and Co. and those of the Municipal Engineer. Witness himself had also made a plan. The defendant's levels did not correspond with the Municipal levels or the existing levels. The average difference between the existing levels and those of the defendant was 2 feet 6 inches. The work done by Wight was, practically speaking, according to the defendant's levels. According to the defendant's plan, the gateway would be 1 foot 10 inches below the surface. It was the duty of the defendant to prepare proper levels before he submitted plans.

Cross-examined by Mr. Gardiner: Whoever supplied the plans should prepare the levels for the Municipality. Mr. Heward had prepared the levels for his plans, and if the former were wrong, witness's would be also. Mr. Versfeld's plan was incorrect if it showed that Wight had not followed the defendant's levels.

John Wight stated that he constructed the fencing according to the levels of the defendant. It would not have made any difference whether the construction was fitted with adjustable joints or not.

Harry Tidawell, contractor, said that, on account of the extra excavations on the Bellevue-road, he had to add £162 to his contract for the brick wall.

Mr. Searle closed his case.

William Black, the defendant, stated that he found after making comparisons that the levels were approximately correct. They were within .79 of a foot of the levels of the principal witness for the plaintiff. He conscientiously believed none of the pencil marks were on the plan when it left the office. The plaintiff was aware that the levels would have to be adjusted according to the Municipal levels. It was the custom to submit the plans and levels to the Municipality. The plaintiff was told that he should get adjustable joints so that the fence could be raised or lowered. The ground was very rough, and until it was cleared it would be difficult to take accurate levels. Wight started to erect the fence to the level of the gutter instead of the crown of the road, and had he come to witness, the whole thing would have been right. Mr. Heward's plans were incorrectly taken from the middle of the road. Any competent contractor would set out the whole fence before starting with excavations. The cause of the fence coming down was another instance of bad workmanship. If a sample of the concrete were placed in water, it would soon be in mud. The construction should have been covered by £45, as it was done by Wight. To reconstruct the work after Wight's failure would have cost about £60.

Cross-examined by Mr. Searle: He brought Wight to the plaintiff's notice when the billiard-room was being constructed. At the time he was asked to prepare levels for the fence, the plaintiff understood that they were only approximate. It would have been impossible for witness to have obtained the Municipal levels previous to the plaintiff's departure to England. The plan was sufficiently accurate for the purpose. Witness did not mark "for adjustable joints" on the plan. The Court would see in comparing the engineer's plan with his own that the former was taken too low. The sole cause of the fence blowing over was indifferent construction. Mrs. Rivas and Wight told him that the work only cost £71, and the plaintiff came into the office on a game of "bounce," and demanded £170. Unfortunately he could not help thinking that the whole case was a conspiracy to rob him. The plaintiff should have been interdicted by the Municipality from encroaching on their boundary.

Willem Versfeld, Government land surveyor, said that he found a difference of 13 inches in his levels and those of the defendant, but that would make very little difference in the erection of the fence. Wight had not followed Black's levels, and witness had prepared a plan to prove this.

Cross-examined by Mr. Searle: Because Wight had not taken a point in the road, the great difference occurred.

He only took the two boundaries, and did not, on account of the excavations, take the intermediate points.

W. D. Wunder, who took the levels for the defendant, denied having any conversation with Wight, beyond remarking to the latter that it was a "sad job." He started his level from the highest point in the High Level-road, and marked the point "A."

Cross-examined by Mr. Searle: He did not specially go to see Wight; he went to see the fence. Witness asked to see the plan, but Wight said he had not got it. He did not say that within the time he could not take accurate levels; he thought approximate levels were sufficient for the purpose. Witness admitted that he told Mr. Wight he was in a bit of a hurry. When he handed the plan to the defendant there were no pencil marks on it.

Ernest Petersen, civil engineer, said his special line was street buildings. He saw Mr. Black's levels, and he thought the plans were sufficient for the manufacturer in England. Assuming that the plans had been misread in England, and that the same mistake had been as that of the contractor, the whole thing could have been made right by altering two panels at the expense of £10. Had he taken the job in hand, he would soon have noticed if there was a mistake in the starting point. When Wight had started digging a trench, he should have noticed at once that he was wrong, and it was his duty to at once seek further advice from the architect.

Cross-examined by Mr. Searle: Even with 13 inches, it would be necessary to have adjustable joints. He saw the fence after it had been erected, and he thought very little judgment had been exercised in its construction, in fact, they were tunnelling instead of erecting fences.

Alexander Armstrong, engineer, stated that he thought Mr. Black's plan was sufficient for manufacturers in England. He agreed with the last witness that even if the plan had been misread in England it could easily have been re-adjusted. If he had the contract he would make sure of the starting point.

Cross-examined by Mr. Searle: He had never done any fencing work himself.

Francis Drake, member of the Association of Civil Engineers, said that he found the defendants levels almost correct, and absolutely sufficient for the construction of the fence, and for the erection of it. He was sorry for the man's reputation who put up the fence. The contractor could not possibly have followed the levels. Witness would not have been two hours on the job before he would have found out that the levels were wrong.

Cross-examined by Mr. Searle: He had taken levels every twenty feet, but he had not retained any documentary statement of them. The engineers in Eng-

land would have required to know every particular about the environment irrespective of the plans before they constructed the fencing.

Geo. Pallitt, builder and contractor, said that there was quite sufficient information in the defendant's plan to guide him in the erection of the fence except that he would want to know the boundaries. If he found that he was getting into a trench he would go to the owner or the architect. If he had noticed that the English engineers had made a mistake in the boundary, he could have readjusted it correctly for practically nothing.

Cross-examined by Mr. Searle: If it was only a question of 13 inches in the 400 feet length it would have been a very easy matter to adjust the fence.

Robert Blackburn, contractor, stated that he would have erected the work done by Wight for £55. Witness offered to take it down and put the whole thing right for £65.

Cross-examined by Mr. Searle: He gave a tender in writing to that effect to Mr. Black.

Postea (April 20th).

Mr. Searle was heard in argument on the facts, and without calling on Mr. Gardiner.

Hopley, J., said that, although his mind had fluctuated a good deal during the course of the case from the view he now took, it would be unnecessary to hear counsel for the defendant. While one could not help feeling for Mr. Rivas for the considerable loss he had suffered, the question the Court had to determine was whether the defendant was the person in law responsible for it. No actual instructions had been given to the defendant to prepare plans for a railing or fence in November, 1902, but thereafter, at the plaintiff's request, the defendant furnished him with levels for an iron fencing to be constructed in England. The defendant said that he warned the plaintiff that the levels were only approximate, and that the iron fencing would have to be constructed with adjustable joints. What actually had to be decided in the case was whether the defendant, having undertaken to furnish the plaintiff with levels, did reasonably carry out that contract and furnish him with proper levels of his ground. The defendant said he would send a competent man to do the work, and nothing had transpired in the case to show that Wunder was an incompetent man, or that he did his work in an incompetent manner. He took levels in the ordinary sort of way, and one professional man after another stated that his levels were not by any means wrong. The plaintiff might have thought that he knew all about the plan, and might have given information to the engineers in England, and if no information was given to them he could not understand how they could have acted upon the as-

sumption that the point "A" was necessarily the correct one. A firm like Baylis would necessarily have asked which was the right point to start from, and someone must have told them to start from "A." Going on the line of the level itself, and scaling it from the point "M," as the bottom boundary, it would be found that the end of the boundary would come not to "A," but very nearly to "B." The whole of these unfortunate damages resulted from the assumption that "A" meant the boundary, and through the defendant not asking for more particulars from the Municipal Engineer or from Mr. Black before the fence was constructed. He was convinced by Mr. Versfeld that the levels were fairly enough given, and that the fence should have been adjusted to the actual ground, or what the actual ground would be when the road was properly made, and all that could have been done at very small expense. The assumption having been made in England, the fence was constructed slightly wrongly; but when the fence came out, it was not a useless fence. If Mr. Rivas had done his duty, he would have sent in a sketch, and the whole thing would have been corrected before anything had been done. The rule 215 of the Municipal Regulations required persons intending to erect or add to or alter their building to give notice in writing, and forward plans showing levels and foundations to the Council. That obligation rested upon Mr. Rivas, as the person going to put up a structure. It was true that such work was ordinarily done by the architect, and if Mr. Rivas on his return had said to Mr. Black that he had got the fence, and asked him to draw up the plans and get the proper leave from the Municipality, Mr. Black would have seen how it stood, and drawn the structure, and got the proper levels. It only meant a change in the cement work, and perhaps the lengthening of some standards, or some bays, and might have been done for a very small additional expense. Even had Mr. Rivas not chosen to go to Mr. Black, but had gone to the engineer of the Municipality, he would have started at the proper levels, and all the excavations and the expense would have been rendered unnecessary. It seemed to him that no damages ought to have been incurred, even if the fence had been slightly wrongly constructed, and the defendant had only his rashness to account for the mistake if he thought he could follow the architect's plans. It was clear from the evidence of practical workers like Messrs. Pallitt and Armstrong, and the Government Land Surveyor, Mr. Versfeld, that the point "A" was not on the plaintiff's ground at all, but on the level behind it. When he heard the evidence of practical men like Pallitt and Armstrong, that they would

not have assumed anything of the sort, he could be sorry for Mr. Rivas for jumping to the conclusion which landed him in the present loss. He had only himself to blame for any damages incurred. There would be judgment for the defendant, with costs.

[Plaintiff's Attorneys: Berrangé and Son; Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

RETIEF V. RETIEF. { 1904.
Apr. 19th.

This was an action brought by Susanna Elizabeth Retief against her husband, Johannes Carel Jacobus Retief, late of Swellendam, for divorce, on the ground of his adultery with one Elizabeth M. J. Goussard, with whom he had entered into a bigamous marriage. Plaintiff also prayed for forfeiture by the defendant of the benefits of the marriage and custody of the children. Mr. M. Bisset was for the plaintiff; the suit was undefended.

Charles W. H. Smith, clerk in charge of the marriage register, produced the register of the marriage.

Susanna Elizabeth Retief (the plaintiff) said that she was married to the defendant in the district of Herbert on the 20th October, 1892. They lived together for some years, and had had three children. In 1900 her husband left her. The second marriage of the defendant with Miss Goussard took place in 1902. Witness was present at the trial of the defendant at Swellendam in July, 1903, on a charge of bigamy, when he was sentenced to two years' imprisonment.

Order granted in terms of the plaintiff's declaration

COLTON V. VAN ALMELO.

Share broker—Purchase "on call"

—Evidence, oral and written.

This was an action brought by Isaac Edward Colton, mercantile and share broker, Cape Town, against Edward van

Almelo, share speculator, residing at Claremont, to recover £112 10s., balance of account upon certain share transactions.

The declaration set out that prior to May, 1902, the plaintiff, at the special instance and request of the defendant, purchased and sold shares for the defendant, expended moneys on his behalf for shares bought, and received moneys on his behalf for shares sold. On the 1st May, 1902, it was agreed between the parties that the balance due to the plaintiff was £267 1s. 6d. The plaintiff said that there was now due and owing, in respect of moneys disbursed for and on account of defendant, together with interest, the sum of £112 10s., which sum the defendant refused to pay. Plaintiff had in his custody 500 Hermann's Patent shares, the property of the defendant, which he held as security for payment of the said sum. The plaintiff tendered delivery of the said shares, and claimed the sum of £112 10s. and costs of suit.

The defendant in his plea denied that he purchased 500 or any other number of Hermann's Patents from the plaintiff; he admitted that he purchased a call upon 500 Hermann's Patents at 1s. upon 6s., but said that the call was never exercised by him. On or about the 11th, November, 1902, the defendant saw the plaintiff, who informed him that the amount due was £67 3s. 6d., and this balance the defendant discharged by giving a cheque for £37 3s. 6d. and a bill for the balance of £30, which bill was duly met. He said he had no interest in any Hermann's Patents shares, which the plaintiff might have in his custody. He prayed that the claim be dismissed, with costs.

The plaintiff, in his replication, said he admitted the payments alleged, and that credit had been given, but he denied that the payments were a final settlement.

Mr. W. P. Buchanan (with him Mr. D. Buchanan), for plaintiff; Mr. Burton for defendant.

Mr. Burton said he thought it might shorten the case very much if he explained the defendant's position. The plaintiff in his account charged £150 for Hermann's Patent shares, and £12 for interest on the 31st December. The defendant said that, instead of Hermann's Patents shares having been bought outright, there was a call of 1s. upon 6s. per share, so that the amount would be £25, and the item of interest would go out except as to £5. He did not admit the rest of the account, and he specially denied having purchased Hermann's Patent shares, so that the amount of £150 should be reduced by £125, and the interest of £12 by £7, which would wipe out completely the plaintiff's claim of £112 10s. The defendant did not claim the balance in his favour because he said that in November,

1902, the plaintiff presented an account, and that they then squared off.

Mr. Buchanan said he took it that the issue was narrowed down to whether Hermann's Patent shares were acquired on call or were an out and out purchase.

Isaac Edward Colton (the plaintiff) said that in May, 1902, they had a settlement, and witness was given certain security. Van Almelo was always about the Exchange. He gave witness orders to buy scrip, and left him with general instructions to sell if there was a rise and if he thought fit. Witness never bought without special instructions. He had had no instructions to buy on call, but only out and out purchase. The Hermann's Patents transaction was an out and out purchase of 500 shares at 6s. per share. Witness produced an entry, which he made at the time in his notebook. The transaction was carried through to his cash-book and ledger. The shares had been all the time in the bank. Witness produced a stock-book, showing that on the 18th June, 1902, certain Hermann's Patents were bought, and that 500 were allocated to Monson, and 500 to Van Almelo. Witness also produced his call book. Witness's clerk made the entries in the cash-book and ledger. The clerk had since gone to Johannesburg. Witness's notebook also showed a purchase of Shebas for the defendant.

By the Court: Monson and Van Almelo came to him together, and ordered the Hermann's Patents shares. Monson was now in Johannesburg. Monson also had failed to pay witness.

Witness (continuing his evidence) said that on November 11, 1902, he bought up certain amounts, with interest due. He received £37 odd from the defendant. The balance due on that date was £167 3s. 6d. Witness had as security certain title deeds. Van Almelo asked him for them. Witness held the Hermann's Patents shares. He agreed to release the deeds if the Patents shares were reduced from 6s. to 4s.; the shares were then going down. Witness released the title deeds he received from the defendant for £30, and held the shares as security for £100 10s., the defendant stating that he would take up the shares later. The defendant did not take up the shares. Witness now sued for the amount of £100 10s., taking the shares at 4s. each, plus interest to date. He had repeatedly requested the defendant to take up the shares. The first time witness heard about these shares being on option was in defendant's plea.

By the Court: To the best of his belief, the defendant was furnished with a broker's note. He did not receive the duplicate signed by the defendant. If this had been the case the defendant would have had a broker's note. He always looked upon the defendant as a "fairly decent fellow," and he therefore did not insist upon the duplicates being returned.

Cross-examined: He received the order for the shares from the defendant. He did not remember Mr. Black, of "Sport and Play," or Mr. Behr, a broker; he had not met these men. Witness did a little betting on horse races. He was dealing largely in Hermann's Patents at that time; he bought out and out as a rule, though he might occasionally have purchased calls. Sometimes, if they had a call on shares for a client, they bought the shares outright on their own account. He expected that the defendant would have taken up the shares after he had delivered up the title deeds. The defendant desired to raise a loan on the property, and witness expected that after he had raised the loan defendant would have taken up the shares. Witness had lost heavily on the Exchange during the past year. He had lost a little on the racecourse.

Re-examined: Business became very bad about November.

Francis W. C. Chiappini, partner in the firm of Chiappini Bros., share brokers, Cape Town, said that as a rule they did not make out a broker's note. They sent a letter to the defendant at the plaintiff's request, calling on him to take up the shares, but they received no response from Van Almelo.

Mr. Buchanan closed his case.

Edward van Almelo, the defendant, said that he met the plaintiff while he (defendant) was in company with Black and Behr, and asked him what would be the call on Hermann's Patents. Plaintiff said it would be 1s. on 6s. Witness asked him to procure 500 for him. About an hour later plaintiff came back and told him he had secured 500 Hermann's Patents for him on call at 1s. per share. He frequently called on the plaintiff to ask him for the broker's note; plaintiff always put him off by saying he was too busy. Witness did not exercise the call. The shares were going down; he lost his call money. When he got back his papers he sold the property for £250. There was a bond on the property for £300. When he called upon the plaintiff in November, 1902, plaintiff told him that he owed him £67 3s. 6d. He was glad to get out of the plaintiff's hands, because he had always been "doing" him. Plaintiff sold 400 Shebas for him at 30s. when the market price was 33s. the same day. One Schiskin, who was with witness, paid the plaintiff £37 3s. 6d. in cash, and witness gave the defendant a bill for the balance of £30 for the call on Hermann's Patents and interest. He took no notice of the letter from Chiappini's, because he did not owe the money.

Cross-examined: His attorney sent a demand to the plaintiff for £60 for selling 400 Shebas at 30s., which he ought to have sold at 33s. Plaintiff had been humbugging him all along; he was only too pleased to get out of the plaintiff's hands. He did not propose to the plaintiff in

November, 1902, to pay him the difference between £67 3s. 6d. and £60, which he said he was entitled to for the Shebas.

Stephen William Black, of Claremont, sporting journalist and broker, said that the defendant ordered 500 shares on call from the plaintiff. Witness told the defendant that he did not think the shares would be any good; and he remembered that he bet the defendant a hat that the shares would not be any good.

Cross-examined: Witness believed the transaction took place on the day of the Royal Hunt Cup of 1902. Van Almelo wanted witness to take half the shares on 1s. at call. Van Almelo said it would not be much, and then, after Van Almelo had seen Colton, he said it would only be £12 10s.

Johannes Behr, property broker, gave corroborative evidence as to the interview between Van Almelo and the plaintiff as to the purchase of the shares on call.

Solomon Schiskin, of the Central Hotel, Hermanuspetrusfontein, said he was formerly a broker in Cape Town, and he went in November, 1902, with Van Almelo to the plaintiff to release his title deeds. The plaintiff said the balance due to him was £67 3s. 6d. Witness gave the plaintiff a cheque for £37 3s. 6d., and defendant gave a bill for the balance of £30 at two months.

Mr. Burton closed his case.

Counsel having been heard in argument on the facts.

De Villiers, C.J., said: The question in dispute between the parties is whether, on the 18th June, 1902, the defendant instructed the plaintiff to purchase calls on 500 Hermanns at 1s., or to buy the shares themselves at 6s. per share. If the Court looks only at the oral evidence given in the present case, there is no doubt that there are a greater number of witnesses who depose to the instruction being that the plaintiff should purchase calls instead of shares. But it is a transaction which took place two years ago, and it is quite possible that the witnesses made a mistake as to what took place, and under all the circumstances, in the present case, I think it is the better course to abide by the written documents which have been produced. We have first of all the books kept by the plaintiff himself. There is no doubt there was some degree of laxity in the manner in which the plaintiff himself carried on his business. If he had been more careful in the matter, he would have seen to it that all the broker's notes which he sent to the defendant for confirmation were properly signed before he had any further dealings with the defendant. But there seems to have been considerable laxity, because, amongst the documents which the defendant himself has produced, there are certain broker's notes in duplicate still in the possession of the defendant, neither of which he has signed or

returned to the plaintiff. It is quite possible, therefore, in regard to the broker's notes of this transaction, there should have been similar laxity, and that the defendant may never have returned the broker's notes which were sent to him. But what is of importance in this case, and what it is impossible now for the Court to overlook, is the fact that on the 12th November, the parties came to a partial settlement. At that time the plaintiff had in his possession certain securities which the defendant wished to realise, and in order to induce the plaintiff to release these securities, a settlement was arrived at. In that settlement there was cash paid to the plaintiff, £37 3s. 6d., and a bill given for £30. According to the plaintiff, the defendant had full opportunity of investigating the accounts, and the defendant does not deny that he had access to the books. He might have examined the books if he chose, and he deliberately, then, paid £37 3s. 6d., and gave a bill for £30. This conduct of the defendant seems to me entirely inconsistent with his present statement that these shares had been purchased on call, and not the shares themselves, because if that were so, the result of this payment of £37 3s. 6d. and the Bill for £30 would really have been that the defendant was over-paying, or paying a larger sum to the plaintiff than was really due. To my mind, the plaintiff's explanation seems to be more reasonable, and that is, that the matter of Hermann's was not brought up, seeing that he kept Hermann's as security; that the defendant knew that Hermann's were being kept as security, and that this cash was not brought up, but that the balance was left simply as against the security on the 500 Hermann's shares. Proceeding. His Lordship said that if there were any doubt upon that matter it was removed by what subsequently took place, and judgment would, therefore, be given for the plaintiff as prayed.

[Plaintiff's Attorneys: P. A. M. Cloete; Defendant's Attorneys: Dempers and Van Ryneveld.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

BLOEMBERG V. BLOEMBERG. { 1904.
Apr. 20th.

This was an action brought by Samuel Bloemberg, shoemaker, Uitvlugt Loca-

tion, Maitland, against Lena Bloemberg, now of Market-street, Johannesburg, for divorce on the ground of her adultery with one Smulovitz, and for forfeiture of the benefits of marriage in community. Mr. Alexander was for the plaintiff; the suit was undefended.

Charles W. H. Smith, clerk in charge of the marriage register at the Colonial Office, produced register of the marriage.

Samuel Bloemberg, the plaintiff, said he was a shoemaker, carrying on business at the Kafir location at Maitland. He was married to defendant at Cape Town in September, 1900. They resided first at Hanover-street and afterwards at Wynberg. A child was born. He did not cohabit with his wife after February, 1901. His wife remained at the house in Hanover-street, until November, 1902. Early one morning he saw his wife and Smulovitz together in her bedroom. He and his wife agreed to separate, and the latter went to Johannesburg. Witness did not press for custody of the child.

From evidence taken on commission, it appeared that a private detective in Johannesburg had seen Smulovitz going to a room occupied by the defendant in Market-street.

Decree of divorce granted, with forfeiture of the benefits of community.

BENNER V. BENNER.

This was an action brought by the plaintiff, who resides in Cape Town, against her husband, Charles Edwin Benner, for restitution of conjugal rights, failing which, divorce. Mr. Russell appeared for the plaintiff; the suit was undefended.

Charles W. H. Smith, clerk in the Colonial Office, produced the register of the marriage.

The plaintiff said she was married to the defendant at St. George's Cathedral, Cape Town, in 1884, by ante-nuptial contract, under which her property was secured to her. There had been three children of the marriage—three girls, now aged 17, 16, and 14. After the marriage, witness and her husband did not get on well together, as he was always in financial difficulties. In 1895 he left witness to go up-country to look for work, and he had not returned to her. Defendant was in Cape Town in 1902, and was living at the International Hotel. Defendant then said he was going away again, and that he would send money for the support of the children. During the war, defendant was employed by the military authorities, and they deducted from his pay £2 a month, which was paid to witness towards the support of her family. This went on for about twelve months. Apart from that money, she had received nothing from him.

Decree of restitution granted, the defendant to return to or receive the plaintiff on or before the 15th June; failing which, rule to issue, calling on the defendant to show cause on the last day of next term why a decree of divorce should not be granted, plaintiff to be entitled to custody of the children of the marriage, the defendant to be declared to have forfeited the benefits of the marriage, and to pay costs.

Postea (July 14th). The rule was made absolute.

COKER V. COKER.

This was an action brought by Frances Coker, of Rondebosch, against her husband, for divorce on the ground of his adultery with one Annie Lawrence, with whom he was cohabiting. Mr. Williams appeared for the plaintiff; the suit was undefended.

Frances Coker, the plaintiff, stated that she was married in 1898 to Coker. The marriage proved unhappy; her husband beat her, and failed to support her after he had left her in July, 1903. He was at present living with Annie Lawrence, in Vredenberg Lane.

Christina Johnson stated that she lived at Vredenberg Lane. Mr. and Mrs. Coker had formerly been living with her. Coker cohabited with another woman; he acknowledged so much to her.

The Venerable Archdeacon Lightfoot produced the register to prove the marriage.

Order granted in terms of the declaration.

MAKKE V. SET.

{ 1901.
{ Apr. 20th.

Negligence—Risk—Expert.

While the plaintiff's cow was calving, M. attempted to remove the afterbirth, but failed. The defendant, who did not profess to be a veterinary surgeon, offered to try the removal, and the plaintiff consented and held the cow's head while the defendant operated. The operation proved unsuccessful, and the cow died. There was no expert evidence as to the cause of the cow's death.

Held, on appeal, that the Magistrate had properly given judgment for the defendant.

This was an appeal from a judgment of the Resident Magistrate of Stutterheim, the appellant having sued the

respondent in the Court below for £20 damages for the loss of a cow.

From the record in the Court below it appeared that the defendant was sued in the Court below for the sum of £20 damages for alleged maltreatment of the animal while calving, in consequence of which it died. Provisional judgment was given for the plaintiff, with costs. Subsequently the defendant moved the Court to have the case reopened, and the judgment reversed, on the ground that the defendant intended to defend the case, and the hearing took place during his temporary absence at a late stage of the sitting of the Court, while he had gone in search of his horse. The Magistrate consented to the reopening of the case, and mulcted the defendant in the costs of the first hearing. At the re-hearing of the case, the plea of the general issue was raised, and evidence was given on behalf of and by the defendant. He denied maltreatment, and said that plaintiff was his uncle, and that he did the act out of friendship. He believed the cow would have died in any event. He was not a cow doctor. He had seen cows die from a similar cause before treatment. For the plaintiff, evidence was given to the effect that the defendant had thrust himself forward, and had offered to perform the operation, saying he knew how to do it. The Magistrate gave judgment for the defendant, with costs, and against this judgment the plaintiff now appealed. The Magistrate's reasons appear from the judgment.

Mr. W. P. Buchanan for appellant. Respondent in default.

Mr. Buchanan: The proceedings in the Court below were irregular. The plaintiff was present in Court that morning. The Court adjourned at 1 p.m., and when it re-opened the defendant was absent when the case was called; but Sec. 29 of the Schedule to Act 20 of 1856, gives the Magistrate no power to reopen the case under such circumstances. He can only do so if a person is prevented from attending Court by just and reasonable causes. That was not the case here. The defendant had no witnesses, he had no agent, and went away from Court simply to look after his horse. When in a recent Supreme Court case (not yet reported), a man who had been summoned as a witness failed to appear, and attempted to excuse himself by saying that he could not leave his shop at Sea Point, the Court held that that was no excuse and that he was liable to be committed for contempt of Court.

[De Villiers, C.J.: That case was not on all fours with this.]

No. for one thing that was a case of a witness, but if cases of this kind were upheld, every case might be re-opened.

[De Villiers, C.J.: Oh, no, people would be deterred by the costs.]

Parties might be willing to face those. In this case the defendant was represented by an agent on the subsequent occasion, and recovered costs for his agent.

Then the Magistrate was wrong on the evidence. The defence seems to be that the plaintiffs gave tacit consent to the operation by holding the cow by the head. The defendant acted contrary to the advice of Sangile, an expert. The question is not whether the defendant was engaged as an expert, but whether he held himself out as an expert.

[De Villeirs, C.J.: He did not say that he was an expert.]

Oh yes; see Sangile's evidence. He told the plaintiff and Sangile that he knew all about the operation.

[De Villiers, C.J.: He did not go there as a veterinary surgeon.]

That makes no difference. If a man says he knows "all about" a thing he cannot plead thereafter non-liability for everything save gross negligence. See *Seven on Negligence* (vol. 2, 1401 to 1403). Here an expert was present and was prepared to perform the operation, but defendant, who held himself out as an expert, undertook to do it, and performed it in a grossly negligent manner. As to defendant having rendered his services gratuitously, see *Wilson v. Brett* (11 M. and W. 113).

De Villiers, C.J.: The Magistrate, in giving his reasons, stated that he believed the evidence given on behalf of and by the defendant, in preference to that given by the plaintiff, and this Court is not in a position to say that he was wrong—he saw the witnesses, and was able to judge of their credibility. If the defendant's evidence is correct, then the Magistrate was right in his decision. The defendant did not pretend to be a veterinary surgeon; he simply acted as a friend. His Lordship then proceeded to quote from the evidence given in the lower court. Proceeding, he said:—If it be the case that the plaintiff himself held the cow and allowed the defendant to operate, I do not see how the defendant can now be held liable. The plaintiff, knowing that the defendant was not a professional veterinary surgeon took the risk of the consequences. That might result from the defendant's assisting at the delivery of the cow. There appears to be another difficulty in this case: there is an absence of expert evidence as to the cause of death of the cow. It seems possible that this cow may have died from other causes than injury to the womb. The Magistrate laid stress on this point also. Upon the whole, I think that the Court would not be justified in disturbing the decision of the Magistrate. The appeal will be dismissed.

[Appellant's Attorneys: Hutton and Buchanan; Respondent in default.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY]

TRIAL CAUSES.

CLARK V. MACNAMARA. { 1901.
Apr. 20th.
" 25th.

Brokerage—Failure of broker to obtain purchaser on terms prescribed by principal —
Consensus ad idem.

This was an action brought by Thomas Adam Clark, a licensed broker, of Cape Town, against Michael MacNamara, a landed proprietor, of Woodstock, to recover £312 10s., being the amount of brokerage on the purchase price of certain property sold through the agency of the plaintiff.

The declaration set out that in June, 1902, the defendant employed plaintiff as his broker to negotiate for the sale of his property at Woodstock, and undertook to pay the usual brokerage, 2½ per cent. on the purchase price. On the 13th June, whilst the plaintiff was still so employed, he submitted to the defendant an offer of £12,500 by one Andrew Allan for his property. The document was dated 13th June, 1902, and stipulated that a broker's note was to be passed, and £500 cash was to be paid next day. The defendant accepted the offer, and signed the document. By reason of the said transaction, the plaintiff claimed £312 as due to him for brokerage, with interest.

The plea admitted the formal allegations in the declaration. The land was originally purchased at a sheriff's sale in 1884, but the transfer did not convey the whole of the land. In May, 1902, the defendant obtained an order under the Derelict Lands Act for the transfer of the remaining portion of the land. About June, 1902, the plaintiff approached the defendant, and offered to purchase the said land, and on the 13th June he brought a document to the defendant, and the defendant signed it. It was agreed that the broker's note should be drawn up, and £500 was to be paid on the next day. On the 14th June the plaintiff informed the defendant that the said Allan was not prepared to pay the sum of £500 in cash, but the plaintiff tendered a broker's note stipulating that the money should be paid in ten days. The defendant's son-in-law acted for the plaintiff, and he refused to sell the property. Several days afterwards £500 was tendered, but the defendant refused to accept it, as he was entitled to do.

Mr. Searle, K.C. (with him Mr. Russell) for defendant; Mr. Upington for plaintiff.

Thomas Clark stated that in May, 1902, the defendant met him in St. George's-street, and gave him certain properties to dispose of. The defendant wanted £13,000 for the property, and witness interviewed Mr. Andrew Allan, and on May 28 he wrote to the defendant, stating that Allan would buy the property. In June Allan offered £12,500, and the defendant accepted the offer, which was made through plaintiff. A broker's note was drawn up to protect witness, but there was no mention of ten days in it when it was issued. The defendant's son-in-law Thornton called at the office and asked for a cheque for £500, but the letter stated that he had no authority to sign the document. He saw Mr. McNamara that afternoon, and he said he was too ill to talk business. The defendant called on the following Monday morning and said that his attorney had advised him to leave the matter in abeyance for a few days until the diagrams were in order. Subsequently the defendant said he would have the diagrams ready in fourteen days. Allan was a man of substance, as he had floated the British Asphalte Company at a capital of £45,000. The defendant subsequently left for England, but before leaving referred witness to his solicitor. The solicitor was unsuccessfully pressed from time to time for the diagrams.

Cross-examined by Mr. Searle: When Thornton came to the office all he wanted was a cheque pure and simple. The defendant did not say that unless he got the cash the whole thing was off, as he would not consent to the clause as to payment in ten days. The £500 was tendered some days after, but witness knew nothing about the tendering. Thornton did not tell him the whole thing was off when he went to see McNamara. As far as he knew, Allan did not tell Thornton that the £500 would be paid in ten days.

Andrew Allan stated that in May the plaintiff came to him with the offer of a property belonging to the defendant. Witness finally agreed to purchase it for £12,500, and the plaintiff was instructed to make that offer. Shortly afterwards the sale note was drawn up, and he looked upon the sale as completed. The defendant did not come to witness's office on the 14th June, but the plaintiff and Thornton did. The latter said that the plaintiff was ill. Witness was prepared to pay the £500 in cash, but not until he saw the diagrams. There was no note containing a clause about payment in ten days tendered to Thornton. He withdrew a case against the defendant for transfer and damages on the advice of an old friend of the defendant. He had repeatedly tried to get the diagrams from the defendant's solicitor, but without avail.

Cross-examined by Mr. Searle: It would have been a great advantage to his company to have the ground. He

withdrew an action against the defendant for £15,000. He did not see the broker's note on the Saturday. He never signed a broker's note, nor was he ever asked to sign one; in fact, he would not accept one unless he was satisfied with the diagram. On the 19th July he called on Mr. Moore, the defendant's solicitor, in reference to the diagrams, and the latter said that the defendant repudiated the whole transaction altogether. Thornton merely said on the 14th June that he had no power to sign anything, but that he would accept a cheque. About the end of 1902 he entered into further negotiations with the defendant through Mr. Searle, who was to go to £14,000 for the property, as witness was anxious to have it before the flotation of his company.

Re-examined by Mr. Upington: He recognised the document annexed to the declaration as binding on him as the purchaser.

Mr. Upington closed his case.

Michael McNamara stated that he bought part of this property under a sheriff's sale, and he got the remainder under the Derelict Lands Act. The plaintiff asked witness would he give him the sale of the property, and witness agreed, putting the price at £14,000. On the 28th May Clarke wrote, saying that he thought he could get £13,000 for the property. On the 13th June the plaintiff came and offered £12,500, and witness agreed on condition that he would get a cheque next day for £500 and a broker's note. Witness did not go into town next day, but he sent Thornton in. That afternoon he saw Clarke, who said that he had not got the cheque and witness said the deal was off. The plaintiff produced a note for payment in a number of days, but witness would have nothing to do with it. The plaintiff said that £500 was not so easily got and that Allan said that witness could not be hard up. The following Monday, after seeing his attorney, he told Clarke that he was advised not to sell the property until a proper diagram was put in. He returned from England in October, when Mr. Allan and Mr. Searle saw him, and subsequently the latter offered £14,00 on behalf of the former.

Cross-examined by Mr. Upington: The plaintiff suggested that broker's notes should be passed. He sold the ground for £12,500, £500 to be paid in cash on acceptance. If the £500 had been paid there would have been no further trouble. The real difficulty was not that he had not got his diagrams ready. He did not get transfer under the Derelict Lands Act until March, 1903.

Re-examined by Mr. Searle: He looked on it as a conditional sale, and the only reason he had for terminating the contract was that the £500 was not forthcoming.

Patrick Geo. Thornton, son-in-law of the defendant, stated that he was present

on the 13th June when the memorandum was drawn up. The plaintiff said that the cheque would be at Mr. Allan's office next morning. Allan said he could not put his hand on £500 that morning, but that he would be able to do so in ten or fourteen days. The plaintiff asked him if he would accept a broker's note, but witness refused to do so. There was no broker's note produced on that occasion. That afternoon the plaintiff called, and witness informed him that the defendant had instructed him to say that the deal was off.

Cross-examined by Mr. Upington: He had been holding the defendant's power of attorney on the 13th June. He had authority to accept the broker's note. He did not lead Allan and Clarke to believe that he had no authority to accept the broker's note.

Henry O'Connor stated that he remembered Clarke calling at his house to see the defendant. The plaintiff asked defendant to sign a note, and the latter asked for the £500, and Clarke said that it was not easily picked up. Witness understood Clarke to say that the money might be forthcoming in ten or twelve days, and the defendant said if the money could not be produced the deal was off. Previous to that Clarke said that he would not give the cheque to Thornton, but when McNamara asked him if he had the cheque then he replied in the negative.

Cross-examined by Mr. Upington: He remembered the occasion very distinctly; in fact he took a great interest in the proceedings. He did not recollect the defendant making any arrangements about going to town on Monday.

This closed the evidence, and counsel having been heard in argument on the facts,

Cur. adv. vult.

Postea (April 25th).

Hopley, J.: The plaintiff, who is a broker, sues the defendant for the sum of £312 10s. as due to him by way of commission on the sale, in June, 1902, of certain landed property—being 2½ per cent. on the sum of £12,500, the amount for which he alleges that he, acting as the plaintiff's agent, sold the said property to one Allen. The defendant denies that he and Allen ever came to terms or that the sale was completed as alleged by the plaintiff. The facts are that the defendant had, in 1884, acquired certain land at Woodstock adjoining the railway and that about May, 1902, he had applied for and obtained an order from this Court for an amended diagram and title under the provisions of the Derelict Lands Act, in order to get transfer of a portion of the land, in his possession but not included in his original transfer. Such amended transfer had not in June, 1902, been issued, and as a matter of fact was not issued until March, 1903. About May, 1902, defend-

ant had instructed the plaintiff to sell the said land, and certain negotiations took place between him and Mr. Allen, who was desirous of acquiring the land for the purposes of his business, the British South African Asphalt Co., which he at that time contemplated turning into a limited liability company, a step which he has since carried out. These negotiations culminated in the submission, on the 13th of June, 1902, of a firm offer by Allen through the plaintiff of £12,500 for the property. The defendant was satisfied with the price offered, but made certain conditions which were embodied in a written memorandum which the plaintiff then drew up, and which was signed by the defendant. The memorandum is as follows:—"June 13, 1902.—Bought on account of Andrew Allen, Esq., or his nominees, certain piece of ground, approximately 480 x 180 x 280, as per diagram and transfer in favour of seller, for the sum of £12,500 (twelve thousand five hundred pounds sterling). Broker's note to be passed on the 14th inst., in terms as follows:—£500 cash on acceptance of B/N, and the balance on transfer.—M. McNamara."—The defendant agreed to attend at the plaintiff's office on the 14th to complete the matter: but on that day, feeling indisposed, he deputed his son-in-law, Thornton, who at the time also held his General Power of Attorney, to represent him in the matter: and accordingly Thornton, Allen, and the plaintiff presented broker's notes in triplicate for acceptance by the parties in the following terms:—"Myburgh's Chambers, St. George's-street, June 14th, 1902.—Bought from M. McNamara, Esq., Woodstock: Sold to Andrew Allen, Esq., or his nominees, Woodstock, certain landed property in Woodstock, abutting on the railway, as per diagram in possession of the seller, approximately measuring 480 x 180 x 280 x 360, for the sum of Twelve thousand five hundred pounds sterling, all these with buildings thereon. The sum of Five hundred pounds sterling to be paid on acceptance of these presents, and the balance on transfer—such transfer to be given and accepted within six months of date hereof. Payment as above, seller to pay brokerage 2½ per cent.—Thos. A. Clarke, Broker."

There is a dispute as to what happened at the interview. The plaintiff alleges that Thornton said he had come only to receive Allen's cheque for £500, and that he had no authority to accept the broker's note—whereas Thornton says that he was fully empowered to represent the defendant, and that he would have accepted the broker's note if the cheque had been forthcoming. Allen does not give any decided evidence on the point, but he admits that he raised a difficulty about giving the cheque forthwith unless the diagrams were first exhibited to him. The plaintiff says that, owing to Thornton's alleged inability to

act in the matter of the acceptance, and to suit the convenience of the defendant, it was then agreed that the completion of the transaction, in so far as the formal acceptance of the broker's notes and the payment of the cheque went, should stand over for about ten days, and that he then inserted in the broker's notes, after the words "these presents," the words "or within ten days of date,"—so that the notes now ran (as to that portion thereof) as follows:—"The sum of £500 to be paid on acceptance of these presents or within ten days of date, and the balance on transfer, etc." Thornton on the other hand alleges that Allen said his money was just then otherwise employed, and that he would not be able to find £500 for a week or ten days, and that he thereupon said that he had no power to accept such terms.

On this portion of the case I am disposed to believe that Thornton's version is the correct one. It is highly improbable that he would have been deputed by the defendant to receive a cheque, unempowered to perform the act which was necessarily a condition precedent to such payment. Allen admits that he raised a difficulty about paying £500 without first seeing the diagrams—a demand on his part probably made to gain delay, as he must have known that at the time the amended diagrams and titles had not yet been issued.

Thornton then went to the defendant and reported what had happened; and the defendant, who was not confined to his house, went to visit a neighbour, a Mr. O'Connor. In the afternoon of the same day the plaintiff went to Woodstock, first to defendant's house, where he found only Thornton, who swears that he gave plaintiff a message from defendant that the deal was off. This is, however, denied by the plaintiff. Thornton also told him where defendant was to be found and plaintiff consequently went to O'Connor's house, where in the presence of the latter, he had an interview with the defendant, to whom he presented the broker's note, altered as above set forth, for his acceptance. He states that the defendant was quite satisfied with the new arrangement, and promised to go into Cape Town on Monday, 16th June, to complete the papers. The defendant and O'Connor, however, are positive that no such acquiescence was expressed by defendant, but that, on the contrary, he asked for the cheque for £500 and, upon plaintiff's being unable to satisfy that demand, he declared that as his conditions had not been complied with by Allen, the "deal was off." It is clear that plaintiff left Woodstock with his broker's notes still unaccepted; and on Monday the defendant consulted his attorneys and subsequently went to plaintiff's office, where he communicated to him the substance of their advice, which was that it would be inadvisable to sell the land to anyone until the amended

titles had been issued. Nothing further seems to have been then done. Defendant went for some months to England, and on his return, about October of the same year, he was approached by Allen and plaintiff, who said they wanted the ground on behalf of Allen. On defendant's telling them that there had been no sale, plaintiff said that an addition of £500 or £1,000 to the price would be no impediment; and subsequently a Mr. Searle, a friend of Allen's and of the defendant's, tried to negotiate a sale at £14,000—but this also came to nothing, as by that time the property was under offer to another person, provisionally, on the failure of Allen to establish the transactions of the 13th and 14th June, 1902, as a sale—a position which Allen had not at that time abandoned. When the offer through Searle produced nothing, Allen sued the defendant; but he did not go beyond the close of pleadings and never set the case down for trial; and eventually, when the defendant had, in October, 1903, set down the matter to obtain judgment by reason of Allen's failure to proceed, the latter withdrew proceedings and paid the defendant's costs. Thereafter the present plaintiff instituted the present suit about sixteen months after the alleged sale, by virtue of which he claims his commission.

On the whole of the evidence I am of opinion that there never was a *consensus ad idem* between the parties as to the matter. It seems to me that plaintiff was, on June 13, authorised by Allen to offer £12,500 for the ground: but that not anticipating defendant's demand for £500 cash, to be paid next day, he had not authorised plaintiff to agree to such a condition. Defendant, however, in accepting the offer of £12,500 made it an essential condition that there should be an immediate payment of £500. Plaintiff embodied this condition in the memorandum above set forth, and promised to have the transaction closed next day by the passing of accepted broker's notes setting forth the terms to which he no doubt thought that Allen would readily accede. No point is made by the defendant of the fact that in the broker's notes as drawn up, there was an undertaking on his part to give transfer within six months, a somewhat risky undertaking in the circumstances, and if Allen had been ready to pay the £500 on the 14th June, no doubt the transaction would have been complete. But the evidence is clear that Allen did not and would not pay the £500 on the 14th of June, and as he had never authorised plaintiff to impose that obligation upon him, it seems to me that his refusal to pay—save on compliance by the defendant with a demand, the production of his diagrams, which it was at that time impossible to fulfil—put an end to the transaction. The plaintiff tried to repair the breach by inserting a new condition, which he hoped would suit both parties, but with-

out avail. The result was that there never was a concluded, enforceable contract between Allen and the defendant, and consequently no benefit ever enured to the defendant as a result of the plaintiff's work. There must therefore be judgment for the defendant, with costs.

[Plaintiff's Attorneys: Silberbauer, Wahl, and Fuller; Defendant's Attorneys: Moore and Son.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1904.
 { Apr. 21st.

Mr. W. P. Buchanan moved for the admission of Wm. Charles Leonard Hedding (a Transvaal attorney), as an attorney of this Court, under Act 30, of 1892.

Mr. Gardiner, representing the Law Society, said that they did not oppose the application.

Application granted, oath to be taken before the Registrar of the Witwatersrand High Court at Johannesburg.

Mr. W. P. Buchanan moved for the admission of Wm. Angus Hofmeyr, as a notary. Applicant was an attorney of this Court, and he had applied to be examined for admission as a notary under Section 5 of the Act of 1858. Applicant had now been examined, and had duly passed.

Buchanan, J., said that the Law Society stated that the applicant had filed affidavits upon them.

Mr. Buchanan contended that another affidavit was not necessary. Notice of the application had been served on the Law Society.

Application granted, and oath administered.

PROVISIONAL ROLL.

ARONSTAM V. MAISEL BROS.

Mr. Gardiner moved for provisional sentence on certain two dishonoured cheques on the A.B.C. Bank, for £125 each, together with interest from the 1st March, 1904, and costs. There was also a claim for statement of account, and debate of account in certain joint dealings.

Mr. M. de Villiers said he appeared for the defendant to oppose the provisional claim. The defendant had three

defences to the claim itself. He objected to the form in which the action was proceeded with, as the citation was uncertain, inconsistent, and irregular. The present objection was to the form in which the action was brought.

Mr. Gardiner said he merely asked at present for provisional sentence.

Mr. De Villiers read the original affidavit of the petitioner, which showed that there had been a complicated series of transactions between the parties. Petitioner believed that there were funds in the bank in the name of Maisel or Maisel Bros. Petitioner desired to institute proceedings against the said Maisel and against the firm of Maisel Bros. by edictal citation for the purpose of recovering £250, which he had deposited, and for damages for breach of contract. He thought he had been doing business with Maisel personally, and not with a limited liability company. An order had been made for attachment of moneys in the bank to the credit of Maisel or Maisel Bros. Mr. De Villiers read the citation, and submitted that it was irregular. The order was that the interdict should be served on the bank restraining them from paying out any moneys belonging to defendants. The petitioner was inconsistent, because he alleged first that the partnership continued to exist, and then that it was at an end. The citation was uncertain, irregular, and inconsistent, and was not in terms of the order made by the Court. He was sure that the intention of the Court was that there should be one action between the parties and not two actions.

Buchanan, J., said that the Court could not take notice of such technical objections. The main object of the citation was to bring the parties into court.

Mr. De Villiers put in the affidavit of Bennie Maisel, which denied that the deponent had ever given himself out as the proprietor of the respondent company. He gave the plaintiff two cheques, and informed him that he would avail himself of the option to pay the £250 plus 8 per cent., and he was perfectly satisfied. Deponent had iron in the partnership to the value of £700 or £800, and the plaintiff sold it for £140. He also disposed of two horses, and a wagon, and wrecked the whole business. He intended instituting an action against the plaintiff, who had written a letter, the original of which could not be produced, cancelling the partnership.

Mr. Gardiner read the replying affidavit of Moses Aranstam, which set out that Maisel had represented to him that he was the proprietor of the company. The statement that Maisel purchased 200 tons of iron was absolutely incorrect; he had no more than 10 tons on hand. He absolutely repudiated the copy of the letter put in by the defendant.

Judgment was given on the two cheques of £125, less £184 4s., received

by the plaintiff, with costs, and with leave to either party to go into the principal case.

BOSMAN V. ROYTOWSKI.

Mr. Roux moved for the final sequestration of the defendant's estate.
Order granted.

BERGL V. CONRAD.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.
Order granted.

CUTLER V. STEPHAN.

Mr. P. Jones moved for judgment on a mortgage bond for £3,000, together with interest at the rate of 6 per cent. from July 1, 1903, and that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of interest.
Order granted.

S.A. BREWERIES V. ZIN.

Mr. Gardiner moved for judgment, under Rule 329d, for £6 19s., for goods sold and delivered, and for provisional sentence for £550 on a mortgage bond, which had become due by non-payment of instalments and interest, with interest at the rate of 6 per cent. from August 1, 1903, and that the property specially hypothecated be declared executable.
Order granted.

CELLIERS V. D'OLIVEIRA.

Mr. Gardiner moved for judgment on a mortgage bond for £250, with interest at the rate of 6 per cent. from June 9, 1903, and that the property specially hypothecated be declared executable.
Order granted.

BARRON V. HENNESSY.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £1,200, with interest at the rate of 6 per cent. from July 1, 1903, which had become due by reason of the non-payment of interest, and that the property hypothecated should be declared executable.
Order granted.

FLETCHER'S RETAIL AND OTHERS V. VAN DYK.

Mr. Upington moved to make final the provisional order of sequestration

granted against the defendant's estate on April 7.

Order granted.

ABRAHAMSE BROS. V. KEMPAN AND HOBBERMAN.

Mr. Roux moved for judgment on a promissory note for £302, with interest from April, 1904, and costs.
Order granted.

JUTA AND CO. V. SHAW.

Mr. W. P. Buchanan moved for provisional sentence upon a promissory note for £63 and costs.
Order granted.

ILLIQUID ROLL.

DE WAAL AND CO. V. { 1904.
BURGER. { Apr. 21st.

Mr. De Waal moved for judgment, under Rule 329d, for £16 8s. 6d., with interest and costs of suit.
Order granted.

PURCELL, YALLOP AND EVERETT V. MCLEOD.

Mr. W. P. Buchanan moved for judgment, under Rule 319, in default of plea, for the sum of £82 13s. 9d., being balance of account due for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

MOLLER V. CROWE.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £100, the balance of the purchase price of certain landed property situated at Glen Lily, with interest and costs.
Order granted.

KNEE BROS. V. SEBBA BROS.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for two claims for interest, and an order of ejectment.

Order granted.

AFRICA V. A.M.E. CHURCH.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £20, money lent, with interest of £3, as agreed upon, and costs.

Order granted.

SEA POINT MUNICIPALITY V. COHEN
AND KAPLEN.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £88 15s., rates assessed for the year 1904, and £1 18s. 3d., balance of account for drainage work done on certain property of the plaintiff, less the sum of £30, paid on account.

Order granted.

TETLEY AND FLEMING V. BUFFALO
SUPPLY CO.

Mr. Schreiner, K.C., moved, under Rule 319, for £758 17s. 11d., balance of a judgment, and £427 16s. 4d., interest, and interest on the total amount of £20,852 5s. 2d., from March, 1903.

Judgment as prayed.

VAN ROOYEN V. SACK.

Mr. J. E. R. de Villiers moved for judgment, under Rule 319, on the plaintiff's declaration, for sums of £128, £17 17s. 6d., and £8 4s. 6d., for goods sold and delivered, with interest *a tempore moræ*, and costs.

Order granted.

JOHNSON V. CUNNINGHAM AND CORTESE.

Mr. W. P. Buchanan moved, under Rule 319, for judgment in default of plea for £63, for rent due, and payable in advance, with interest and costs of suit.

Order granted.

Mr. Buchanan mentioned a matter between the parties, which appeared in the motion roll, for an interdict to restrain removal of goods.

Buchanan, J., said that execution could be taken against defendants at once.

GENERAL MOTIONS.

SOYERS V. SOYERS. { 1904.
Apr. 21st.

Mr. Struben moved for the rule *nisi* for leave to sue *in forma pauperis* for divorce to be made absolute.

Rule made absolute, Mr. Struben accepting reference as counsel and Mr. Cloete as attorney.

MARAIS V. MARAIS.

Sir H. Juta, K.C., moved for a rule *nisi* to be made absolute. The matter he said arose out of an application by Pieter Johannes Marais for an order restraining the Standard Bank and the Board of Executors from paying to Mrs.

Belfield Marais any moneys other than a reasonable sum for the purposes of the defence of herself and her daughter, pending a further order of Court. A rule had been granted, which had been operating as an interim interdict.

His Lordship said that the applicant did not seem to have much *locus standi*. He did not allege that her money was his.

Sir H. Juta said that the plaintiff was instituting an action.

[Buchanan, J.: I don't see that that is a sufficient ground. The respondent does not appear herself, but she has sent a letter objecting to the interdict. The interdict is very indefinite in terms—"other than a reasonable sum." The point is, what is a reasonable sum?]

Sir H. Juta said he thought £50 would be a reasonable sum for the defence.

Buchanan, J., said that the Court could not make an order, and the rule *nisi* would lapse.

BARRY V. BARRY.

Mr. Alexander moved, on behalf of the plaintiff (Mrs. Barry), for leave to sue *in forma pauperis* for divorce.

The plaintiff, replying to His Lordship, said she had no means.

Rule *nisi* granted, calling on the defendant to show cause on Thursday next why leave should not be granted as prayed.

Ex parte CAPE MARINE SUBURBS, LTD.

Mr. W. P. Buchanan moved for the rule *nisi* for the cancellation of certain sales of property to be made absolute.

Rule made absolute accordingly.

PERRAM AND BESLEY V. LAREY.

Mr. M. de Villiers said that, after reading the respondent's affidavit, he was afraid that he could not successfully oppose the discharge of the rule which had been granted, restraining the purchaser of certain property from paying certain money to defendant.

Mr. Upington (for the defendant) said that he supposed the rule would be discharged, with costs.

Rule discharged, with costs.

JOHNSON V. CUNNINGHAM AND CORTESE.

Mr. W. P. Buchanan applied for a extension of interdict upon certain goods until such time as execution could be carried out.

Rule made absolute with costs, but not to prevent the attachment of the property in execution of judgment already given on illiquid claim for rent.

**ST. SAYLOUR'S CHURCH (CLAREMONT)
V. FRIEDMAN.**

Mr. M. Bisset moved for the rule *nisi* to be made absolute requiring one Schapiera to pay rent of premises which he had under lease from the respondent Michael Friedman to one Brunt, who was authorised to receive same by the applicants. The applicants had obtained provisional sentence on a mortgage bond for £2,500 against the respondent.

Mr. Bisset said the respondent was the owner of the premises, he had let them to Schapiera, who had not paid his rent for March and April, and he had got a rule *nisi* restraining Schapiera from removing his goods pending an action for rent.

Rule made absolute.

Ex parte CLOETE.

Mr. W. P. Buchanan moved for an order authorising the cancellation of certain mortgage bond for £400 upon shares which petitioner (who resided in the Caledon district) had in certain property in the Bredasdorp division. Petitioner found that, although he had paid the capital, the bond had not been cancelled in the Debt Register by Layman, the mortgagor, who left the Colony some years ago to reside in Germany.

Buchanan, J., directed the matter to stand over, pending the report of the Registrar of Deeds.

Ex parte FULLER.

Mr. Howel Jones moved, on behalf of the Secretary of Agriculture, for a rule *nisi* to be made absolute calling on all concerned to show cause why title of certain lands should not be re-issued to one Decker.

Rule made absolute.

Ex parte KLEINHAUS.

Mr. W. P. Buchanan moved for an order confirming the partition of certain property in the division of Riversdale, in which a minor was interested.

The Master reported favourably.
Order granted.

TURNER V. SHEPHERD BROS.

Mr. McGregor moved for an award of arbitrator to be made rule of Court and costs, and for witnesses' expenses of the applicant and his manager.

Mr. Schreiner, K.C., said that the respondent objected to the latter part of the application. The expenses amounted to over £50.

Mr. McGregor stated that Mr. Polhemus Lyon sat as arbitrator, in terms

of Act 29 of 1898, to settle certain differences between the parties. It was found by the arbitrator that there was an amount due to the applicant of £339. The applicant was Thomas Wm. Turner, confectioner, Durban, Natal, and the respondents were Shepherd Bros., of Stellenbosch. A letter from the arbitrator stated that his award was in favour of the applicant for payment of a bill of exchange for £339 1s. 3d., which had been dishonoured, with interest at 6 per cent. from the date when the said bill was dishonoured, together with costs of reference and award, including arbitrator's fee of 10 guineas.

Mr. Schreiner said that the respondents opposed, on the ground that applicant was not entitled to his witnesses' expenses.

Counsel having been heard in argument,

Buchanan, J., directed that the award should be made a rule of Court, with costs, the costs and the reference of award to be taxed by the taxing master, and the respondent to have the costs of opposition to the motion.

In re THE INSOLVENT ESTATE OF
THOMAS DICKER.

Mr. M. Bisset, for the petitioning creditors, moved for the appointment of John Olander Walter as trustee.

Mr. W. P. Buchanan, for certain other creditors, read the affidavit of Mr. Mostert, of Messrs. Silberbauer, Wahl and Fuller, which set out that his firm had received instructions from some of the creditors to oppose the motion, and to ask for the appointment of Frederick William Wilmot, who represented the same number of creditors and more of the insolvent estate as trustee.

Buchanan, J., directed that both parties named be appointed as joint trustees, with power to liquidate the estate, the costs of both petitions to come out of the estate.

**BRETT V. THE DIVISIONAL COUNCIL OF
VICTORIA WEST.**

Mr. Upington moved to fix a day for the trial of the action by jury which had been duly demanded, in accordance with the provisions of Act 23 of 1891, and for the plaintiff's evidence to be taken on commission. Mr. J. E. R. de Villiers was for the respondent.

Ordered to be set down for 2nd May, and the evidence of the plaintiff to be taken on commission, Dr. Greer to act as commissioner, costs to be costs in the cause.

**NOURSE V. THE "CAPE TIMES" AND
OTHERS.**

These were applications to fix a day for trial by jury and for the appoint-

ment of a commission *de bene esse*. The action was for libel contained in an article which appeared in the "Owl" and the "Cape Times" as the publisher, was joined in the action. The commission was to take evidence of certain witnesses in Johannesburg.

The affidavit of Mr. McIntyre, the respondent Kingswell's attorney, set out that on the 24th July, 1903, the defendant was served with a summons. On the 29th July the defendant entered an appearance, and on the 13th August he filed his plea. On the 5th September the replication was filed. The second-named defendant, Mr. G. H. Kingswell, had been specially retained as war correspondent for the "Daily Express," London, and a syndicate of American papers, and he was called by his employers to proceed to the scene of hostilities between Russia and Japan. On the 8th January, 1904, the said defendant received cable instructions to proceed to Japan, and notice of his departure had been prominently chronicled in the "Cape Times" and the "South African News." He left on the 14th January by the troopship *Assaye*. No action was taken by the plaintiff in the matter, and no notice given to the defendant, who, deponent was confident, had been led to believe that the plaintiff had abandoned the action. Deponent's firm was unable to proceed with the defence, as the defendant was a material witness in the case. He had called on the representatives of the said defendant, but was unable to get any assistance in order to work up the defence. The defence would be greatly prejudiced in the action through his absence, and he had told deponent that he would return as soon as his agreement as war correspondent terminated.

The answering affidavit of Mr. Van Zyl, the plaintiff's attorney, set out that the defendant's attorney was well aware of the fact that the case could not be proceeded with sooner, as material witnesses for the plaintiff were in Europe. The defendant had every opportunity of giving his evidence on commission before leaving the Colony.

The replying affidavit of Mr. McIntyre denied that he was aware that very necessary witnesses of the plaintiff were in Europe or that the trial was delayed for that reason.

Mr. Schreiner, K.C., for the applicant. Sir H. Juta, K.C., for the respondent Kingswell. Mr. P. Jones for the "Cape Times."

Mr. Schreiner said that the pleadings closed as far back as September last, and before Mr. Kingswell left there were ample opportunities to take his evidence. Surely in an action where there were certain allegations in a newspaper it would not be a very difficult thing to prepare the defence? Was the plaintiff to wait until Russia and Japan

had settled their difference in the Far East?

[Buchanan, J.: What time would it take to communicate with him in Japan?]

Mr. Kingswell may be sending wireless telegrams for all I know. We have no means of ascertaining when the war will terminate. Continuing, counsel said Mr. Nourse's reputation had been injured in connection with certain statements with regard to racing transactions at Johannesburg and Kenilworth. What had Mr. Kingswell to put forward of his own knowledge in relation to these matters? There was really nothing before the Court to show why the action should be postponed. If Mr. Kingswell was such an important witness, then his evidence should have been taken on commission before he left the Colony.

[Buchanan, J.: What time do you think you would require, Sir Henry?]

Sir H. Juta said he had made inquiries from his attorney, and he was not certain when Mr. Kingswell would be back, but the attorney was under the impression he would return in August. If the plaintiff was in such a hurry to bring the action, he could have had his witnesses examined on commission. Mr. Kingswell was a most important witness, and there were circumstances, especially in regard to what had taken place since this case had been listed, which gave him the idea that the case had been abandoned, and it would be utterly impossible to go to trial without him. What harm would it do the plaintiff to wait a couple of months longer, and in the meantime it might be possible to communicate with Mr. Kingswell, and give the Court more definite information.

Buchanan, J., said it was only reasonable some time should be given to communicate with the defendant, but if he could not appear before the date, he would have to take the consequences. Justice would be met by fixing the day of trial for 17th August next, but the defendant would have to be prepared to go to trial on that date. The application to take the evidence of certain witnesses for the plaintiff in Johannesburg would be granted, and Mr. Percival Smith would act as commissioner. The evidence, however, would not be taken before 10th June.

WALSH AND WALSH V. ERSKINE.

Mr. Gardiner moved for leave to sue the respondent by edictal citation for the balance of a certain mortgage bond for £7,000, and for an order attaching the hypothecated property *ad fundandam jurisdictionem*.

Leave granted, the return day fixed for 14th July, personal service to be

affected, and an order granted to attach the property.

Ex parte RETIEF.

Mr. M. Bisset moved for leave to sell certain property in Graaff-Reinet. The will of petitioner's late husband stipulated that the farm should not be sold, but, at the present time, her income was very uncertain. The Master's report was favourable.

Judgment in terms of the Master's report.

COLONIAL GOVERNMENT V. BISHOP.

Mr. Howel Jones moved for an order of ejectment against the respondent from the beach at Camp's Bay, where she had had permission to erect tents for the use of tea rooms during the summer months. The condition of the grant was that this permission could be withdrawn on two weeks' notice. The affidavit of the Under Colonial Secretary set out that the respondent had been convicted of selling intoxicating liquor, and she had refused to quit the place.

The respondent appeared in person, and said that her tents had been blown away three times. She admitted the conviction against her, but said that there was nothing else against her since. She had lived there for three years, and as no workhouse existed in Cape Town, she did not know what she should do.

Buchanan, J.: You will have to leave the premises by the end of the month. You can take your order, Mr. Jones.

PARKER V. PARKER.

Mr. M. Bisset moved for leave to sue the respondent, applicant's husband, by edictal citation for restitution of conjugal rights, failing which a decree of divorce, a division of the joint estate, and custody of the minor children of the marriage. The respondent had not written since July, 1902.

Leave granted, personal service to be effected, failing which, one publication in the "Gazette" and a Bloemfontein paper, returnable 2nd June, and the respondent to be served with the notice of trial along with the citation.

Postea (October 17th). The rule was made absolute.

Ex parte WATCHAM.

Mr. W. P. Buchanan moved for an order confirming the sale of certain property. The respondent had purchased certain property in East London for his minor daughter for £200, and had sold it for £250 within a few weeks. Counsel asked that an order should be

granted authorising the Registrar of Deeds, King William's Town, to pass transfer from the daughter to the purchaser. The Master's report was favourable.

Order granted.

MCKENZIE AND CO. V. TABLE BAY HARBOUR BOARD.

Sir H. Juta moved, in terms of a consent paper, for an order setting aside a certain judgment, and for leave to the applicants to purge their default.

Leave granted, the defendant to pay costs of the application.

Ex parte LE ROUX.

Mr. Van Zyl moved for leave to raise money on mortgage on certain property in Oudtshoorn, and to appoint some person to represent the minor children in the division of the property. The Master's report was favourable, and he suggested Johannes Botha as a fit and proper person to look after the children's interests.

Order granted in terms of the Master's report.

Ex parte STREITLER.

Mr. W. P. Buchanan moved for an order confirming the sale of certain property, which the petitioner had bought at an auction of an estate, of which he was an executor.

Order granted.

BOARD OF EXECUTORS AND OTHERS V. HADIEN.

Mr. Gardiner moved for an order authorising certain of the applicants to sequester the respondent's estate. Mr. Alexander appeared for the receivers.

Buchanan, J., said that the petition was not in order. There was no allegation of any act of insolvency, and there was nothing to show the condition of the estate. If the Board of Executors wished to amend their position they should apply for an extension of the return day.

Ex parte WOLF AND WIFE.

Mr. J. E. R. de Villiers moved on notice of motion for the registration in this colony of a certain ante-nuptial contract registered in Pretoria.

Order granted subject to the rights of any interim creditors.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

STAUDE V. STAUDE. { 1904.
 { Apr. 22nd.

This was an action for the restitution of conjugal rights, failing which, a decree of divorce, and costs, with forfeiture of the benefits of community, plaintiff to have custody of the child.

The declaration set out that the parties were married on February 24, 1898, within this colony. In February, 1902, the defendant wilfully and maliciously deserted the plaintiff. There was one child (a minor) issue of the marriage.

Mr. Russell appeared for the plaintiff; the suit was undefended.

Charles W. H. Smith, clerk in charge of the marriage register, produced the register of the marriage.

The plaintiff, Lydia Staude, said she was married to the defendant at King William's Town on the 24th February, 1898. After their marriage they lived in King William's Town; one child, a girl, was born, now four years of age. Defendant left King William's Town in February, 1902; he said he was going to Queen's Town. He did not ask her to go with him. He had not since communicated with her in any way. After the summons by edictal citation was published, a letter was received from him, dated February, this year, saying that he arrived in Cape Town in December last, after having been employed as cook on the construction works at Ermelo. He said he had been waiting for her letter, but she had never sent him a word. He had had hard times, and had frequently been sick. He was willing to return to her if they prepared a home. He asked her to send him his green coat. He promised to give up drink. Witness added that she knew defendant was in Cape Town. Her attorneys replied to the defendant's letter, but the defendant did not answer this communication.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th June, failing which to show cause on the last day of next term why a decree of divorce should not be granted as prayed, personal service to be effected.

Postea (August 11th). The rule was made absolute.

[Before the Hon. Mr. Justice HOPLEY.]

GROBELAAR, TROMP AND { 1904.
 CO. V. CHRISTIE. { Apr. 22nd.

This was an action brought by Grobelaar, Tromp and Co., of Bloemfontein, against a farmer named Christie, of Beaufort West, for the recovery of the sum of £497 13s., balance of the purchase price of some sheep and goats sold to the defendant in November, 1902, alleged to be due. The defendant pleaded that the debt had been duly discharged.

From plaintiff's declaration it appeared that they had in their employ a man named Grobelaar, who in November, 1902, went to Beaufort West to purchase some sheep on behalf of the plaintiff company. Grobelaar bought from the defendant Christie sheep to the value of £1,597 13s., of which he paid £1,100 in cash, leaving a balance due of £497 13s. Subsequently Grobelaar sold to Christie some other sheep, the subject of the suit, to the value of £600. The position between the parties then was that Grobelaar owed Christie £497 13s. and Christie owed Grobelaar £600. Grobelaar went to the bank and paid in to the credit of Christie the sum of £497 13s., Grobelaar subsequently took from Christie a cheque for £102 7s., giving him a receipt for the full amount of £600. Defendant pleaded that he had paid Christie £497 13s., together with the cheque for £102 7s.

Sir H. Juta, K.C. (with him Mr. Gardiner) for plaintiffs: Mr. McGregor (with him Mr. Bisset) for defendant.

Andries Herbert Hatzenberg, clerk in the Standard Bank at Beaufort West, stated that in July, 1902, Mr. Christie had an account in the bank. The credit slip produced was that in connection with the payment which Grobelaar had paid in to Christie's credit Grobelaar drew a cheque for £1,500, of which £497 13s. was transferred to Christie's account.

Cross-examined by Mr. McGregor: To his knowledge Christie paid nothing in on the day in question. Mr. Grobelaar put £497 13s. to Christie's credit. The same day Grobelaar came to the bank subsequently and cashed a cheque for £102 7s., drawn by Mr. Christie. On November 27, Christie deposited £1,000.

Evert Nicholas Grobelaar, aged 21, stated that in November, 1902, he came down from Springfontein, O.R.C., on behalf of the plaintiffs to Beaufort West. On arrival at Beaufort West he drew from the bank £1,300, placed to his credit by his principals. On the 25th he went to Christie's farm. On the following day he bought sheep and goats from Christie to the value of £1,597 13s. After the animals had been counted out, witness went with Christie and a man named Marais into the house. They then proceeded to settle up. As he had not sufficient money to pay the whole sum, he paid Christie £1,100. Christie

Marais, and witness then went to Beaufort West, where they arrived about mid-day. Witness had previously bought sheep from a man named Verster to the value of £1,037. As these sheep were not in good condition, witness sold them to Christie for £600; that was at a loss of £437. The position of affairs then was that witness owed Christie £497 13s., and Christie owed him £600. Witness went to Beaufort West and placed £497 13s. to the credit of Christie at the bank, witness having received a further credit of £1,500 from his principals. Subsequently, Christie came to witness and said, "I will pay you £102 7s., the difference between £497 13s. and £600." Witness took Christie's cheque for £102 7s., giving Christie a receipt for £600. Christie told witness to insert on the receipt the words, "and have paid it." It was not until witness returned to his firm that he discovered his mistake. The error was due to the fact that at the time he took the £102 7s. he had forgotten about the £497 13s. which he had placed to Christie's credit. Witness went back to Beaufort West, and after some conversation and interviews, during which Christie said he could not understand it, Christie, having consulted his attorneys, declined to refund the money.

Cross-examined by Mr. MacGregor. On November 24, 1902, he bought 1,150 sheep from Mr. Verster for £1,037. He had the money with him, but intended to use that money—£1,200—in buying sheep from Christie. Witness went then to Christie's farm, Paardekraal, where the transaction of the buying of the sheep and the paying of the £1,100 took place. No receipts were given. When he had paid the £1,100 to Christie, witness had £100 left. On November 27 he asked Mr. Verster to take back his sheep, but he declined. Witness then asked Christie to take them over. After first declining to do so, Christie took the sheep at £600. On Monday, December 1, witness met Christie in the street. Witness denied that Christie told him he was going to the bank. They, Christie and himself, went to the bank, where witness placed the £497 13s. to Christie's credit. The whole transaction was not settled at the bank by Christie giving witness a cheque for £102 7s., because witness's books, etc., were at his rooms. Witness had all his receipts drawn up prior to his receiving any payments. When he left the bank, the only other thing outstanding between Christie and him was the matter of the £600. He knew that the first transaction was closed, but he got confused in the figures.

[Hopley, J. (to Mr. McGregor): Your case must be that Christie paid Grobelaar a cheque for £102 7s. and £497 13s. in cash.]

Mr. McGregor: Yes, my lord.

[Hopley, J.: It seems a peculiar thing thing to do.

Referring to the words "en betaald heb" ("and have paid it"), appearing on the receipt, his Lordship remarked that it appeared like over-precautionousness.

Further cross-examined, witness stated his brother had bought some sheep from him about a month previously, for which on 29th December he received in cash £455 12s. 6d. He gave no receipt, as it was not customary amongst speculators to give receipts. There was no evidence of this transaction, except his own and his brother's word. On the Monday morning he took this money along with some other funds to deposit in the bank. Young Mr. Grobelaar met him, and they went to his (Grobelaar's) room. Grobelaar had some receipts, which he asked witness to sign for previous transactions, and witness then asked plaintiff for a receipt for the £497 13s. he had paid him in cash and the cheque for £102 7s. Plaintiff then drew up a receipt in Dutch for £600. Grobelaar then went to pay some money to Mr. Truter. Witness next saw Grobelaar at his brother's house about a week afterwards. Plaintiff then complained to him that he had not received all the money for the sheep. Witness explained that he had paid him, and suggested they should go to Mr. Theron (a local attorney) that afternoon. Subsequently an appointment for the following morning was arranged. The next day Mr. Theron also explained the matter to plaintiff, who appeared to be satisfied. Mr. Theron had cautioned plaintiff not to spread reports about that he had not been paid, or he might get himself into trouble. Later he received letters from plaintiff, but thought it unnecessary to reply. Plaintiff had told him he wanted cash to make up an amount of £1,500, and that he did not want to deposit it. It was a deep-laid plot to make him pay the money again. He did not keep books. He could not say what business he was doing of what he was worth. He did not consider it was necessary to keep books for his transactions, they were mostly cash, or he got promissory notes. He just made a note in his pocket-book. He could not produce the note-book or say where it was; it might be on the farm. He had sold the sheep to his brother by letter, and had since destroyed the letter.

Mr. Theron stated he was an attorney practising at Beaufort West. Christie had come to him on the 29th December, and handed him a receipt signed by Grobelaar for £600. He saw both Christie and Grobelaar the following morning, and Christie had explained how he had paid £102 7s. by cheque, and £497 13s. in cash. Grobelaar then said he could not remember anything about the cash payment of £497 13s., and practically denied it. Christie had thereupon explained how he had paid the money,

mentioning the hour, etc. After Christie's explanation, Grobelaar said, "Ik verstaan noe" (I understand now), and witness quite understood that he was satisfied. He then told Grobelaar that he should not go spreading reports that Mr. Christie had not paid him the money and that if he did he would have to stand the consequences.

Mr. Truter stated he was a local Attorney of Beaufort West, and also Deputy Sheriff. It was not the prevailing custom to give receipts. He had a Good-for to collect from Grobelaar amounting to £1,037, for a Mr. Verstaan. Grobelaar told him he had not got the money, but that he was re-selling some sheep, and as soon as he had sold them would settle. He had no dealings with Grobelaar on the 29th December, but on the following Monday Grobelaar came to witness's office and handed him a canvas bag containing coin. Witness emptied this bag on to his table and counted out £1,037, passing the residue, which consisted of some hundreds of coins, both gold and silver, to Grobelaar. Grobelaar had a leather bag with him also, but all the money paid witness was from the canvas bag. He could not say how much actually remained after he had taken the £1,037, but there were certainly hundreds of coins.

John Christie, brother of defendant, stated he was a farmer, residing at Kalakraal, in the district of Beaufort West, about eight hours journey off. He saw his brother towards the end of November. He had bought some sheep from his brother about a month previous, and in consequence of a letter he received from his brother he went to Beaufort West to pay him. On the 29th he met his brother and paid him £455 12s. 6d. He did not keep any books except an account of what stock he had. He had not brought this book with him. He did not keep a banking account, but knew his brother did. He always kept a certain amount of ready money in the house and paid his brother in cash.

This closed the case for the defence.

The Court did not call on Sir Henry Juta.

Mr. McGregor said that a receipt raised a *prima facie* presumption that the money had been paid, and the onus of rebutting that view lay on defendant. He considered from the evidence that the two transactions were absolutely separate. How could a man give a receipt in cold blood for £600 when he only received a cheque for £100. This could not have been done in ignorance or forgetfulness. The evidence of Grobelaar on which the case was entirely based, was utterly uncorroborated.

Hopley, J.: This is an action for the balance of the purchase price of certain sheep sold by plaintiff firm to the defendant. The defendant held a receipt for the whole amount, and was therefore in the better and superior

position. If I had felt any doubt whatever, I would have called on Sir Henry Juta to argue the question. But I have no doubt whatever. Young Grobelaar was only a mere schoolboy at the time, and had got muddled in the transactions which gave rise to the present action. The defendant's explanation of the passing of £497 13s was wholly incredible. He thought that Grobelaar had taken the cheque for £102 7s. in error. The form of the acknowledgement of the purchase of the sheep by Grobelaar confirm this view, signed as it was by the defendant. Judgment will therefore be for the plaintiff as prayed with costs.

[Plaintiffs' Attorneys: Fairbridge, Arderne and Lawton; Defendants Attorneys: Syfret, Godlonton and Low.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ABEL V. ELLIOTT AND CO. { 1904.
Apr. 22nd.

Principal and agent - Payment to dishonest agent.

Defendant had made a payment by cheque to one S., who had sold certain sheep to him as plaintiff's agent. S. thereupon forged plaintiff's indorsement on the cheque and converted it to his own uses.

Held, that as S. was known to the plaintiff to be a man of doubtful character, and the defendant had acted bona fide, this payment to plaintiff was good.

This was an action brought by Richard Abel, a stock-breeder, of Malmesbury, against Elliott and Co., butchers, Wynberg, to recover £715 7s. 6d., being the purchase price of certain sheep sold to the defendants.

The declaration set out that about 1st September, 1903, plaintiff sold to the defendant, and the defendant purchased from the plaintiff 485 sheep for £715 7s. 6d. The sheep were duly delivered to defendant, but the defendant refused to pay for the same. Plaintiff claimed £715 7s. 6d.

The plea set out that the sale was effected through the agency of one Storey, who was duly authorised by the plaintiff, and the defendants about 7th September, paid to the plaintiff, through his agent, £715 7s. 6d.

Mr. M. De Villiers (with him Mr. Burton), for the plaintiff; Mr. Upington (with him Mr. Van Zyl), for the defendant.

Mr. M. de Villiers said that he thought the *onus probandi* rested with the defence.

Mr. Upington accepted that and called the defendant.

George Elliott stated that he carried on business at Wynberg as C. H. Elliott and Brother, as butchers. Prior to the transaction he had never seen the plaintiff. About the 28th August he received a telephone message from Storey, offering 500 sheep, and he stated Abel was in the office. When he said 32s. he was going to shut off the telephone, but witness promised to look at the sheep at 30s. Witness saw the sheep on the 1st September, and the owner of the farm told him he had received telegraphic instructions to show him the sheep, and later that another message had arrived telling him to call at the City Hall Hotel that afternoon. Neither the plaintiff nor Storey was there, but there was a note from the latter regretting that they were unable to keep the appointment, and asking for an interview at 7 o'clock. Witness met Abel and Storey that evening, and after both of them discussed the matter, they said the sheep could be had for 29s. 6d., and it was arranged that Storey was to give delivery of the sheep next day. Rees went to get the sheep and paid Storey £2 for expenses. On the 7th September Storey came along for the cheque, and witness made it out in favour of Abel, and Storey gave him a receipt. Storey had been convicted of forgery and appropriating the proceeds. On the 12th September the plaintiff wired, asking witness to meet him to settle the transaction. On Tuesday 15th, Abel and Storey came to Wynberg and spoke about 2,000 more sheep and some oxen, and asked him if he was prepared to go to Hopefield to see the latter. There was not a word in the shop about the cheque, but outside Abel asked him for the cheque, and Storey said to Abel that he was sending it on. As the plaintiff said nothing, witness took it that everything was in order. On the 17th Abel wired "Cheque for sheep not received stop sharp," and later in the day "Cheque not received to whom issued hold you responsible," and to the latter witness replied, "Cheque handed to Storey September 7th, cleared both banks 8th and 9th." Abel never said that he was the sole owner of the sheep, and from the conduct of Abel and Storey he thought that the latter was authorised to receive the cheque.

Cross-examined by Mr. De Villiers: At the Criminal Sessions he stated that he believed that Storey and Abel were partners in the sheep. He did not get Abel's address to send the cheque to him

through the post. The cheque was not crossed.

Re-examined by Mr. Upington: The usual custom in stock transactions was to hand the cheque over to the man who delivered the sheep.

By Buchanan, J.: Stock was usually a cash transaction, except other arrangements were made.

Mark Storey, at present serving a term of imprisonment on the Breakwater, in connection with a cheque, stated that about August he commenced to have business with Abel. On the 6th of that month witness was told by Abel that they could do good business, as he had 2,000 sheep coming from Namaqualand. The sheep did not arrive as was expected, and witness went to Hopefield and saw Bester, from whom Abel and he purchased a small lot of 505. Abel paid for the sheep, and witness was to have half the profit when they were resold. Verbally, he was authorised to receive payment for the sheep. Previous to the transaction with Elliott he had seen several people with a view of disposing of them. Mr. Potts, of Messrs. Berg's, asked whom he should see about the sheep, and the plaintiff said that he should see witness, and he also told Mr. Taylor to deal with witness. When he spoke on the telephone to Elliott the latter asked whom he was speaking to, and witness replied in Abel's hearing that he (Abel) was a partner. Rees was informed when he took over the sheep that witness would call for the sheep. He saw Abel after he received the cheque, and told him that he collected it. From Saturday to Tuesday Abel and he were together in town, and on Tuesday they saw Elliott about further stock transactions. Rees was in the shop when they discussed further transactions. On the way to the hotel Abel asked Elliott for the cheque, and the latter replied that he gave it to witness, who said that he would send it on.

Cross-examined by Mr. M. de Villiers: He told Abel that he had collected the cheque. They were known as Abel and Storey in a sort of partnership in stock transactions. The sheep belonged to Abel and himself. Abel had not paid him anything like his share in the profits. When witness left after cashing the cheque he did so under an assumed name. He did so because he had booked third class, and did not wish to advertise the fact.

Mr. J. Mostert said he had been partner with Abel some eighteen months. Storey told him on the Parade in the presence of Abel that he had gone into partnership with the plaintiff. When he saw Taylor about the sheep Abel went over and brought Storey, and both of them said they could not do any business until six o'clock that night. In ordinary stock transactions he did not ask for any deed of partnership.

Cross-examined by Mr. De Villiers: Abel said he was in with Storey, but that when the 2,000 sheep came down the plaintiff said he would see him about that. He considered Storey one of the straightest young men in Cape Town, until he had a row with him over the partnership with Abel.

Pembroke Potts said that he was a buyer and seller for the firm of Bergl Limited. About the 26th or the 27th August he saw Abel and Storey outside the office, and they offered witness 500 sheep. He could have concluded the bargain with Storey or Abel, the latter having stated that they were acting as partners in the deal.

Cross-examined by Mr. M. de Villiers: From the statement that they were working together he asked them if they were partners.

Edmund Taylor, general broker, stated that about the end of August last year he met the plaintiff and Storey near the National Bank. Abel seemed somewhat reticent about striking a bargain, and drew Storey away, and then said he could not say anything until six o'clock that night. Storey had evidently something to do with the transaction.

Cross-examined by Mr. M. de Villiers: He looked upon Storey as a dealer. He considered that both Abel and Storey were in the deal together. He had never seen a written partnership between stock dealers; what they usually said was "standing in."

The evidence of James Rees, formerly a manager to Elliott and Co., was taken on commission, and he was under the impression that Storey and Abel had equal shares in the matter. Storey took a leading part in the transactions.

Mr. Upington closed his case.

Richard Abel, plaintiff, stated that when he met Storey on the 25th August he wanted witness to go surety for the purchase of certain sheep, which he refused to do. There was no such thing as partnership with Storey; in fact, the latter was always trying to get something out of him. Storey was to get half profit when he negotiated a sale in Cape Town. That was said in the presence of Bester and Retief. Witness purchased the sheep from Bester, which Storey was unable to pay for. On the telephone Storey told Elliott that the sheep belonged to witness. Storey was no partner of his. Storey was brought to the office of Mr. Retief in order to get evidence as a precautionary measure. It was true that he believed that Storey was a slippery customer, although he did not put Mr. Elliott on his guard. Most of the stock transactions were cash, where no other agreement was made. Storey had no authority to accept the cheque. All the people that took Storey and witness for partners were friends of the former. If Storey had said he was a partner, witness

would have taken no notice of him, except he was serious. The reason he called Storey aside when they met Elliott was to ask him if he would be satisfied with the profit.

John Retief stated that in August plaintiff and Storey had a business transaction over certain sheep. Storey attempted to purchase the sheep, but he could not find the money. Abel subsequently bought the sheep.

Cross-examined by Mr. Upington: Storey was brought to the office to get evidence as a precautionary measure.

Jacobus Bester, speculator, stated that the sheep were first offered to Storey, but Abel came later on and bought them.

Mr. De Villiers argued that defendant's payment to Storey was bad. He who puts it in the power of a forger to commit a forgery should bear any loss which may directly result from that forgery.

Mr. Upington argued that this rule is by no means of universal application. Here plaintiff knew the character of his accredited agent, and it was only fair that he should suffer for this agent's dishonesty.

Buchanan, J.: This is an action brought by the plaintiff, a stock-breeder, living in Malmesbury, for the purchase price of certain sheep sold to the defendant for the sum of £715 7s. 6d. The declaration states that the sheep were duly delivered and the defendant declines to pay for them. The plea admits the sale and admits that the sheep were the property of the plaintiff, but sets up the defence that the defendant has paid for the sheep through the plaintiff's agent, one Storey. It is further urged that the sale was effected through the agency of Storey, and with the authorisation of the plaintiff the sheep were delivered by the said Storey, and that the money was paid to Storey, who was authorised to receive the same. This plea is hardly correct in saying that the purchase-price itself was paid to Storey, as what was given Storey was a cheque in favour of the plaintiff, made out to "A. C. Abel or order." The sole question in this case is one of fact, and that is whether the defendant was justified, under the circumstances of the case, in giving this cheque to Storey or not. The parties—no doubt innocent parties—come to Court, and where there are two innocent parties, the Court has to decide which has to suffer. That one has to suffer who puts it in the power of a forger to commit a forgery. It is true Storey could not have forged the endorsement on the cheque unless the cheque had been handed to him. Take the case of a person who owes money to a merchant, and pays the money by means of a cheque handed to the servant of the merchant who is authorised to receive it. The mere physical handing over of the cheque enables the person to forge the endorsement, but the person would not necessarily be always respon-

sible for it. The question would be was he justified in handing the cheque over to the person who receives it? That is the principle that applies in this case. The question of partnership is out of the case altogether. The pleadings are against it, and the evidence does not support the allegation that there is a partnership, but when we come to consider Storey's authority, we must look carefully into the relations between the parties. It is common cause that Storey, who had been dealing in cattle, had gone to Hopefield and attempted to buy the sheep from Versfeld. He had struck a bargain with Versfeld, but he was unable to pay for the sheep, and after speaking to the plaintiff in the case, the plaintiff advised him to let the bargain go on, and he would buy these sheep and have them taken up to town, and they would share in the proceeds. The sheep were sent to town, and the plaintiff and Storey came into town to attempt to dispose of them. It is clear on the evidence that Storey had as much to do, if not more, in negotiating the sale than the plaintiff himself. Mostert and Potts said that Abel had understood there was a partnership in the deal, and Taylor concluded that he was perfectly justified in dealing with either of them as the principal in the transaction. It was clear from the way in which Abel and Storey conducted the business that Abel would not sell without Storey's advice and consent, and it was only when Storey had given his consent that the transaction went through. Then Elliott goes out and inspects the sheep at Gird's farm, and the transaction is closed. Nothing is said, and Storey is left to deliver the sheep. The sheep are brought up to Salt River and handed over to Elliott's manager, Rees, by Storey. I asked Mr. Elliott in the box what was said about payment, and he said we only fixed the price, that nothing whatever was said, no credit given, or time of payment discussed. It is true that Mr. Abel said that he had asked the cheque for the sheep to be sent to him by post by Mr. Elliott. Mr. Elliott said nothing of the kind was agreed to or suggested or said. I must say that when the evidence of Mr. Abel and Mr. Elliott comes into conflict, I am rather inclined to take Elliott's statement in preference, because Abel's statement on a critical matter was contradicted by the correspondence itself. Let me take one or two instances. When the cheque was handed over to Storey, the plaintiff says some days after that he telegraphed to Elliott that he must send him his cheque. Now, when we look at the telegram put in, it says: "Meet me one train this afternoon; if not, will come and see at once to settle sheep business." When this transaction took place the parties were now entering into further negotiations, as stated by Abel and Storey, that a great many more

sheep were to come up—2,000 sheep and some oxen. There is nothing in this telegram to indicate to Elliott that the cheque he had given to Storey had never reached its destination. Then when Abel goes up he takes Storey with him, and when they see Elliott they discuss other transactions, and nothing is said about the cheque being sent. After the discussion Abel says he turned to Elliott and said where was his cheque, and Elliott said he had given it to Storey, whereupon Abel said: "I hope it is all right, but I hold you responsible." In the criminal proceedings Mr. Abel said "I turned to Elliott and said, 'I hope it will be all right; I hold you responsible, as I wired I was coming for the cheque.'" No such wire ever was sent, and it is clear Mr. Abel's evidence is not in accordance with the documents before the Court. It is not necessarily a wilful misstatement of Mr. Abel, and I will acquit him of it, but in cases of this kind people think they have done things they would like to have done or intended to do. Mr. Elliott says that when he was asked for the cheque he said "I have given it to Storey." On this point Storey, who had been called, does not agree entirely with either of the parties, but the case can be decided irrespective of Storey's evidence. I think it is extremely improbable that Elliott would have received such a statement, and said nothing. If such a thing had been said as "I hold you responsible," Elliott would have said "I have given the cheque to Storey, and there he is." If Abel did not wish Storey to receive the cheque he ought to have said to Elliott, "What right have you to give the cheque to Storey; immediately demand the cheque?" but when Elliott said he gave it to Storey he says it is all right. Storey says he intended to send his own cheque, and Abel must have considered that Elliott was perfectly justified in handing the cheque to Storey. I must hold that the defendant has discharged the onus upon him. He has paid for the sheep, and given a cheque for the sheep, which was not negotiable without an endorsement by Abel on the cheque. The endorsement was forged by Storey, whose character was well known to the plaintiff. One must have considerable sympathy for the plaintiff, but he knew the man he was dealing with. There will be judgment for the defendant with costs.

[Plaintiff's Attorneys: D. Tennant, junr.; Defendant's Attorneys: Van Zyl and Buissinné]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

ALLIE V. HADIE. { 1904.
{ Apr. 15th

Mr. Nightingale said that, on behalf of the plaintiff, he had to apply that the case should be allowed to stand over till next term. A petition for sequestration in this matter was presented on Thursday last, but it was found not to be in form. Petitioners were then given leave to apply again for the sequestration of the estate.

De Villiers, C.J., said that the case would stand over on the understanding that the plaintiff should pay the costs of the day.

SEALE V. TOLL AND COURTIS.

This was an action brought by Henry Francis Seale, jeweller, Cape Town, against William E. Toll and John W. Courtis, trading as Toll and Courtis, in Cape Town, for an order (a) compelling the defendants to take transfer forthwith of certain land upon payment of the balance of purchase price, viz., £19,500, with interest at the rate of 6 per cent. from the 19th December, 1903, and conveyancing and transfer expenses; (b) for payment of £19,500, together with interest, as aforesaid. Mr. Schreiner appeared for the plaintiff; the suit was undefended.

Mr. Schreiner said that he would lead formal evidence, and then apply to their lordships for judgment.

The plaintiff, Henry Francis Seale, of Cape Town, said that in August last year he sold certain land situate at the back portion of the plaintiff's corner building, Adderley-street. The defendants purchased through a broker's note, made by Mr. H. W. Joseph, which was signed by witness and the defendants. Amongst the terms it was provided that transfer was to be taken within six months, rates and taxes to be paid by the seller to the date of the transfer; conveyancing and transfer expenses to be paid by the purchaser, and interest to be paid at the rate of 6 per cent., the purchaser to pay the sum of £1,000 on the 1st September, 1903, and the balance upon transfer being taken. Witness claimed interest from the 19th December last. He put in a letter from the architects certifying that the building had been completed. Transfer was to be taken six months after the broker's note

was signed. No further portion of the sum of £19,500 had been paid by the defendants.

De Villiers, C.J., said that it would not be necessary to hear further evidence, and that judgment would be given for the plaintiff as prayed.

HELLIG V. HELLIG.

This was an action brought by Fanny Hellig, at present of Cape Town, against her husband, Frederick Philip Hellig, of the Fraserburg district, for restitution of conjugal rights, failing which for divorce.

The declaration set out that the parties were married in Russia in September, 1883. There had been no issue of the marriage. The defendant deserted her in Johannesburg in 1897.

The plaintiff, Fanny Hellig, stated that she was married to the defendant in Russia, on the 2nd September, 1883. Witness and her husband came to this colony sixteen years ago, and after remaining in Cape Town six years they went to Calvinia, and subsequently to Johannesburg. About June, 1897, the defendant deserted her and went to Russia. She had written to him several times, but he disregarded all her supplications to return. At present he was in business with his brother at Fraserburg.

A translator was called to swear to a translation of the marriage certificate from the Russian to the English language.

An order was granted for restitution of conjugal rights, the defendant to receive or return to the plaintiff on or before the 15th June, failing which a rule to be taken calling upon the defendant to show cause on the last day of the next term why a decree of divorce should not be granted, with costs; personal service to be effected.

Postea (July 14th.)

The rule was made absolute.

KNOESEN V. THERON. { 1904.
{ Apr. 25th.

Defamation—Unchastity.

The defendant, knowing that the plaintiff passed as an unmarried woman, stated to several persons, who also believed her to be unmarried, that she had a son by one M., and was married to him.

Held, that the statement, if false, was defamatory.

This was an appeal from a judgment of the Resident Magistrate of Kokstad, in

which he found for the defendant in an action brought by the appellant, Maria Johanna Knoesen, against the respondent, Barend Jacobus Theron, to recover £500 damages for alleged slander.

This matter had previously been before the Court (see 13 C.T.R., 811) upon an exception taken by the defendant to the summons. The Magistrate upheld the exception taken to the summons, in that the words were not defamatory, and in no way exposed the plaintiff to hatred, ridicule, or contempt. Mr. Justice Maasdorp, upon the appeal against the Magistrate's decision upon the exception coming before him, dismissed the exception, and referred the case back to the Magistrate for trial upon the merits. The present appeal was brought against the Magistrate's judgment at the trial upon the merits. The plaintiff alleged that in July, 1901, the defendant, while riding to the town of Kokstad, said of the plaintiff to one Zietsman that he was told by one Lilford that she was really a married woman, and that he was in the church when she was married to a man named Matthews, and that one Jimmy Knoesen was a son of the marriage, which had been in force for seventeen years. The Magistrate, in his reasons for judgment, said that the only persons to whom it was alleged the defendant had uttered the words were the two Zietsmans. The younger Zietsman said he never understood from Theron that Miss Knoesen was guilty of immorality, and he gathered from Theron that he was acting *bona fide* in the matter, and the elder Zietsman concluded that Theron had no intention of slandering Miss Knoesen. He had heard such remarks before, and Theron was not the first to say so. In giving judgment for the defendant, the Magistrate said that in his opinion the defendant was acting honestly, and in no way did he intend to maliciously injure the plaintiff.

Mr. W. P. Buchanan for appellant; Mr. Upington for respondent.

Mr. Buchanan: It is true that the respondent did not originate this story, but he has nevertheless made himself responsible for it by helping to inculcate it. The Magistrate held that the statement was not malicious, but the cross-examination of Miss Knoesen showed considerable malice.

[De Villiers, C.J.: That was after the words were spoken, so you cannot argue on that.]

It shows nevertheless the defendant's disposition towards her. It is all very well to say that he had no malicious intent, but words may be defamatory *ex facie*. The statement made to Zietsman was clearly defamatory, and the respondent was simply a tale-bearer, who repeated what he now admits he knew to be false. In his defence he has repeatedly shifted his position. He first

denied that he had used the words; then he admitted having used them, but said they did not refer to the plaintiff. A person who makes a defamatory statement must be presumed to have intended the natural consequences of his words.

Mr. Upington said that on the question of the interpretation of the words by the bystanders, the two witnesses that could speak with authority were the two Zietsmans, who were called by the plaintiff herself, and it was perfectly clear from these witnesses that they never for one moment took up the view that the words conveyed an imputation of unchastity, or that they were spoken with malice. The Magistrate's finding on the question of fact was amply justified by the evidence in the case. If the plaintiff failed on that point her whole case fell to the ground, because he submitted that to say that a woman was married was not necessarily defamatory. There must be something in the way it was said, or some other surrounding circumstance to make it defamatory. Apparently it was idle talk, and there was certainly no intention to injure the plaintiff in any way. If a man was to be held liable under such circumstances there would be no end to causes of action that would arise from everyday conversation. If the words in themselves were not defamatory, it rested surely with the plaintiff to prove that there was some special circumstance connected with the case to show that they were. It was a pure question of fact, and counsel submitted on the evidence of the plaintiff and her witnesses that the Magistrate's finding was amply justified.

De Villiers, C.J.: The plaintiff is an unmarried woman, and she was known to the defendant at the time the words were uttered, to pass as an unmarried woman. The persons to whom the words were spoken also believed her to be an unmarried woman. In the house in which she was living there was a young man going by the name of Knoesen, and what was said by the defendant was that this Knoesen living in the same house was really her son, and that she had been previously married to one Matthews. Here is a statement in regard to an unmarried woman that the child living in the same house is her son. If the defendant knew that she passed as an unmarried woman, it is clear that the defendant imputed either unchastity or imputed that the plaintiff was sailing under false colours, in that, being a married woman, she passed herself off as an unmarried woman. The statement in regard to an unmarried woman that she has a child, in itself implies unchastity, and the mere fact that it is coupled with the statement that she had been married does not excuse the person

who utters these words. The defendant had an opportunity of retracting what he had said. He was asked to apologise for them, but then he said he never used the words. At the trial it was proved he had used the words. If the defendant had apologised and withdrawn the words, nothing more would have been heard of the case. Instead of that, he persisted in going to trial, and at the trial he somewhat aggravated his offence by the cross-examination, suggesting that this woman had been guilty of immorality with an elderly man of the name of De Kock—and witnesses were called to prove that she had been sleeping in the same bedroom with De Kock. The appeal will be allowed, and judgment entered for the plaintiff for £1 damages, with costs in this Court and the Court below.

Appellant's Attorneys: Findlay and Tait; Respondent's Attorneys: Faure and Zietsman.

HATTINGH v. ROBERTSON. { 1904.
Apr. 25th.

Immovable property—Restrictions imposed on purchaser by vendor—Rights of subsequent purchasers.

This was an appeal from a decision of the Court of Assistant Resident Magistrate of Sterkstroom, in the district of Queen's Town, by which the appellant (defendant) was ordered to pay the respondent £1 10s., by reason of certain cattle, the property of the defendant, trespassing on the land of the plaintiff.

To the summons a special plea was filed by the defendant's attorney, to the effect that inasmuch as the property on which the damage was alleged to have occurred was not enclosed or sufficiently fenced, and that in view of a clause in the conditions of sale, which stipulated that the purchaser of the erven should properly fence it, and a counter claim was set up for 16s. 9d., for pound fees and damages, no claim for damages could be established.

The Magistrate, in dismissing the special plea, said the Court would have to decide whether clause 22 of the conditions of sale applied to the property in question, and secondly, if so, was the said property sufficiently fenced. As regards the second question, the magistrate found that the ground was not sufficiently fenced, but on the first question he decided that it was absolutely in conflict with the provisions of another clause in the conditions. The special plea was overruled, and the Court, falling back on the common law, found that the damages as sued for were fully proved.

Mr. Schreiner, K.C. (for the appellant); Mr. Burton for the respondent.

Mr. Schreiner: The real meaning of the condition in the conditions of sale is that cattle are not to be impounded should they trespass upon these unfenced lands. If a man wishes to keep cattle off his land he must fence. This condition is obviously for the benefit of the entire community to the welfare of which that of individuals must yield. In connection with this case, and of the right of vendors to sell their land subject to conditions, see *Steytlerville D.R. Church v. Bosman* (3, C.T.R., 85). See also *Trudman's Benefit Society v. Du Preez* (5, S.C.R., 269).

Mr. Burton: No conditions of sale entered into between the vendor and the vendee can affect the rights of third persons. Nothing was registered on the title.

[De Villiers, C.J.: I think you should argue as if there had been registration.]

That would place me in a very awkward position, as I came prepared merely to argue on the record, and I can find nothing about registration there. Again there is no evidence, as has been said, that these regulations were for the benefit of the community, and not rather for the individual benefit of the purchaser. Can, then, an erf holder claim the benefit of these conditions. All we know about the appellant is that he is the owner of certain cattle which strayed. He had already paid damages for trespass, and after having done that he attempts to set up these conditions of sale. I submit that the appeal should be dismissed.

Mr. Schreiner (in reply): If we are to admit that there was registration, I confess I cannot follow the argument of counsel for the respondent. With regard to our claim in reconvention, I do not press that.

De Villiers, C.J.: It is impossible in this case to decide on the questions raised without some further evidence. The Court will therefore remit the case for evidence on the following points: first, whether the plaintiff bought his erf from the original vendor, namely, the committee of the Dutch Reformed Church, or from a subsequent vendor; secondly, whether defendant is an erf-holder, and if so, from whom he bought; and, thirdly, whether the conditions are registered against the plaintiff's title. The parties may save considerable expense by agreeing upon the facts, by signing a note to that effect, in which case the Court will either give judgment or, if necessary, hear further argument. If the parties do not agree on the facts then further evidence will have to be given.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Walker and Jacobsohn.]

APPOLIS V. CYSTER.

1904.
(Apr. 25th.

Magistrate's Court — Costs — Defamation.

The plaintiff issued a summons in the Magistrate's Court against the defendant for damages, but omitted the names of the persons in whose presence the alleged defamatory words had been uttered. Before the return day, the plaintiff gave notice to the defendant that at the trial he would apply for an amendment of the summons, by inserting the names which he mentioned. The defendant, however, brought no witnesses for the trial, preferring to raise the objection to the form of summons. The Magistrate allowed the plaintiff's application for amendment of the summons, but ordered the plaintiff to pay the costs of the day.

Held, that the Magistrate erred in ordering the plaintiff to pay the costs of the day, and the costs were accordingly ordered to be costs in the cause.

This was an appeal from a decision of the Resident Magistrate of Wynberg, in which he allowed an exception taken to the plaintiff's summons as vague, embarrassing, and bad in law, in an action for slander against the defendant, and ordered the plaintiff to pay the costs of the postponement. Mr. Burton was for the appellant, and the respondent was not represented.

It appeared from the record that an action was taken against the respondent for damages for slander, in that, on the 9th November, 1903, and at Wynberg, the defendant unlawfully and maliciously published slanderous statements concerning the plaintiff. The case was down for November 30th, and it was postponed until December 16th. Between the dates mentioned the plaintiff's attorney had been present in court when the Magistrate gave a decision regarding the mentioning of witnesses in whose presence slander was uttered. He wrote on December 8 to the defendant's attorney giving him notice of the names of the persons who heard the slander. When the case came on on December 16 the defendant's attorney excepted to the summons as vague, embarrassing, and bad in law, as it did not mention the names of the persons to whom the alleged slander was uttered.

The summons was amended, and the case postponed until January 14, the plaintiff having to pay the costs of the day. The Magistrate, in his reasons for judgment, said that when the amendment to the summons was allowed the defendant's agent applied for a postponement, stating that he had not secured his witnesses. The Magistrate held that the summons was bad, and that the defendant had reason to think that the case would be dismissed, and that it would be unnecessary to bring his witnesses, and he ordered the plaintiff to pay the costs of the day. Mr. Burton (for the appellant), contended that the Magistrate was clearly wrong in ordering the plaintiff to pay the cost of the postponement. He had looked up all the leading authorities, and could not find any rule that the names of the persons in whose presence a slander was uttered must be set forth in the summons. A slander might be uttered in the presence of a crowd of people, amongst whom the plaintiff might not be ready to select who was to give evidence. Whether it was a common practice or not, there was no law which required in a summons for defamation of character that the names of the witnesses should be set forth. In the present case the attorney on the other side had eight days' notice that the amendment would be applied for.

[De Villiers, C.J.: Had the Magistrate the letter before him when he gave judgment?]

Oh, yes, my lord, it forms part of the judgment, and he refers to it in his reasons.

De Villiers, C.J.: On December 16, 1903, the plaintiff's agent wrote to the defendant's agent giving him notice of the names of the persons in whose presence the slander complained of was uttered, and that at the trial he would accordingly apply for an amendment of the summons. On the 10th December the trial was to take place, but the defendant, instead of bringing his witnesses, chose not to bring his witnesses at all, intending to rely upon his defence that the summons was bad, although the defendant's agent knew that that defect was to be cured at the trial. Clearly, it was the duty of the defendant's agents to be prepared with his witnesses to meet the plaintiff's case. The Magistrate therefore, in my opinion, erred in making the plaintiff pay the costs of that day, seeing that it was the defendant's fault, and the defendant's fault only that the case was not heard on that day. The appeal must, therefore, be allowed, and instead of the costs being paid by the plaintiff, they will be costs in the cause. The costs of this appeal will, of course, be paid by the defendant.

[Appellants' Attorney: C. Brady. Respondent in default.]

PINNOY V. AFRICAN AND } 1904.
UNITED COLD STORAGE. { Apr. 25th.

Wholesale butcher — Standing order.

This was an appeal from a judgment of the Resident Magistrate of Molteno, in which he found for the plaintiffs in a claim for £22 3s. 9d. for goods sold and delivered to the defendant. Mr. Searle, K.C., was for the appellant, and Mr. Uppington was for the respondent.

The Magistrate, in his reasons, held there was a standing order for a weekly supply of meat to the plaintiffs from the evidence disclosed in the case. There was evidence to show there was a stoppage of supply on October 22, but the witness Kamp gave a perfectly reasonable explanation of that. Mr. Pinnoy admitted that his cheque would not arrive at Port Elizabeth until October 31. He stated in that letter he terminated all transactions with the plaintiffs, but the witnesses Kamp and Stockdale stated that a standing order had been received, and the defendant did not deny that. The manner in which the defendant gave his evidence in court satisfied him that he was not misled by the footnote, and as he was a perfect stranger to the plaintiffs they could not be blamed for protecting their own interests.

Mr. Searle said that at the trial no standing order was produced. All they had was the telegram of October 14, asking for the supply of two hind and two fore quarters of beef once a week, and the price. To that the plaintiffs wrote, giving their price, that any order would have their immediate attention, and hoping to be favoured with the defendant's custom. Certainly the plaintiffs did not regard that as a standing order. Both Kamp and Stockdale admitted that no more meat would be supplied until an account was paid, and even if there was a standing order they broke it themselves.

Mr. Uppington contended that if the wire sent by the defendant were read along with the letter, it would be seen there was a standing order, because otherwise the second consignment was sent on without orders. At the trial the defendant did not deny there was a standing order. The transaction was a cash one, and when the defendant had not met his obligations the plaintiffs refused to send further supplies. The Magistrate, he contended, was perfectly correct in his judgment.

De Villiers, C.J., said that the Magistrate had mistaken the true position of the parties, and he ought to have given absolution from the instance. The appeal was allowed, and judgment altered to one of absolution from the instance with costs in both Courts.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

TRIAL CAUSE.

VAN BOOM V. VISSER. { 1904.
{ Apr. 26th.

This was an action brought by Frans Jacobus van Boom against Daniel Visser, for damages. Mr. M. de Villiers appeared for the plaintiff; Mr. Williams was for the defendant.

Mr. Williams applied for a postponement, because, he said, he intended to move the Court for removal of bar in order to enable the defendant to enter his defence.

Mr. De Villiers said that he would raise no objection so long as due and proper security was given for costs.

His Lordship said that the case would be postponed *sine die* on the understanding that due security would be given for costs within 24 hours, and proper notice given to certain parties interested in the suit.

APPEALS.

BETHUNE V. KEY.

Medical practitioner — Fees —
Proof of status.

A medical practitioner, in order to recover fees, must prove that he is duly licensed to practice in this Colony. Production of the Medical register is not sufficient proof of status.

Louw v. Fryer and Nqumbela v. Culligan followed.

This was an appeal from a decision of the Acting Resident Magistrate of Coleberg.

The Acting Resident Magistrate had given judgment for the respondent for £14 16s. 6d., for professional services rendered and medicine supplied. The ground of appeal was that the respondent had not given proof of his qualifications as required by Act 34 of 1891.

The Magistrate, in his reasons for judgment, said that after the plaintiff (James Key) had given his evidence, in which he stated, *inter alia*, that he was a duly qualified medical practitioner, and that he could produce his certificates, if necessary, he (the Magistrate) asked the attorney for the defence if he had any questions to put to the doctor, and he replied that he had nothing to ask the plaintiff,

and he thereupon applied for absolution from the instance, on the ground that there was no *prima facie* evidence that the doctor was a duly qualified medical practitioner, as required by the 56th section of the Medical and Pharmacy Act, and he named two cases which appeared on the record, which he did not produce, and did not quote from. He (the Magistrate) refused to accede to his application, after having taken judicial notice of the fact that plaintiff's name was duly registered as qualified in the Medical and Pharmacy Register for the Colony of the Cape of Good Hope, published by direction of the Medical Council, and the Colonial Pharmacy Board, which was constituted under the Medical and Pharmacy Act, and it would be superfluous to prove it. He considered that, together with the doctor's evidence, sufficiently *prima facie*, and as that was his (the defendant's attorney's) only defence, according to his own statement, of such a plea as stood recorded, he (the Magistrate) gave judgment for the plaintiff, with costs.

Mr. Upington (for the appellant) cited the cases of *Louw v. Fryer* (8 C.T.R. 253), and *Nqumbela v. Cullinan* (13 C.T.R. 489), in support of his contention, and he submitted that the Magistrate should have granted absolution from the instance.

De Villiers, C.J., said that he regretted that the previous decisions of the Court which had been cited were not brought before the Magistrate. The appeal would be allowed and absolution from the instance would be granted.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent in default.]

GACULA V. DICKERSON.

This was an appeal from a judgment of the Resident Magistrate of Tabankulu, Native Territories, in an interpleader action. The appellant was the plaintiff in the Court below in an interpleader action in respect of certain oxen and a wagon, the Magistrate giving judgment in favour of the respondent.

The inter-pleader case arose out of an action between Dickerson and one Henry Konyana in which the former claimed £78 10s., with interest, in respect of two promissory notes of the amounts of £64 and £14 10s. respectively. The defendant failed to meet the promissory notes. Judgment was given by default for the amount claimed. That was on the 6th August. The messenger of the Court took an indemnity from the plaintiff, holding him harmless in case of execution. A writ of execution was issued, and the property now in dispute was attached. Then the property was claimed by the present appellant, Nomenti, widow of Gacula, and under the circumstances the messenger, caused a

writ to be issued in an interpleader, setting forth that one red ox and two white oxen and one wagon taken under a writ of execution were claimed by the plaintiff, Nomenti, and that the matter would be determined on the 24th August. The Magistrate then declared the cattle and wagon executable.

The appeal had been ordered to stand over pending communication with the Magistrate in order to ascertain whether the summons was finally amended, and whether two or three oxen were declared executable.

It now appeared that the Magistrate had replied, stating that the summons was amended so as to embrace the three oxen.

Mr. W. P. Buchanan for the appellant. Mr. J. E. R. De Villiers for the respondent.

Mr. Buchanan submitted that the white ox should not have been declared executable. The Magistrate gave fairly general reasons, but he did not meet the point that Dickerson's man admitted that no cattle but the three mentioned in the promissory note were Konyana's at all. The only point that there might be some doubt about was in regard to the wagon, and his contention was simply that the strong presumption that they were Konyana's, which arose in the case of the two cattle which were pledged by him, did not arise in this case, because the parties were practically on a level in the matter, seeing that the wagon was not attached at the kraal at all. He must admit that these two cattle which were purported to have been pledged were subsequently seized at the kraal of Nomenti really. He submitted that the plaintiff was entitled to succeed in regard to the white ox.

Mr. De Villiers having been heard, De Villiers, C.J., said that the appeal would be allowed, with costs in this Court, and the judgment would be altered by declaring only two of the cattle executable, and not the white ox mentioned in the summons; judgment as to costs in the Court below to stand.

REX V. FISH.

{ 1904.
{ Apr. 26th.

Adulteration of foods—Vinegar—
Act 5 of 1890—Master and
servant—Fraud.

The defendant's servant sold as vinegar a liquid in a cask, from which he was authorized by the defendant to sell vinegar. The certificate of the analyst under the 27th section of Act 5 of 1890, was to the effect that the liquid was composed of 100 parts of vinegar and 17

of water added, and that the original vinegar had been adulterated by the addition of 17 parts of its weight in water. No application was made at the trial of the defendant before the Magistrate for the cross-examination of the analyst.

Held, that the defendant was responsible for the sale by his servant, and that, although he had not been guilty of fraud, he was liable under the 6th section of the Act.

See *Reg. v. Eichbaum* (10 C.T.R., 556).

This was an appeal from a decision of the Resident Magistrate of Dordrecht, imposing a fine of 5s. or in default five days' imprisonment, on William Fish, a storekeeper, of Dordrecht, found guilty, under section 6 of Act 5 of 1890, of having sold to Henry Marks, a police sergeant, a quantity of vinegar adulterated with water, as vinegar.

The evidence in the Court below went to show that on January 4 Sergeant Marks went to the defendant's store and asked for vinegar. He was served by the shop assistant. The Government analyst at Graham's Town subsequently analysed the contents of the bottle supplied, and certified that they were composed of 100 parts of vinegar and 17 parts added water, that was to say that to 100 parts of the original vinegar 17 parts of water had been added, making a mixture of 117 parts water and vinegar. For the defence, it was stated that the cask from which the contents of the bottle were drawn was received from Cole and Co., Worcester, and that the defendant had no means of testing whether it was adulterated. The cask was received on the undertaking that it contained vinegar. Badger, the assistant who drew the liquid from the cask, and the defendants both stated that they had not tampered with the cask; its contents were sold just as received from Worcester, and it would have been impossible for anyone to add water without their knowledge while the cask was in the store. The Magistrate, in giving his reasons for his decision, declined to entertain the objection that no intent to defraud had been proved, because, he held, it was not necessary to prove such intention. Although satisfied that there was no intent to defraud, he found the defendant guilty of a technical offence against the Act, and inflicted a nominal fine of 5s., or in default five days imprisonment.

Mr. McGregor for the appellant. Mr. H. Jones for the Crown.

Mr. McGregor said that since the

water, which could not be injurious, had only been added to the vinegar, and the mixture was not, therefore, injurious to health, it could not be said that defendant had sold an injurious drug, and failing that it should have been shown that there was intent to defraud.

His Lordship said that the analyst appeared to have assumed a certain standard for vinegar. What, after all, was vinegar? Water entered largely into its composition, and the analyst having, apparently, assumed a standard, stated that 17 parts of water had been added. Was there any fixed standard for vinegar? In the absence of a standard, it would appear that what was sold was only weak vinegar. He did not see how any analyst, however expert he was, could say that 17 parts of water had been added to vinegar, an article into which water largely entered.

Mr. McGregor said that one would like to feel sure that the analyst had not assumed a fictitious standard, adopted from another country, where the conditions which would govern such a standard would differ from those of this country. Proceeding, counsel submitted that what the defendant had sold was vinegar.

In the course of his argument Counsel cited Act 5 of 1890 Sec. 6 and 25. *Reg. v. Anderson* (9 C.T.R. 220), *Quern v. Wright* (11 S.C.R.), *Chamber's Encyclopedia* and *Yure's Dictionary* (Art. "Vinegar.")

Mr. H. Jones: We have no evidence as to what is vinegar; but there must surely be some standard or other of strength for vinegar. If the Court does not consider the analyst's certificate satisfactory, the matter might be referred back to him. I submit the case is too important to be dismissed without further enquiry. It has been contended for the appellant that it is necessary to allege fraud in the summons, but see Sections 24 and 28 of the Act. These sections are taken from the English Act 32 and 33, Vict. C. 112, Sec. 4. In criminal prosecutions for a statutory offence, all that we need do is to set forth the offence. In *Reg. v. Anderson* (9, C.T.R., 221), the question of fraud was not raised.

Mr. McGregor in reply urged that the Court should be guided by the Colonial standard of vinegar and not by the English.

De Villiers, C.J.: The bottle of vinegar was purchased at the appellant's store, and the person who sold it was the servant ordinarily employed by the appellant as salesman. He sold what purported to be vinegar. It was contained in a cask, and there is no evidence that the servant sold anything else other than what the master authorised him to sell, and, therefore, the defence that the appellant cannot be held responsible for what his servant did falls to the ground.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice HOPLEY.]

SALIE V. ABRAHAM. } 1904.
Apr. 26th.

This was an action brought by Hadji Salie, a building contractor, of Cape Town, against Joseph Abrahams, a landed proprietor, also of Cape Town, to recover £165 5s. 6d., being the balance of an account for certain work done by the plaintiff at the defendant's request.

The declaration set out that about December 22, 1902, the plaintiff and the defendant entered into an agreement, whereby the plaintiff undertook for £680 to do certain work on two buildings in Constitution-street, Cape Town. The contract specified there was to be no extra work or waste of material. Plaintiff, about January, 1903, proceeded to carry out the terms of the contract, and with the knowledge and consent of the plaintiff to carry out certain extra work, and he was entitled to claim the extra money stipulated. About the 15th May the plaintiff was obliged to discontinue the work on account of want of material.

The plea denied that the plaintiff did any extra work with the defendant's knowledge or consent, or that he was entitled to payment. He also denied that the plaintiff applied for any extra material. On the 5th May plaintiff wrongfully and unlawfully discontinued the work. The defendant in reconvention admitted an indebtedness of £50 11s. 9d., and tendered £70, with costs, to date of tender.

Mr. Searle, K.C. (with him Mr. Alexander), was for the plaintiff, and Mr. Gardiner (with him Mr. J. E. R. De Villiers), was for the defendant.

Hadji Salie, plaintiff in the case, stated that the defendant asked him to make a tender for the work. The contract was signed on the 22nd December, 1902. The original plan provided for a 10-foot yard. The work was started on the first week in January, and witness served a notice on the building inspector, who told him not to go on with the work on account of insufficient air space. The rooms had to be made five feet smaller, in order to extend the yard. The only indication he had as to how to proceed with the alteration was by means of marks on the adjoining wall made by the defendant. The defendant came to inspect the work every day, and never raised any objection to the way in which the work was being done. The defendant refused on several occasions to give him an amended plan. He was obliged to stop the work about 6th May, for want of sand and cement, of which the defendant had ample notice. He received a letter on Friday that unless he started the work by

The further evidence is that there was no proof of intention to defraud, and the 25th section has been relied upon as showing that there must be proof of an intention to defraud. I think that the 25th section applies to those offences, in which, under the Act, intention to defraud requires to be alleged: the 25th section does not apply to an offence under the 6th section, where fraud does not enter into the composition of the offence. On this objection also the defence seems to me to fall to the ground. My main difficulty in the case is in regard to the certificate of analysis given by the Public Analyst, and I confess I should have much preferred to have had this analyst under strict cross-examination, because, if he had been strictly cross-examined, it is quite possible that it might have been proved that he assumed a standard for vinegar, which no manufacturer has been able to reach. After all, vinegar is diluted acetic acid, and, in the composition of vinegar, a large proportion of water enters; and I see great difficulty in any analyst, however able he may be, laying down a particular standard, and saying so much is vinegar, and, if there is any proportion of water beyond what he has fixed, that proportion must be considered as having been added. But the 27th section of the Act is clear in its provisions—the production of the certificate of analysis shall be evidence of the facts therein stated, unless the defendant requires the analyst to be present, or to be examined by interrogatives. If the defendant had done that, I feel satisfied that the analyst would have been considerably shaken in his evidence. The defendant chose not to avail himself of the facilities allowed by the Act, and I must take it that he was satisfied to accept the analysis. If the defendant was satisfied, and did not choose to avail himself of the facilities, the Court of Appeal is bound by that analysis: however much it may distrust it, it is the only evidence on the point. The certificate says: "I am of opinion that the contents are composed of 100 parts of vinegar and 17 parts of added water." Clearly, then, the analyst says that to what may be considered vinegar, water was added. And the certificate goes on as follows: "The original vinegar was adulterated by the addition of 17 parts of its weight in water, making, thereby, 117 parts altogether." There is nothing to contradict these statements which would bring the defendant under the sub-section, because if he has added 17 per cent. of water to what is vinegar, he has clearly sold a drug which is not of the substance, nature, and quality of what was demanded.

The appeal must therefore be dismissed.

[Appellant's Attorney: V. A. Van der Byl.]

4 o'clock on the previous day the work would be taken away from him. It was impossible to resume, owing to inclement weather until Tuesday, and when he went there he then found other men on the job. The extra work was done with the sanction of the defendant. In making the yard larger it was agreed that £35 would be a fair price for the saving of material and labour. There could be no damages, as witness had carried out the work according to defendant's instructions.

Cross-examined by Mr. Gardiner: The 3,500 extra bricks were required because Abrahams said that cement was too costly. The defendant did not mark 15 feet on the wall. He took more space off the small rooms than the larger ones. There were more than two plasterers at the work. He knew nothing of the police complaining about the heaps of material lying on the road.

Re-examined by Mr. Alexander: The cement and sand were wasted through the defendant's failure to supply the material.

Omar Habes, the foreman, was called, and stated that he had a plan at the beginning of the work. When the alterations were decided upon he proceeded with the work on a mark made by Abrahams on the wall. Abrahams came to the work a couple of times a day, but never complained of the manner in which the work was being done. The work was stopped in May for want of material. All the extra work was done at the instructions of the defendant.

Cross-examined by Mr. Gardiner: He was not on the work on the 6th May, and he only heard that there was a paucity of material. He heard the defendant, after the Building Inspector had visited the place, instruct plaintiff to make a brick foundation.

Comarodien, a mason at the work, gave corroborative evidence as to the defendant marking the wall where the alteration was to be made.

Cross-examined by Mr. Gardiner: The defendant made a mark with a pencil on the brick wall, and plaintiff did nothing to make the mark more permanent.

Anthony de Witt, architect, stated that he measured the yard of this building, and estimated £24 as a fair amount to allow for the saving in brick and material by the extension of the yard.

Mr. Searle closed his case

Joseph Abrahams said that in 1902 he got certain plans from an architect for two buildings in Constitution-street. The first he heard of any extra work was in the pleadings. It was absolutely false that he ordered the plaintiff to put bricks in the foundation, neither was it true that he ordered plaintiff to put a window in instead of a door. The plaintiff was told to proceed with the work according to the plan of a building in the neighbourhood. Salie was told to

make the yard 15 feet instead of 10, and to take 5 feet off the buildings, and plaintiff pointed out that the small bedrooms were so small already that he could not reduce them. Witness then told him to take off 5 feet from the front rooms. As a result of the plaintiff's work he had to reduce the rent £2 a month. It was untrue that he marked the wall of an existing building where the wall was to come. The £28 claim for rent was reasonable, considering that similar buildings had been erected in eight or nine weeks. The man who finished the work used the material on the ground.

Cross-examined by Mr. Searle: As far as witness knew, there was no extra work done on the foundation. He had not specified in his contract any time for completion of the work, but he put in "without delay."

Percival William Goodchild stated that he prepared a plan of the buildings, and now found that the rooms were unfit for habitation. He would give an allowance of ten weeks to complete the work.

Michael Fox, a plasterer, stated that when he went to complete the job, he had to take off the plastering. There was plenty of material on the spot when he arrived. Previous to that he was working on another job close by, and was never prevented from working through the weather.

Solomon Kanterowitz stated that he owned the property adjoining the one in question. He never noticed any want of material at the defendant's property.

Cross-examined by Mr. Searle: He did not see the property in May.

Charles Stewart was called to prove the rainfall for the month of May.

Counsel having been heard in argument on the facts,

Buchanan, J., in giving judgment, said that when the building inspector condemned the construction, Mr. Abrahams did not trouble to prepare fresh plans. He was on the spot every day, and no architect was employed. Therefore, he was cognisant of everything that was going on. Judgment would be entered for the plaintiff for £154 13s., and as the tender was not sufficient to avoid costs, the plaintiff would also be entitled to costs in the case.

[Plaintiff's Attorney: D. Tennant; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte MASON. { 1904.
Apr. 27th.

Mr. Gardiner moved for an order for the removal of the name of Phillip Mason from the roll of advocates of the Supreme Court, petitioner being desirous of becoming an articled clerk to an attorney.

Order granted.

Ex parte SYNNE.

Mr. Gardiner moved for an order authorising the executors in the estate of the late Mathilda Synne to dispose of certain property for the benefit of the minor heirs in the estate.

The matter, counsel said, had been before the Court previously, but had been referred back in order to have the petition amended. The late Mathilda Synne bequeathed to her three children, in equal shares, certain property, consisting of a house and piece of ground. As the ground was not bringing in any return to the estate, it was, on an order of the Court, disposed of, and the proceeds were paid into the Guardian Fund to the credit of the heirs. The revenue derived from the house amounted to only £74 per annum, and it was desired to sell the property, and, as in the previous instance, place the proceeds to the credit of the children in the Guardian Fund.

The Master recommended that the petition be granted.

Order granted, the proceeds to be paid into the Guardian Fund to the credit of the heirs.

APPEALS.

REX V. LANG. { 1904.
Apr. 27th.

Police Offences Act, section 14—
Proof of authority—Police officer.

In a prosecution for a contravention of the 14th section of Act 27 of 1882, the demand for admittance was made by a policeman, but there was no

proof that he had been thereto authorized by any officer of police or chief constable.

Held, that in the absence of such proof, the defendant had been wrongfully convicted of such contravention.

This was an appeal from the Court of the Resident Magistrate at Wynberg against the conviction of Solomon Lang, who was charged with having, on the 20th ult., at Claremont, refused admission to licensed premises after hours to one Anthony Roche, a police-constable.

In giving evidence in the court below, the constable, Roche, stated that at 10.15 he saw a light in the bar of the defendant's hotel at Claremont. He watched the place until 11.10, and during that time the light disappeared and reappeared again several times. The closing time was 9 p.m. He went to the door, and asked to be admitted. He knocked, and heard noises as of persons rushing from the bar. He went round to the side door, and just then two men came out. He apprehended one of them, a man named Morrison, who was in the defendant's employment, who was running, but the other man got away. For the defence, the defendant and the men who were with him in the room stated that they were engaged in stock-taking and making up accounts, as the end of the month was approaching. There was light only in one room. The room in which they were was separated by three doors from where the constable was, and they were not aware that anyone was demanding admission. The man Morrison, who was apprehended by the constable, stated that he had been engaged with the others in stock-taking, etc. When he came out at the side door he began running because the night was dark. As soon as he became aware that a constable wanted him to stop he ceased running and stood. The Magistrate, in giving his reasons for convicting the defendant, said that the Court was satisfied that the constable Roche had succeeded in conveying to the inmates of the hotel that he was a constable, and that his request for admittance was deliberately ignored.

Mr. Wilkinson appeared for the appellant, and Mr. Howel Jones was for the Crown.

Mr. Wilkinson submitted that before any one could be convicted under the Act it should be shown that the demand was made by a person authorised by an officer of police to enter the premises. But in this case there was no tittle of evidence on that point.

[De Villiers, C.J.: It struck me at once that there was no evidence on that point.]

Mr. Jones: I am not aware that this point has ever been raised before, but section 14 of the Act clearly draws a distinction between a constable and a policeman.

[De Villiers, J.C.: Is this man a sergeant?]

That does not appear on the record, but any such objection as is now urged should have been raised in the Court below. The Crown has had no notice of this objection; it has been sprung upon us. The meaning of section 14 evidently is that a constable requires a special authorisation to enable him to claim admission after hours to licensed premises, but not a policeman; otherwise the comma after the word "policeman" would be unmeaning.

[De Villiers, J.C.: Was not a similar point raised in an appeal from Aliwal North some time ago?]

I do not remember, but my point is that the comma to which I have referred shows that in this matter a policeman is placed on the same footing as an inspector, sergeant, etc., while a constable is not.

Mr. Wilkinson (in reply), admitting (for the sake of the argument) the distinction between a policeman and a constable, in this case the appellant was not charged with refusing admission to a policeman, but to a constable.

Mr. De Villiers, C.J.: The powers given to the police under the 14th section of the Police Offences Act constitutes a considerable infringement on the rights of the subject. His Lordship then proceeded to quote the section of the Act, which authorised "any police officer, policeman, or constable, who may be authorised by any such officers," to demand admittance to licensed premises if he has reasonable and proper grounds for suspecting a violation of the law; and lays down that if the licence holder, after being informed of the official nature of the demand, wilfully and intentionally refuse admittance, or cause an undue delay in complying with the demand, he shall be liable to certain penalties. Proceeding. His Lordship said: "It is clear therefore that the provisions of the section should, in every respect, be complied with before a person may be held liable to the penalty. The Act seems to guard the rights of the licence-holder by requiring that it shall be some person in authority who either enters or gives the ordinary policeman or constable authority to enter. If, therefore a person demands admittance who does not prove that he has authority to demand admittance, there is no offence under the section. The words of the section make it clear to my mind that even if this witness were a policeman, or constable—although I must say I do not know the difference—but supposing there is a difference—he requires the authority of an officer of police before he can de-

mand admittance, and this being a criminal case, the witness should have proved his authority. There is a total absence of any proof of authority. It is possible that the man had it, but there is no evidence of any authority. The evidence as to whether there was any unnecessary delay is somewhat doubtful, I am bound to add, because it is just possible that the defendant may not have heard the noise. But that is a question of fact, which it is not necessary to decide. Proof is wanting to justify the conviction, and the appeal must be upheld and the conviction quashed.

[Applicant's Attorney: C. W. Slaughter.]

REX V. KUKARD. { 1904.
{ Apr. 27th.

Trading without licence—Carrying on business of general dealer.

The accused, a shunter on the railway, bought a job lot of goods at a sale without knowing what was in the parcel and without any intention of dealing in the contents. Finding that the parcel contained watches, he gave away three and sold the remaining three to some railway workmen.

Held, that the sale was an isolated act which was not sufficient to prove that the accused had carried on the business of a general dealer.

This was an appeal from the decision of the Resident Magistrate of Sterkstroom, who convicted Wm. Kukard, a shunter on the Cape Government Railways, on a charge of having contravened the Stamps, Duties, and Licences Act by exercising the trade of general dealer, in that he sold three watches to three natives in the employ of the Railway Department without having a dealer's licence.

In the Court below, the defendant, William Kukard, stated that he had bought a parcel of jewellery at a sale which he attended. The parcel contained six watches and some other articles. He gave away three of the watches, and sold three others to natives working on the railway. The public were not admitted to the place where the sale was transacted. He had not intended to exercise the trade of a dealer. He sold the watches because he did not want them himself. He did not know exactly what the parcel contained when he bought it. The Magistrate's reasons for

his decision were that he found it difficult to believe the circumstances under which the watches were bought, as stated by the defendant, because a man in Kukard's position did not spend 39s. without knowing what he was going to do with the articles purchased; and the manner in which the defendant had pressed the watches on the three men told against him. The grounds of appeal were that the form of the indictment was bad in law, and the conviction was not borne out by the evidence.

Mr. Gardiner appeared for the appellant, and Mr. Howel Jones was for the Crown.

Mr. Gardiner: The evidence shows that the appellant sold three watches, but that does not bring him under the definition of a general dealer given in section 3 of Act 38 of 1887. Then there is no proof that these watches were not made in South Africa. (See section 3.) But I rely chiefly on the fact that one or two isolated transactions do not constitute a carrying on of trade. *Green v. Parkins* (3 E.D.C., 167), *Queen v. Amos* (11 E.D.C., 129), *Queen v. Plockey* (5 H.C., 368). If the appellant carried on any business at all (which I do not admit) it was that of a hawker, it certainly was not that of a general dealer.

Mr. Jones: I admit that the case falls very near the line, but it is just over the line. The case for the appellant was that he bought a box for his own amusement: he seems, however, to have made a very substantial profit on the transaction. Where can we draw the line between isolated cases and the carrying on of business? The Court certainly has ruled that one or two sales do not constitute a carrying on of business, but here we have three sales.

Mr. Gardiner was not heard in reply.

De Villiers, C.J.: The accused was a shunter on the railway. He happened to attend a sale; there was a job lot of jewellery sold, and he bought the lot, without knowing what was really in the parcel. Not knowing what to do with them, he gave away three of the watches, and having three more left, he met some of the railway employees and sold the watches to them. This was held to be an act of trade. There was no proof whatever that there was any habitual trading, or that the watches were bought with a view or intention of trading. There was no proof that the defendant carried on the business of general dealer, as he was charged. The watches were only sold because the man had happened to buy things he did not want. Even if he had made material profits, it would have been impossible to hold that he is a general dealer. I am of opinion that the Magistrate was wrong, and the appeal must be allowed.

[Appellant's Attorneys: Walker and Jacobsohn.]

REX V. MILLER.

1894.
Apr. 27th.

Adulteration of foods—Pepper—
Act 5 of 1890—Warranty.

The defendant, under a prosecution for a contravention of the 6th section of Act No. 5 of 1890, in selling pepper, with which ground olive stone had been mixed, proved that he had bought the pepper, in tins, from L., of Cape Town, and that on the tins was a label of the manufacturers, warranting the pepper to be genuine.

Held, that there was no such "written warranty" from the person from whom the defendant had bought the pepper, as is required by the 29th section of the Act.

This was an appeal from the decision of the Resident Magistrate of Somerset West, who convicted Wolf Miller, a store-keeper, on a charge of having contravened section 6 of Act 5 of 1890, by having, on December 3, at Somerset West, sold to John Opey, a policeman, 2½ oz. of a mixture, consisting of 100 parts of pepper, adulterated by the addition of 15 parts of olive stones, which was not of the nature, quality, and substance of the article demanded.

In the Lower Court, the certificate of the Public Analyst was put in in support of the charge, showing that the mixture was composed of 115 parts of pepper and olive stones. The defence was that the mixture was purchased as black pepper from Messrs. B. Lawrence and Co., Cape Town, it being supplied in a tin labelled with Messrs. Goodall, Backhouse and Co.'s (Leeds) label, on which was printed "Black pepper; warranted genuine." It was further stated that the contents of this tin had not been tampered with while in the possession of the defendant, and there was no intention to defraud.

Mr. Gardiner was for the appellant, and Mr. Howel Jones appeared for the Crown.

Mr. Gardiner: The appellant was convicted of contravening Sec. 6 of Act 5 of 1890, but sec. 29 is really the important section. The Magistrate distinguishes between a warranty, an invoice, and a label, but it has been held in English cases that a label such as that which was affixed to these tins is a warranty *Farmers' Association v. Sterenson* (63 L.T. 776). I rely on the wording of this label "warranted genuine pepper."

[De Villiers, C. J.: Lawrence did not

give that warranty, if it was a warranty, but Goodhall.]

It is true that there was an intermediate vendor between Goodhall and Miller, but Lawrence may have been acting as the agent of Goodhall. See *Laidlaw v. Wilson* (Q.B. 1894, vol. 1, p. 74).

[De Villiers, C. J.: That was a case of a warranty given by the immediate vendor, but here you have a case of an intermediate vendor. Does not the Act give the purchaser a right of action against an intermediate vendor?]

I submit that the intermediate vendor is simply an agent, and the maxim *respondet superior* would apply.

Mr. Jones: It has frequently been held in England that a label affixed to goods is not to be regarded as a warranty. See *Jones v. Van Tromp* (59 J.P. Cases 246); *Elder v. Smith* (57 J.P. Cases 1809); *Hodgson v. Hindmark* (23 Q.B. 181). Also as to the adulteration of milk, etc., *Cleveland Dairy Co. v. Stevenson* (63 L.T. 776), and *Laidlaw v. Wilson* (Q.B. 1894, vol. 1, p. 74).

Mr. Gardiner declined to reply.

De Villiers, C.J.: I confess that in these cases of contravention of the Adulteration Act I feel considerable sympathy with the unfortunate shopkeepers who are charged. In most cases they buy the articles from Town merchants, and they simply retail what they have purchased, and they believe to be genuine articles. But the sixth section of the Act does not require that there should be any fraud on the part of the seller. If he sells, "to the prejudice of the purchaser, any article or food which is not of the nature, substance, or quality of the article demanded by such purchaser," he is liable to a penalty, unless he fall within certain exceptions which do not apply in the present case. The exceptions to the contraventions of the 29th section of the Act are: "If the defendant in any prosecution under this Act prove to the satisfaction of the Court that he purchased the article in question as of the same nature, substance, and quality as that demanded of him by the purchaser, and with a written warranty to that effect; that he had no reason to believe at the time that he sold it that the article was otherwise, and that he had sold it in the same state as when he purchased it, he shall be discharged from the prosecution." In the present case the accused has proved everything in this section except one thing. He has proved that he purchased the article in the "same nature, substance, and quality"; he has proved also, I think, that at the time he sold it he had no reason to believe it was otherwise; and that he sold it in the same state as that in which he purchased it. But he has not proved that he purchased it with a written warranty to that effect. It is said that the tin in which the pepper was en-

closed contains a label. "warranted genuine." But it is a label put on the tin by Goodhall, Backhouse and Co., Leeds. It is not the label of the vendor, of the person from whom the accused bought, viz., Lawrence and Co., Cape Town. It is impossible, therefore, to hold that this is a written warranty given by the vendor to the effect that the article is "of the same nature, substance, and quality." In my opinion, it is clear that this section refers to a written warranty given by the person from whom the accused bought the article, and in the present case there is no proof whatever of any warranty having been given by Lawrence and Co., from whom the accused bought. For these reasons, I am of opinion that he was rightly convicted. The appeal must be dismissed.

[Appellants' Attorneys: Walker and Jacobsohn].

REX V. TAYLOR.

Liquor licence—Dealing in liquor.

The tenant of a billiard room, not licensed for the sale of intoxicants, who dispenses to a number of persons present intoxicating liquor brought on the premises by one of those persons, is not guilty of dealing in liquor.

This was an appeal from a judgment of the Resident Magistrate of Umtata, in which the appellant, Frederick Edward Taylor, had been convicted of a contravention of section 27, of Proclamation 104, of 1903, governing the sale of liquor in the native territories.

The charge against the accused was that he did wrongfully and unlawfully sell, deal in, or dispose of certain intoxicating liquor to certain members of the C.M.R. at a billiard room, known as the Imperial Billiard Saloon, which was not licensed for the sale of such liquors. The said billiard room was licensed for billiards, aerated waters, and tobacco. The appellant was also the holder of a licence for the Masonic Hotel, and he kept a boarding-house, as well as the billiard room. Appellant was fined £10, or in default, one month's imprisonment.

The Magistrate's reasons appear from the judgment.

Mr. Graham, K.C., for the appellant; Mr. H. Jones for the Crown.

Mr. Graham submitted that there was no evidence of a sale in the present case. It seemed to him that the story of the prosecution was highly improbable. A man named Roberts, apparently, was about to leave the C.M.R. Seeing one of his old comrades approaching, he asked them into this billiard room to

have a drink. The fittings, it was true, were like bar fittings, because this place had previously been a licensed bar. Roberts had bought this liquor at the Masonio Hotel. He took the whiskey to his bedroom, and afterwards went into the billiard room, and invited Taylor to a drink. They then seemed to have put the whiskey under the counter. It did not seem to him of any importance whether Taylor or Roberts helped the C.M.R. men to the drink. He contended that the magistrate had misinterpreted the term "deal." No money passed. He submitted that all the probabilities were in favour of the story told by the defendant and the witness Roberts. The question was not one of credibility, but of probabilities.

Mr. Jones contended that this was an issue of fact, and that the matter was, therefore, one of the credibility of witnesses. There was a direct conflict of testimony. One of the witnesses for the prosecution distinctly said that he saw bottles of brandy and whisky on the shelves. The defendant said that Roberts signed a card for the soda that was used along with the whisky. Why did not the defendant produce this card at the hearing?

De Villiers, C.J.: The accused seems to me to have been guilty of some degree of imprudence in allowing Roberts to treat his friends on those premises. He ran the risk of being himself considered to have been guilty of the treating and of having dealt in liquor at a place where he was not authorised to deal in liquor. But the prosecution had to prove that there was a sale or dealing in liquor by the accused, and what seems to me to have been proved was that Roberts, a sergeant-major in the C.M.R., having been about to retire from the Service, or having just retired, wished to treat some of his friends, and he had brought a bottle of liquor from his own room into those premises, and he then gave liquor to his friends. There is a difference of opinion as to whether Taylor himself poured out the liquor, or whether Roberts did it, or who did it, but I will assume, for the purposes of this case, that Taylor (the accused) served the liquor. If he did pour out the liquor which had been brought by Roberts, the serving of a man with liquor would not make him guilty of a contravention of the law. The Magistrate seems to have believed that Taylor did pour out the liquor, but unfortunately he expressed no opinion upon the question whether he only disbelieved the evidence given by Roberts. I am inclined to think that he could not wholly have disbelieved it, because the reasons he gives seem to show that he considered that the fact that Taylor poured out the liquor constituted to his mind the offence of dealing in liquor. He says: "The Court found that Privates Cook and Skipwith had been sup-

plied by the accused Taylor with intoxicating liquor on premises for which he had no licence to deal in such liquor, but which were licensed for a billiard table and for the sale of aerated waters and tobacco only. Although no payment was proved, the Court was satisfied that Taylor has dealt in intoxicating liquors within the meaning of section 27 of Proclamation No. 104 of 1903." It is not quite clear to me what he meant by this. It is just possible that he may mean that, although no payment was proved, yet payment may be presumed from all the circumstances. It seems more likely that what he really means was that, while there was no payment made, yet, inasmuch as Taylor poured out the liquor, under the circumstances he has dealt with intoxicating liquors within the meaning of the section, and that would be clearly wrong. As to the view I suggested, that would be merely an inference from the evidence this Court, as a Court of Appeal, has quite as good an opportunity of forming a correct inference from the evidence as the Magistrate had. It is not a question of credibility so far as the question as to whether Taylor poured out the liquor or not is concerned. The Magistrate does not say that he disbelieves Roberts, and I do not think the general tone in which the evidence is given would justify disbelief unless the Magistrate said so. I think it is a case in which the Magistrate ought not to have convicted. The evidence is wholly insufficient to prove that there was a sale, and, on the contrary, the presumption which might arise from the suspicious circumstances of the case is rebutted by the evidence given, not only by the defendant and his witnesses, but by the witnesses for the prosecution themselves. For these reasons, I am of opinion that the appeal should be allowed and the conviction quashed.

[Appellant's Attorneys: Van Zyl and Buissinné.]

REX V. WALKER AND OTHERS. { 1904.
Apr. 26th.
" 29th.

Liquor Licensing Acts—Subscription dance—Refreshments.

The applicants were promoters of a dance, at which they supplied liquor and other refreshments to the subscribers in consideration of the sum of eight shillings and sixpence paid by each subscriber. There was a loss on the transaction, which was paid by the promoters, but if there had been a profit they would have been entitled to the benefit of it.

Held, that as the promoters held no licence, they had rightly convicted of selling liquor without a licence.

This was an appeal from a judgment of the Acting A.R.M. of Wynberg by which the appellants, Thomas Walker and two others—Cape coloured labourers—had been convicted of a charge that at Claremont they did "wrongfully and unlawfully, without licence, sell, deal in, or dispose of a quantity of intoxicating liquor on premises known as the Mechanics' Hall, at Claremont." Mr. Burton was for the appellant; Mr. Howel Jones was for the Crown.

The evidence was to the effect that the police visited the Mechanics' Hall, Claremont, while a dance was in progress, and that they found a temporary bar behind the stage, where there were sherry, pontac, ticky beer, etc. The police seized the liquor. The evidence for the defence was to the effect that the dance was promoted in honour of a birthday, and that tickets were disposed of to friends at 8s. 6d. each, to include refreshments. The Magistrate found the defendants guilty, and imposed a fine of £1 upon each.

Mr. Burton: This appeal is brought on the grounds (1) that the conviction was not supported by the evidence (2) that it is contrary to law (3) it is not stated to whom the liquor was sold Sec. 25 of Act 28 of 1883 does not meet this case.

[De Villiers, C.J.: This was not a subscription dance].

We say it was.

[De Villiers, C.J.: In the case of a subscription dance, people buy liquor for their friends, but here the liquor was sold to anybody].

The three appellants bought liquor on behalf of the people who came to dance. They did not sell to the subscribers, but the vendors of the liquor sold to them.

[De Villiers, C.J.: What is there to show that they could not pocket any profit which might be made?]

They did not enter into this transaction with a view of making a profit. There was no intention to contravene the law. No thought was taken as to the disposal of any balance, and, as a matter of fact, the subscribers had to meet a deficit.

[De Villiers, C.J.: It would be very dangerous if people were allowed to get up these dances and make a profit.]

The same remark would apply to ordinary subscription balls.

[De Villiers, C.J.: In these cases the proceeds are usually distributed in charity].

That is immaterial. The only question is, "was any profit made on this liquor or not?" *Non constat* that there

was any profit, and the evidence all goes to show that everything in this case was *bona fide*, and that there was no intention to evade the law.

Mr. H. Jones: It is not necessary in such a case as this to show that any money passed (*see sec 77*). Nor is it necessary, or even possible to allege in the summons a sale to any particular individual in cases of this nature. I admit that it would be difficult to distinguish this dance from many subscription dances; but the important question is, "had there been a profit, who would have got it?" It has been said that the liquor was thrown in as a kind of present to the purchasers of tickets, but obviously something was charged for the liquor. The appellants say that they made no profit, but the onus is on them to prove that, and this onus, I submit, they have not discharged.

Mr. Burton in reply.

Cur. Adv. Vult.

Postea (April 29th).

De Villiers, C.J., said: This is an appeal against a conviction of the appellants of the offence of selling liquor without a licence. The offence consisted in selling tickets to various people, which admitted them to a ball at which refreshments were provided for the purchasers of the tickets. The refreshments included liquors of different kinds, including beer, sherry, port wine, and brandy. Whilst the dance was proceeding, at the Mechanics Hall, Claremont, the police entered, and after a short conversation with the three appellants, who were the promoters of the dance, seized all the liquor on the premises. The defence at the trial of the appellants was that the dance was got up as a sort of entertainment on the occasion of the birthday of the first appellant's child, and not for the purpose of making any profit for themselves. When asked what they would have done with the money if there had been a profit, two of them said they did not know, and a third witness said that the usual practice in case of similar balls, is for the subscribers to have a jollification among themselves. Now, if this had been an ordinary subscription ball, the promoters of which act only as the agents of the subscribers in the purchase of liquor as part of the refreshments, it would have been impossible to support the conviction. If people moving in what is called society are allowed to have their subscription dances and charity balls, there is no reason why people, moving in a humbler sphere of life, should be deprived of a similar liberty. The difficulty, however, in the present case is that the appellants, in buying the liquor for the entertainment, did so on their own behalf, and not as agents for the subscribers. The liquor, therefore, which was supplied to the subscribers

was liquor belonging not to the subscribers, but to the appellants as promoters. The supply of the liquor was an important part of the consideration for which each ticket-holder paid his 8s. 6d., and it is impossible therefore to avoid the conclusion that the liquor was sold by the promoters to the subscribers. It does not appear that the promoters paid any subscription in the first instance. The ball ended in a loss—probably on account of the police raid; and the loss was borne by the promoters only, and not by all the subscribers. This fact alone is sufficient to show that if there had been a profit, the promoters only would have been entitled to share in it. It was suggested on the hearing of the appeal that similar arrangements are often made in regard to fashionable subscription dances; but I can only say that if there be any truth in the suggestion, it is to be hoped that the police will be instructed to treat future offenders as they have treated the present appellants. The law will never be respected so long as there is any good ground for the suspicion that a different measure of justice is meted out to the poor and humble from that which is meted out to those who are rich or supposed to move in good society. The appellants, however, have in my opinion contravened the law, and the appeal must therefore be dismissed.

[Appellant's Attorney: W. G. Coulton].

REX V. ROOCE.

1904.
 { Apr. 26th.
 " 29th.

Liquor Licensing Acts—Wholesale licence—Unbroken case.

The appellant, being the holder of a wholesale licence to deal in intoxicating liquors, sold to D. half a dozen quart bottles of Ohlsson's beer for 1s. 6d. and half a dozen Castle ale for 3s. 6d., and, after placing them in a case and nailing down the lid, he delivered the case to the purchaser.

Held, that the sale was by retail and not by wholesale as authorized by sub-section 1 of section 7 of Act 28 of 1883.

This was an appeal against the decision of the Acting A.R.M. of Wynberg, in which the applicant was charged under Section 15 of Act 28 of 1883, as amended by subsequent liquor laws, in that he did wrongfully and unlawfully, contrary to the provisions of the said Act, and with-

out licence, sell to one Robert Donald, a sergeant of the police, one-half dozen bottles of beer, known as tickey beer, and a similar quantity of Castle ale.

Sir Henry Juta appeared for the applicant, and Mr. Howel Jones for the Crown.

Sir Henry Juta said that the question was one that largely affected wholesale dealers. The Act provided that the wholesale dealer could sell an unbroken case containing not less than twelve reputed quarts or twenty-four pints, or a cask, containing not less than five gallons, such liquor not to be consumed on the premises. The applicant had such a licence, and the beer sold was six of one kind and six of another. Similar cases had come before Mr. Blackstone Williams, the Resident Magistrate of Wynberg, who had given a verdict of not guilty, but the A.R.M. had found the applicant guilty. The important point in law was whether the twelve reputed quarts must be all of the same kind. In this case the Magistrate seemed to have assumed that there must be twelve quarts of the same kind of liquor. The evidence had proved that it was a common practice for such dealers to sell different kinds of liquor to make up a dozen.

[De Villiers, C.J.: What do you mean by an unbroken case?]

Simply the grammatical meaning of the word.

[Hopley, J.: Supposing you have a cask divided into five compartments to contain a gallon of five kinds of liquor, would that come within the Act?]

[De Villiers, C.J.: Is not an unbroken case the case as it comes from the manufacturer?]

I take it to mean unbroken in quantity. [Hopley, J.: It may mean unbroken in quality or kind.]

I take it to mean just what it says.

Mr. Howel Jones contended that the legislature had intended that the dealer should not handle the bottles, but simply supply single casks or cases, as received from the manufacturers. At that time the manufacturers had been almost entirely resident in foreign countries.

[De Villiers, C.J.: Suppose the dealer receives some thousands of bottles from the manufacturers, and has to make them up into cases, or suppose he buys in casks from the farmers and bottles it himself.]

If he buys in casks he must sell in casks.

[De Villiers, C.J.: Take the case of a manufacturer sending cases of samples to introduce the various brands.]

Sir Henry Juta (in reply) contended that the idea was to restrict the quantity only.

Cur. adv. vult.

Postea (April 29th.)

De Villiers, C.J.: This case raises a very important question as to the rights acquired by a dealer in intoxicating liquors under a

wholesale licence. The appellant, as the holder of such a licence, sold to one Donald half-a-dozen quart bottles of Ohlsson's beer for 1s. 6d., and half-a-dozen Castle ale for 3s. 6d., and, after placing them in a case and nailing down the lid with a single nail at each end, he delivered the case to the purchaser. He was charged with selling liquor by retail, and was convicted and sentenced to pay a fine of £10, and he now appeals against the conviction and sentence.

The 7th section of Act 28 of 1883 provides that "a wholesale licence shall authorise a dealer to sell and deliver liquors in quantities of not less than five gallons if in cask, or one unbroken case containing not less than twelve reputed quarts or 24 reputed pint bottles, to be delivered at one time, such liquors not to be consumed in or upon the seller's premises." The practice of Resident Magistrates in the construction of this clause has by no means been uniform, and it is certainly surprising that the question as to the correct meaning of the words "one unbroken case" has never yet come before this Court for decision. The ordinary meaning of the term "selling by wholesale," is correctly stated in Bouvier's Law Dictionary as "selling by large parcels, generally in original packages, and not by retail." This idea was followed out by the Cape Legislature in defining a "wholesale dealer" for the purpose of the Stamp Act of 1863. The definition given by the 8th section of that Act is that the term "shall extend to and embrace every person who sells or exposes for sale, goods, wares, or merchandise in the original package as when imported." It appears to me that the same notion must have been present to the mind of the Legislature when it came to deal with a "wholesale dealer's" licence to sell liquors. It seems to have been assumed that if he sells liquors otherwise than in cask he would only sell imported cases of liquor, and accordingly it was enacted that he should sell cases containing not less than twelve quarts at a time, and that such cases shall be in the original unbroken condition as when received. The Legislature does not appear to have contemplated the possibility of a wholesale dealer selling in cases liquor which has not been delivered to him in cases. For instance, he may have purchased wines in cask, and have had them bottled himself. If he places the bottles in a case, or even in a bottle basket, may he sell a dozen to a customer, provided a dozen bottles are delivered at one time, and no portion is consumed on his premises? Taken literally, the section does not provide for such an event, and if the definition were to be taken in its strictest sense, the result would be that a wholesale dealer who wishes to sell liquor in bottles could only sell it in cases in the condition in which he received them from the vendor. In

the ordinary course of trade, each case would contain only one kind of liquor, and it therefore becomes unnecessary to consider the question whether he would have the right to re-sell such case in its unbroken condition. If he had the right at all it would only be on the ground that the case was still unbroken when he re-sold. Where, however, the wholesale dealer has bought the liquor in cases, and has had it bottled himself, the expression "one unbroken case" becomes quite meaningless in reference to a resale. To my mind the essential object of the section is to draw a clear distinction between wholesale and retail dealings. For that purpose, a limit of quantity is fixed, below which the wholesale dealer shall not sell any kind of liquor. The limit is fixed at a dozen quarts, and if he sells not less than that quantity of any one kind bottled by himself, the words, "one unbroken case," would not apply, seeing that he did not buy the liquor in cases, but as he has complied with the essential requirement of the Act that he shall not sell any kind of liquor by retail, he would not be guilty of a contravention of the Act. But the Court is now asked to go a step further, and to hold that he may sell different kinds of liquor in retail quantities, provided only the total quantity sold does not fall below the minimum fixed by the Act. In the present case the two kinds sold are Ohlsson's beer and Castle ale, but they were bought from different manufacturers, and sold at different prices, and if the sale was permissible, there would be no reason why another dealer should not sell, say, one bottle of imported brandy and eleven bottles of Cape beer, provided only he places them all in the same receptacle. In so far as the brandy is concerned, such a transaction would clearly be a retail dealing, and the difference between such a case and the present would be a difference of degree only, and not of principle. The meaning of the Legislature is by no means clear, but the construction now placed upon the section appears to me to be the only one which can reconcile the rights of the wholesale dealer with the rights of the bottle licence holder, and the retail dealer, and with the general interests of the public. The appeal must be dismissed.

[Appellant's Attorney: W. G. Coulton.]

VOLO V. MAJUKZEL. (1901.
(Apr. 26th,

Resident Magistrate's jurisdiction
—Trespass—Right to occupy
land.

This was an appeal from a judgment of the Court of the Resident Magistrate of Queenstown. The plaintiff in the court

below, one Solomon Majiyezi, had brought an action against Paulus Yolo to recover the sum of £20, as and for damages incurred by reason of the defendant having allowed certain cattle, his property, to trespass in and upon certain land occupied by the plaintiff. The Court below gave judgment for the plaintiff for £6 5s. 6d. with costs, and dismissed the claim in reconvention set up for the defendant. Against this judgment the defendant now appealed.

In the Court below the defendant's agent excepted to the summons as vague and indefinite. It having been amended by consent the defendant had pleaded the general issue. The circumstances of the case sufficiently appear from the Magistrate's reasons for his judgment:—

"In this case the plaintiff for certain alleged trespass of stock belonging to the defendant on cultivated lands, the property or in the lawful possession of the plaintiff, claims £20 as damages. In respect of the damage to crops growing on the commonage, the plaintiff appears to have had no authority to cultivate or use any portion thereof and his claim for any trespass thereon cannot be sustained."

With regard to the trespass on crops growing on the land of which the plaintiff is in legal possession or occupation, the plaintiff's witnesses distinctly state that such damage was caused by defendant's cattle. On the other hand, defendant's witnesses assert to the contrary, and it therefore becomes a matter of credibility of witnesses. I am quite satisfied in my own mind that the plaintiff's witnesses are to be believed and those of the defendant discredited. I consider the plaintiff has made out a good case, and have awarded him the sum of £6 5s. 6d., the amount assessed by the Field-Cornet, including cost of valuation. The defendant's claim in reconvention is dismissed on the grounds that in his own evidence he states that he has no claim against plaintiff and none has been proved.

Mr. Burton appeared for the appellant, and Mr. Gardiner for the respondent.

Mr. Burton contended that the matter was to a great extent a question of fact. The case was one of damage by trespass of stock. £20 had been claimed for destruction of crops, the land being in the district of Queen's Town. The plea for the defence had been that the summons was not sufficiently clear, but although permission had been given for the summons to be amended, it had not been done. Defendant therefore took up the position that if the plaintiff proved that trespass had been on certain "common" land, then he denied plaintiff's lawful occupation. If, however, it was proved that trespass took place on plaintiff's private property, then defendant denied the allegation altogether.

Plaintiff's witnesses had stated that the damage was done by defendant's cattle; but, on the other hand, defendant's witnesses had stated to the contrary. The Magistrate, in giving judgment, had stated he was quite satisfied the plaintiff's witnesses were to be believed, and awarded £6 5s. 6d. damages. The evidence involved numerous questions as to title of the land, ownership of the cattle, and the right of impounding.

Mr. Gardiner was not called upon.

De Villiers, C.J.: The question is entirely one of the credibility of witnesses. Some witnesses of repute on the part of the plaintiff swore that they saw defendant's cattle trespassing, not only on the portion of the commonage, but also on his own private land. This is denied. There is no doubt that the majority of the witnesses swore to the contrary. The Magistrate heard them, and came to the conclusion that the witnesses for the plaintiff were to be believed. That being so, it is impossible to reverse the action of the Magistrate, unless the circumstances are so clear as to induce the Court to hold the contrary. Something has been made of the point that if the cattle had been driven into the commonage by Lulu, that the defendant is not to be held responsible. But it seems that the defendant's son was there on his behalf guarding the cattle, and the defendant's son, at all events, was aware of the cattle being driven on to the commonage. He says that he never saw the cattle trespass on defendant's private ground; but this point is contradicted by witnesses for the plaintiff and by the Field-cornet. There is nothing to show that the damage was done by any other cattle. The appeal must be dismissed, with costs.

Hopley, J., said he was of the same opinion, and for the reasons stated.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Silberbauer, Wahl, and Fuller.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

DUMINY V. DAY.

{ 1904.
{ Apr. 27th.

Landlord and tenant—Holding over.

This was an action brought by Francois Duminy, a farmer of D'Urban road, against Petronella Johanna Day, also of D'Urban-road, to recover £44 7s. 2½d., being the actual cost of materials supplied for a certain fence on the defendant's farm.

The declaration set out that the plaintiff was a farmer, and resided at D'Urban-road, and the defendant was married out of community to property to William Day, also of D'Urban-road. About November, 1902, the defendant agreed to let and the plaintiff to hire for six months from 1st January, 1903, at a monthly rental of £10 a certain portion of the defendant's farm. It was agreed that the plaintiff should fence off the portion, and that the defendant should pay for the materials when the lease was up. About January, 1903, the plaintiff entered into occupation and duly fenced the portion of the farm, for which he had expended £44 7s. 2½d. The defendant thereafter gave the plaintiff notice to either quit the farm or to pay £50 a month for rent. The plaintiff quitted the farm at the end of February, although he was not legally obliged to do so.

The plea admitted the formal allegations, but the defendant denied that it was agreed that the plaintiff should have the farm for a period of six months, or that she should pay for the material for the fence. In reconvention she claimed £10, £10, and £50, rent for January, February, and March, in respect of which she had received £20, and taking the plaintiff's claim from the claim in reconvention the defendant claimed the difference, £5 12s. 9½d.

Mr. Upington (with him Mr. Alexander) was for the plaintiff, and Mr. M. Bisset was for the defendant.

Francois Duminy, plaintiff, stated that in November, 1902, he went, along with Mr. Finck, to see the defendant in regard to the lease of a certain portion of her farm. At that time he had a contract with the Repatriation Board for grazing cattle. The defendant promised to give a definite answer through Mr. Finck as to whether plaintiff would have the farm at £10 a month. A period of six months was mentioned, and witness was to erect a fence at his own cost, and at the expiration of six months Mrs. Day was to take over the fence, compensating him for the material only. Everything was settled except the extent of the ground. Next day, Mr. Finck told him that he could have two-thirds of the portion he required, and witness agreed to accept it. The fence was duly erected at the cost of the material mentioned. The cattle remained grazing on the farm until the end of February. On the 21st January, Mrs. Day wrote him giving him notice that from the 1st March the rent would be increased to £50 a month. In February, Mrs. Day wrote again giving him notice to remove the fence. He quitted the farm on the 28th February. The cattle did not on any occasion cross over to defendant's farm.

Cross-examined by Mr. M. Bisset: It was agreed that if Finck wanted a small portion for cultivation it was to be fenced off. He never mentioned the six months' contract in any of the correspondence. There was sufficient herbage on the land to support the cattle for a period of six months. He considered he was cheated out of his bargain. When he gave up the tenancy the matter was in the attorney's hands, and he sent no intimation to the defendant. He did not deny the assertion of the defendant that the cattle were still running on her farm on the 20th March.

The evidence of Arthur Tranmer, formerly Inspector of Stock for the Western Province Repatriation Department, was taken on commission, from which it appeared that Finck told him that the plaintiff had got a six months' lease of the defendant's farm, the plaintiff to fence it, and the defendant after six months to pay for the cost of the material.

Andrew Evats, a fencer in the employ of the plaintiff, stated he erected the wire fence in March. A part of Mr. Duminy's fence was pulled down to allow the cattle to pass through to the camp. The cattle could not get get through to the defendant's farm.

Cross-examined by Mr. M. Bisset: He knew nothing about the gate.

Philip September stated he was in the employ of Finck from December, 1902, to March, 1903. Before March the fence was cut opposite to Finck's house. During March the only cattle in the camp belonged to Mr. Finck.

Cross-examined by Mr. M. Bisset: He had no quarrel with Mr. Finck, but on the 5th April he was fined by the Magistrate for desertion of service.

Johannes Duminy, brother of the plaintiff, said that he owned a farm adjoining that of his brother, and that a reasonable rent for that particular camp for grazing purposes would be £10 or £12 a month.

Mr. Upington closed his case.

Petronella Johanna Day, defendant in the case, stated when the plaintiff came to see her she agreed to take the fence over if it was in order, and to pay for the material. The plaintiff understood within a few days that he could have another portion of the farm for £10 a month. The plaintiff entered into occupancy at the end of December. The reason that she gave notice of an increase of the rent to £50 was because some 600 cattle from which she had been receiving 3s. a head per day had been taken away from her and placed in the camp. About the 7th March she saw a lot of strange cattle grazing in the camp. Although she repudiated the liability for the fencing in March, she now had offered to take it over.

Cross-examined by Mr. Upington: The plaintiff had to sue her before for the purchase price of certain wire. Duminy was only to erect the fence for one month.

Jacobus Finck stated that in November, 1902, he went with the plaintiff to hire some ground, and the defendant said she would hire the land for a month or longer. On the 3rd March there were still 300 cattle on the farm. As regards the fence, Mr. Duminy said he would fence the ground, and Mrs. Day could take it over, but if not he would take it away, and use it on his own farm.

Cross-examined by Mr. Upington: Since the interview with Mr. Walker he had been sued by Mr. Duminy and judgment given against him, and, in consequence, he had to surrender his estate. He denied cutting the wire in February. It was untrue that September and he cut the wire. He never told Tranmer that the lease was for six months.

Wm. Arthur Day, husband of the defendant, said that he virtually acted as his wife's agent in the transaction. Witness saw some of the cattle in the camp on March 12 or 14.

C. Abrams, in the employ of Mrs. Day, said he knew the Camp, and saw a lot of Mr. Duminy's cattle there in March, 1903.

Mr. Benjamin Norton said he remembered seeing 100 to 120 cattle in the camp on the second Saturday in March. They were repatriation cattle.

Mr. Bisset closed his case.

Mr. Upington asked leave to call

Mr. Walker, who stated that on April 6 Fink and Duminy came to his office, and the former said that the arrangement was that Mrs. Day had to repay the cost of putting up the fence, and also that he was with Mr. Duminy, when the arrangement was made. When Fink was asked as to whether cattle was on the ground in March he said he did not know as he was away during that period.

This concluded the evidence, and counsel, having been heard in argument on the facts,

Buchanan, J.: The plaintiff and the defendant are neighbours occupying adjoining farms in the Cape district. Towards the end of the year 1902, the plaintiff Duminy approached the defendant for the purpose of hiring a portion of her farm for grazing purposes. An agreement was entered into which the plaintiff Duminy alleges was for the period of six months from January 1, 1903, at the monthly rental of £10. The plaintiff Duminy also said it was a condition of the agreement that he should fence off the portion of the land he hired, and at the termination of his tenancy the defendant should take over the fence so erected, and pay the plaintiff the cost price of the materials used in making the fence. The defendant denies both the agreement for six months, and also denies that she agreed

to take over the fence, but in her plea she says, although it is not clear on what grounds she admits it, that the plaintiff is entitled to claim the price of the materials of the fence, that she is willing to take the fence over, set off against her claim the cost price of the fence, and that she was always prepared to do so. The question of the cost of the fence does not require further consideration. The plaintiff claims £44 7s. 2½d. as the cost of materials for this fence, and the defendant is willing to pay this and set it off against her counter-claim, so this question need not further be discussed. But the next question is whether there was an agreement for six months at a rental of £10 a month from January 1. The onus of proving that this agreement was entered into lay on the plaintiff, and I must say in the absence of anything in writing, and looking at his conduct and the correspondence, if the case rested here, I should not be prepared to hold that he had an agreement of tenancy for six months at a rental of £10 a month. The defendant in this case, shortly after the tenancy commenced, gave notice to the plaintiff that as she claimed the tenancy to be a monthly tenancy that the agreement would not be continued beyond the end of February, and if the plaintiff wished to continue in possession of the farm after that date, he was to pay £50 a month rent. She alleges that the plaintiff had remained in possession after the month of March, and although he has paid for the month of January and February, he has not paid for the month of March, and if this amount of £50 is found due, judgment will have to be given for the balance. If she is not entitled to claim the amount of £50, judgment will have to be given for the plaintiff for the amount that the material of the fence cost. The plaintiff, in his letter in reply to the notice he received on January 21, does not distinctly set up his agreement, but simply says he does not accept the notice. He says, "I beg to state I am prepared only to carry out the arrangements entered into between us and cannot accept anything else." Then when the letter is put into the hands of his attorneys they write that they will for the sake of peace, give up possession of the property at the end of February, therefore, not insisting upon the agreement to continue in possession after the notice. Has the plaintiff continued in possession after this notice, and, if so, what rate ought to be charged for rent? If the plaintiff remained in possession of the property after the notice had been given by the defendant that the tenancy was to cease, he would, I think, under the circumstances disclosed in the case, be liable to pay £50 a month. He intimated he would not remain in possession after the end of February, and the question is, has he done so? He hired this land for the purpose of grazing certain cattle

owned by the Repatriation Department. These cattle were running on his farm. He gave notice to the manager of the Repatriation Department that he would no longer have the grazing on the defendant's farm, and the manager, Mr. Tanner, said that after receiving this information, he immediately took steps so that the Repatriation cattle should be removed from the defendant's farm. He says they were so removed, and the plaintiff himself says he had nothing further to do with the property, and that after the end of February, no cattle were grazing there, and if there were cattle, he had no concern with them, as all the animals owned by him were removed. As a matter of fact, I think it is proved in this case that cattle were grazing on this property, and it is also proved, I think, that these cattle belonged to the Repatriation Department. But that these cattle were so running on the farm in continuance of a right of tenancy, I think has not been proved. In this case the number of cattle which the Repatriation Department had was a very large number; but the utmost seen by any witness after the 28th February was some 100 or 120, and I think it is clear that the cattle that did get on this farm were cattle trespassing, and not cattle sent on the farm by the plaintiff by virtue of his right of tenancy. The letter which has been put in did not show any tenancy after the 28th February, for the defendant says: "I have to inform you that cattle are still grazing on our land, for which you will have to pay £50 a month as long as they remain." However, it appears from the evidence that there were cattle about the beginning of March, but these cattle were not grazing by any right of tenancy, and if they were there, it was without the knowledge of the plaintiff in this case, and without the knowledge of Tanner. They may have strayed over from one camp to the other, and if so, the defendant in this case would have had the right to claim damages for trespass; but no such claim is set up. I am forced to hold that the plaintiff has not rendered himself liable to pay any rent for the month of March. The defendant, no doubt, found herself rather harshly used. She had these Repatriation cattle running on her farm, and was receiving a large amount—some £95 a month—for grazing. After she let the portion of her farm to the plaintiff, these cattle were removed from her farm, and sent to the portion so hired, and she lost the contract. The bargain with the plaintiff was a fair one, and the defendant herself submitted to it, although she did not probably know the consequences; but she cannot now claim for trespass by the cattle. Under all the circumstances, the plaintiff is entitled to judgment for the cost of the material. He expended

£44 odd, and judgment will be given for the plaintiff as prayed, with costs.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Van Zyl and Buissinné.]

REVIEW CASE.

REX V. PLAATJES.

Remit to Magistrate—Act 20 of 1856.

Where a charge of house-breaking had been remitted to a Magistrate for trial under Act 20 of 1856, and the Magistrate had imposed a sentence of nine months' imprisonment; the sentence was, on review, reduced to three months.

Buchanan, J., said that during the week a case came before him from the Resident Magistrate's Court of Robertson, in which Ephraim Platjes was charged with attempting to commit the crime of housebreaking. The preparatory examination was held, and the case was remitted by the Attorney-General to the Magistrate for trial under his ordinary jurisdiction, under Act 20 of 1856. The Magistrate passed a sentence of nine months' imprisonment with hard labour. The extreme sentence that could be passed under that Act was three months' hard labour, and the sentence would have to be reduced to that.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

1 1904.
1 Apr. 28th.

Sir H. Juta, K.C., moved for the admission of Carl Jeppe as an advocate. Applicant had been admitted in 1884 as an advocate of the High Court of the late South African Republic. In December, 1903, he was admitted to practise as an advocate of the Supreme Court of the Transvaal. Counsel argued that according to Act 30 of 1892, there was no necessity for the Governor to issue a proclamation for an examination of the applicant. He cited the cases of *Ex parte Holderness* (Rhodesia). (13

C.T.R., 254), and *Ex parte Hofmeyr* (Transvaal). (13 C.T.R., 337 and 728).

Application ordered to stand over, to enable their lordships to look into previous cases.

Postea (May 13).

Buchanan, J., said that, in regard to the matter of the application for the admission of Carl Jeppe as an advocate of this Court, the examination which Mr. Jeppe had passed in the Transvaal was not recognized by a proclamation of his Excellency the Governor, under section 1 (b) of Act 30 of 1892, referred to. The Judges had advised his Excellency that this Proclamation may issue, and when the Proclamation issued the application might be renewed.

Postea (November 14th.) Applicant was admitted.

Mr. Schreiner, K.C., moved for the admission of Johannes Nicolaas Vlok as a translator.

Application granted, and oath administered.

PROVISIONAL ROLL.

DANIELL V. ROOS. } 1904.
 } Apr. 28th.

Mr. J. E. R. de Villiers moved for provisional sentence on two mortgage bonds of £250 and £225 respectively, with interest, and for property specially hypothecated to be declared executable, and costs, the bonds having become due one by reason of non-payment of interest, and the other in consequence of notice given.

Order granted.

HERMANN V. FEYER.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £2,500, and for the property specially hypothecated to be declared executable, and costs, also for payment of £5 5s. insurance premiums.

Order granted.

CORTIS V. BROOMBERG.

Mr. Close moved for provisional sentence on a mortgage bond for £1,000, and for the property specially hypothecated to be declared executable, the bond having become due by reason of non-payment of interest.

Mr. M. Bisset read an affidavit by the defendant to the effect that he entered into an arrangement with the plaintiff for the interest due on the 31st December to stand over, as he (defendant) was negotiating for the sale of certain property. This transaction fell through. The plaintiff had agreed to waive his

right to payment of the interest due on the 31st December until the 6th March, 1904. Deponent was ready and willing to pay the interest, had tendered it, and again tendered it.

Mr. Close read an affidavit by plaintiff's agent stating that the defendant failed to pay the interest on the 6th March, and a demand was then sent for the capital and interest. Plaintiff, in an affidavit, denied that he waived his right to interest from the due date, and said that defendant informed him in January that he had made an arrangement with Mr. Arderne, and he would be able to pay the interest. He then consented to waive his right until the 6th March. The interest due on the 31st December was not tendered to deponent.

Mr. Close having been heard in argument,

Buchanan, J., in giving judgment, said that on this claim all that was due to the plaintiff was the interest. Provisional sentence would, therefore, be given for the interest only, and, as the amount of interest was tendered before the proceedings were begun, the plaintiff would have to pay the costs.

BAMFORD V. BROWN.

Mr. W. P. Buchanan moved for provisional sentence upon a document, signed by the defendant, acknowledging his indebtedness to the plaintiff for £30 11s. 6d., which was to be paid by two instalments. One instalment of £10 10s. had been paid, and there was a balance of £20 1s. 6d.

Order granted.

GORDON MITCHELL AND CO. V. KAPLAN.

Mr. Sutton moved for the final order of adjudication of the defendant's estate as insolvent.

Order granted.

VAN BLEEK V. ECKSTEIN.

Mr. Van Zyl moved for provisional sentence on two mortgage bonds for £4,500, with interest, and that the property specially hypothecated be declared executable.

Order granted.

JAGGER AND CO. AND OTHERS. V. GRUSKIN AND POLLIAK.

Mr. Gardiner moved for the final adjudication of the defendant's partnership and private estate. The principal assets of the insolvent estate were perishable, and the creditors were anxious that a provisional trustee should be appointed to realise the stock.

Aron Polliack appeared, and stated that he had been erroneously coupled in the partnership estate.

Order granted. Mr. T. H. Hazell and Mr. Cranmer appointed as trustees, the question of the sequestration of Aron Polliack's estate to stand over until next Thursday.

Postea (May 5th.) An order of final adjudication was granted against Polliack's estate.

GOTZE V. BERGH.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note dated East London, January 4, 1904, and due on the 4th April for value received. The note was for £900, was signed by J. Wedderburn, and endorsed at the bank by the payee, Alex. Bergh. A sum of £539 14s. 9d. had been paid on account, and provisional sentence was applied for in regard to the balance of £360 5s. 3d.

Mr. Upington read an affidavit by the defendant, who said that he endorsed the note for the accommodation of the said Wedderburn, who had purchased scrip in the Federal Supply and Cold Storage of South Africa. He received no value for the note. He made the endorsement on the distinct understanding that the said plaintiff and Wedderburn should discharge the obligation, and that he (defendant) should be held harmless. Plaintiff had sold the scrip, and defendant submitted that it should have been attached to the note as his security. Mr. Upington asked for leave to put in a supplementary affidavit by the defendant.

Mr. Buchanan objected that this was a reply to the plaintiff's affidavit.

The case was ordered to stand over until the 12th May, to enable the plaintiff to file further affidavit, question of costs to stand over.

PURCELL, YALLOP AND EVERETT V. STEENSMA.

Mr. Upington moved for the discharge of the provisional order granted against the defendant on March 30.

Order granted.

BOULTON V. DE WIT.

Mr. Searle, K.C., moved for provisional sentence on two promissory notes amounting £467 17s. 6d.

Mr. Burton, for the defendant, put in affidavits to prove that the defendant owed the plaintiff no money except £37 10s. The plaintiff had never handed him back the old promissory notes, nor had he ever furnished him with a specific account.

The Court ordered the parties to go into the principal case, costs to abide the result.

BLAKE V. FOBIAN AND OTHERS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £700, with interest at the rate of 5½ per cent., from October 1, 1903, and that the property specially hypothecated be declared executable.

Order granted.

LIPSCHITZ V. DELPORT.

Mr. Close moved for provisional sentence on promissory notes for £250, £155, £50, £131, and £2 7s. 5d.

Order granted.

THE MASTER V. VILJOEN.

Mr. D. Buchanan moved for an order on the defendant to file an account in his capacity as executor *dative* in the estate of the late Jan Viljoen, with costs.

Order granted.

LOGAN AND CO., LTD. V. CLAWS.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

The defendant appeared in person, and put in a statement showing that his assets exceeded his liabilities.

The matter was ordered to stand over until Thursday week, the defendant in the meantime to see if an arrangement could not be entered into with the attorneys.

PORT ELIZABETH COLD STORAGE V. MARNICOWITZ.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

S.A. MUTUAL V. NORTJE.

Mr. P. Jones moved for provisional sentence for £24 interest on a bond from July 1, 1903, to the 31st December, 1903, at the rate of 6 per cent.

Order granted.

DUMINY V. DREYER.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for £75.

Order granted.

ORLSSON V. MAGOR.

Mr. Upington moved for judgment for £15,000, less £7,000 paid on ac-

count, together with interest on £1,376 5s. 2d., from 30th June, 1903, to 2nd September, 1903, and on the sum of £8,000 from 2nd September, 1903, at the rate of 6 per cent., and that the property specially hypothecated be declared executable. The bond had become due and payable by reason of the non-payment of interest.

Order granted.

OHLSOON'S CAPE BREWERIES V. MAGOR.

Mr. Upington moved for provisional sentence on a mortgage bond for £2,000, with interest at the rate of 6 per cent. from 29th September, 1903, and that the property specially hypothecated be declared executable. The bond had become due and payable by reason of non-payment of interest.

Order granted.

PATERSON AND ANOTHER V. PITT AND ANOTHER.

Mr. Alexander moved for provisional sentence on two promissory notes for £70 and £85 respectively, together with interest.

Order granted.

PATERSON AND ANOTHER V. TWINE AND ANOTHER.

Mr. Alexander moved for provisional sentence on a promissory note for £90, with interest from 29th March, 1904.

Order granted.

KING BROS. V. ROWAN.

Mr. McGregor moved for a decree of civil imprisonment against the defendant by reason of his non-payment of costs to the amount of £23 1s. 3d.

The defendant appeared in person, and stated that beyond offering £1 a month, which he hoped to borrow from his friends, he could make no definite offer.

Buchanan, J., said that it was clear under the circumstances that no order could be made at present, but there would be leave to apply again if it was discovered that the defendant had any property.

GENERAL MOTIONS.

ALLEN V. MILNER. { 1904.
{ Apr. 28th.

Mr. Upington moved for an order declaring the respondent, Wilfred Harvey Milner, aged sixty, to be of unsound

mind, and appointing a curator of his person and property.

Dr. Dodds, medical superintendent of Valkenberg Asylum, stated that he had Wilfred Harvey Milner under his charge since the 5th April. He was suffering from acute melancholia and hallucinations, and was quite unable to look after his own affairs. There was a fair prospect of recovery, but it would take some time.

Dr. Claude Wright, of Wynberg, stated that he had known Milner for about twenty-five years. About five weeks ago he was called in to see him, and found that he was suffering from melancholia. He refused to speak, or to take food, and was quite unable to manage his own affairs.

[Buchanan, J.: Is the Curator in Court?]

Mr. Upington: He was here, my Lord.

[Buchanan, J.: This is not the proper proceeding, Mr. Upington. The curator is appointed by the Court to look after the interests of the alleged lunatic.]

Mr. Upington, replying to the Bench, said that the curator was not now in Court.

[Buchanan, J.: This is not regular. He ought to be in Court to watch the case on behalf of the lunatic.]

Dr. McGregor, of Wynberg, also gave evidence as to the respondent's insanity.

Mr. Upington read a report by the curator *ad litem* to the effect that the respondent was of unsound mind. He seemed to imagine some impending trouble. The case was put down in the asylum book as "acute melancholia."

Robert Allen stated that the respondent was a widower, and had four children. He owned property in Church-street, Wynberg, part of which brought in a rental of £17 10s. a month.

Order granted as prayed, Mr. Robert Allen to be curator of the respondent's person and property, costs to come out of the estate.

Ex parte THE RECEIVERS OF J. SEDGWICK AND CO.

This was an application by Messrs. Syfret and Steytler, two of the receivers in the estate of J. Sedgwick and Co., for an order authorising them to dispose of the business to Charles Frederick Sedgwick for £116,000.

The petition set out that on the 11th February petitioners were appointed receivers of the company, and after appointing trustworthy valuers and having valued the immovable property, the wine and spirits on hand and the goodwill, Charles Frederick Sedgwick made an offer of £101,000 for the assets of the firm. He estimated that he represented two-thirds of the capital, and as regards his brother, he offered to pay £20,000 in

cash on completion of the sale, and the balance by three yearly instalments, and to furnish satisfactory security. Any attempt to launch on the market the large stock of wine and spirits at the present time, he thought, would entail a great loss. Petitioners were unable to reply to his letter owing to the other liquidator, Mr. Gibson, demanding £155,000, and they were unable to come to any agreement. Petitioners thought that the price was a satisfactory one, but they stipulated for £15,000 for the goodwill, and then Mr. Charles Frederick added that to his original offer. They were convinced that if sold by public auction the estate would not realise anything like the amount offered by Mr. Charles Frederick Sedgwick. Petitioners asked for an order authorising them to dispose of the estate to Charles Frederick Sedgwick, and for authority to pass transfer of any property in the name of the firm, to Charles Frederick Sedgwick, subject to an adjustment of the final order of the firm's transactions and the release from any liability of the firm's debts of Mr. A. M. Sedgwick.

The affidavit of Mr. Gibson set out that he was always ready and willing to accept £155,000 for the business. He hoped by cautious and judicial liquidation to benefit the partnership in the estate. He valued the goodwill at £32,000.

The affidavit of Dr. Hahn set out that it would be utterly impossible to realise anything like the value of the stock if it were placed on the market.

The affidavit of Charles Frederick Sedgwick, set out that he had been acting for the firm for 42 years, and had had the sole management nearly all that time. The gradual liquidation of the business would prove disastrous to the partners, and in addition it would throw out of work 115 men, many of whom were married, and that had in a good measure induced him to make an increased offer. If Mr. Gibson's idea was carried out, it would result in the collapse of the tied houses. He was quite willing to dispose of his share in the business to his brother or anybody else.

Mr. Schreiner, K.C., was for the applicants; Mr. Searle, K.C., for the other receiver, Mr. Gibson; and Sir H. Juta, K.C., was for Charles Frederick Sedgwick.

Mr. Searle, having been heard in argument on the facts,

Buchanan, J., said that if an illustration were wanted it was supplied in the facts disclosed in the affidavits of the wisdom of the Court in granting the last application in this matter by which three liquidators instead of two were appointed. If the matter of liquidation had been left in the hands of two liquidators there could be little doubt that the business would have come to a deadlock. The dissenting liquidator based his objection mainly

upon two things: One was the price at which the wine had been valued, and the other the price put upon the goodwill. The wine had been valued by experienced men without any restriction as regards putting a fair value on it, and on the rest of the assets, he thought the liquidators had made an excellent bargain. If the firm was gradually liquidated the goodwill would entirely vanish, and the opposing liquidator puts in £32,000 for this. The Court was bound to grant the application, and the liquidators would be authorised to make the sale of the business in the way proposed, and to transfer the property, the costs of the case to come out of the liquidation, as both parties came to the Court to do their duty.

Mr. Justice Hopley concurred.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

REVIEW CASE.

REX V. BAARTMAN. { 1904.
{ Apr. 29th.

Acts 19 of 1861, Sec. 15—Act 19 of 1877—Magistrate's ordinary jurisdiction—Whipping.

Where a boy, aged 15, was accused of contravening Sec. 15 of Act 19 of 1861, and the case having been remitted to a Magistrate to try under his ordinary jurisdiction, was sentenced to be whipped.

Held, that as the boy was over 14, and this was a first offence, the Magistrate could not, under his ordinary jurisdiction, inflict a whipping.

Hopley, J. At the end of last month came before me in review the case of the *King v. Thye Baartman* from Beaufort West. The accused was charged with the very serious offence of contravening the 15th section of the Railways Act, in meddling

with the railway points with intent to endanger the safety of the people travelling thereon. That, of course, is a very serious offence, for which 21 years, and, subsequent to the Act, 25 lashes can be administered. This lad is 15 years, and the way in which he is alleged to have committed the offence in itself was not a very serious contravention of the Act, and the Attorney-General seems to have taken that view in remitting the case to the Magistrate under his ordinary jurisdiction, at the same time calling the attention of the Magistrate to the Act 19 of 1877, for which lashes are made possible on conviction. The particular section of the Act is as follows: "Any person who may be convicted of any offence made punishable by the 3rd section of the Forest and Herbage Preservation Act, 1859, or by the 4th or the 15th section of the Railway Regulation Act, 1861, shall be, in addition to, or in lieu of the punishment provided for any such offence in or by the said sections, liable to corporal punishment in any number of lashes or cuts with the cane or rod not exceeding 25." Now, on remission, the Magistrate found the prisoner guilty, and sentenced him to 25 cuts of the cane. Under his ordinary jurisdiction, the Magistrate has no right under a first conviction to give lashes at all, unless the culprit is not over 14 years of age. Here the culprit is 15 years of age, and therefore the Magistrate had no right, under his ordinary jurisdiction, to give lashes, and he has no right to impose any number of lashes under the Act. The sentence is therefore a wholly improper one. If there had been promptitude in the matter the case might have been sent back to Beaufort West to have a proper sentence passed. Under the circumstances, this boy has been in gaol all this time, and it seems to me that the sentence should now be quashed.

GENERAL MOTIONS.

LAPIDUS V. HOFFMANN. } 1904.
 } Apr. 29th.

Mr. M. de Villiers was for the applicant, and Mr. W. P. Schreiner, K.C., was for the respondent. Mr. De Villiers said that the parties had arrived at an understanding. The application was for the appointment of some impartial person to take charge of the business carried on by the applicant and respondent. It was agreed that Mr. James Muir should be appointed as liquidator, with full power to dispose of the goodwill, and the business, either to one of the partners or to any intending purchaser, the costs to come out of the liquidation. Counsel moved to make the consent an order of Court.

Order granted.

NICKOLFS AND CO. V. AIGTIROS.

Mr. Gutsche moved to have the rule *nisi* granted against the respondent to show cause why the Registrar of Deeds should not be authorised to pass transfer of a certain piece of land in Cape Town made absolute.

Rule made absolute.

Ex parte WEINAND.

Mr. Alexander moved for the appointment of a provisional trustee in the estate of one Edward Louis David.

Application granted, Mr. H. Gibson being appointed *curator bonis*, with power to sell the perishable articles in the estate, and to carry on the business.

Ex parte AMSINCK AND CO.

Mr. Searle moved for an order, placing in official liquidation a company at present in voluntary liquidation, and for the appointment of Messrs Steytler, Gibson, and Nash as official liquidators.

A rule *nisi* was granted calling on all persons to show cause why the company in question should not be wound up, the rule to be served on the bank and the present liquidators.

PROVISIONAL ROLL.

WIENER AND CO., LTD. V. } 1904.
FRACK. } Apr. 29th.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

CHORITZ V. SHOOLMAN.

Pactum de non petendo—Forgery.

Where to an application for provisional sentence, the defendant pleaded plaintiff's written agreement, to accept payment of a debt by annual instalments, which agreement the plaintiff alleged to be a forgery, the Court, judging from the admissions of the plaintiff that his contention was improbable, refused provisional sentence and directed plaintiff to prosecute defendant for forgery and then go into the principal case.

Mr. Alexander moved for provisional sentence on an acknowledgement of debt for £300, signed by the defendant,

with interest from the date of summons and costs.

Mr. J. E. R. de Villiers read an affidavit by the defendant, which set out that on the 26th May he was indebted to the plaintiff in the sum of £350, which was advanced to him to discharge his debts. On the same day it was agreed that his indebtedness should be paid off at the rate of £50 a year, the first instalment to be paid in the course of the current year. An agreement was drawn up, and signed to that effect on the 26th February.

Mr. Alexander put in the replying affidavit of the plaintiff, who denied that he ever agreed that the sum of £350 should be paid by instalments. On the 26th February he signed a promissory note, and he had never signed an agreement. The signature on it was a forgery. Plaintiff was illiterate, and the defendant told him he was signing a receipt for the balance of the money on the 4th March.

Counsel having been heard in argument,

De Villiers, C.J.: If the document sued upon of the 11th March stood by itself it would certainly be *prima facie* proof of a debt of £300 being immediately owing by the defendant. The terms of the document are: "Balance due to Mr. Choritz £300, signed by Max Shoolman," but it is quite consistent also with the continued existence in force of the document of the 26th February, 1904. Under that document there was still also to be a balance owing to the defendant, but instead of paying immediately to the plaintiff it would be owing at a future date. The defendant puts in this document which postpones the payment to a future date, and he also puts in another which is a receipt given on the same day as the day on which the document was given, and it is a receipt for a certain amount, for £50 on account of the £350 being the first instalment according to the arrangement of the 26th February, 1904. This document is admitted by the plaintiff, signed by himself, and now he says that the first document is a forgery, although the second document is not a forgery. Still that is a case which he may set up in the principal case, but I think it seems so unlikely that the Court would not be justified in now giving provisional sentence upon the document. The provisional sentence will be refused, and the plaintiff ordered to go into the principal case, and what the plaintiff ought to do now before he goes to trial is to prosecute the defendant for forgery. If he does not do so it will be very difficult at the trial to prove a forgery. The opportunity is now given to the plaintiff to prosecute the defendant for alleged forgery. Provisional sentence refused, plaintiff to go to the principal case, costs to be costs in the cause.

HAMILTON V. MATHIE.

Mr. P. Jones moved for provisional sentence on a promissory note for £150, with interest at the rate of 6 per cent. The note was signed by two promisors, but the plaintiff was only proceeding against Mathie.

Order granted.

HANAU V. VAN DER KAAST.

Mr. Alexander moved for provisional sentence on an unsatisfied judgment of the Resident Magistrate's Court of Simon's Town for £250, with interest at the rate of 1 per cent. per month from the 5th December, 1903, and for £3 13s. 4d., taxed costs, and that certain shares be declared executable.

Order granted.

VESTER AND ANOTHER V. { 1904.
PIENAAR. { Apr. 29th.

Provisional sentence—Surety.

The Court refused provisional sentence against a surety, the principal debtor not having been excused; although the principal debtor was absent from the country, and it was alleged, but not proved, that he was insolvent.

Mr. P. Jones moved for provisional sentence for £569 14s. 9d., balance of a promissory note signed by the defendant as surety.

Mr. M. Bisset put in the affidavit of the defendant, which set out that he was before informed that proceedings would be taken. The principal debtor, he thought, should have been excused before he was sued.

Mr. Jones quoted *Master of H.C. v. Haarhoff* (2 H.C. 215); *Nourse v. Styn* (1 Mens. 23); *Orphan Chamber v. Seretyn and Others* (1 Mens. 25), to show that plaintiff was entitled to proceed at once against the surety in the case owing to the facts, that it was patent from the affidavits that the principal debtor was absent, that he was notoriously insolvent, and that plaintiff could not recover from him. He submitted that the whole practice proved that the plaintiff was entitled to provisional sentence, leaving it to the defendant if he were not satisfied, to put the plaintiff to the proof that the principal debtor could be excused.

Mr. Bisset contended that provisional sentence could not be obtained against a surety, and that he was entitled in the provisional case to set up this defence of non excusation of the principal debtor. He urged that the Court had never departed from the practice

of refusing to grant provisional sentence against a surety to a promissory note, because his liability was merely a contingent one.

[De Villiers, C.J.: Supposing it is clear that the principal debtor is insolvent, and cannot be excused, how can the Court then sustain the defence of the benefit of excussion?]

Mr. Bisset submitted that in this case there was no such proof of insolvency before the Court.

Cur. Adv. Vult.

Postea (May 4th). The Court refused provisional sentence.

ILLIQUID ROLL.

COWLEY V. STEPHAN. { 1904.
Apr. 29th.

Mr. Roux moved for an order compelling defendant to give (1) a full and true account of his administration of her affairs and of all moneys and securities received by him; (2) to give up to her all documents which came into his possession as her agent.

Defendant being in default the Court granted an order as prayed with costs.

BOBBINS V. LE ROUX.

Mr. P. S. T. Jones moved for judgment against plaintiff (Le Roux) for not having proceeded with her action within two terms; also for costs of the original application, whereon the present applicant was ordered to proceed by way of action.

De Villiers, C.J., pointed out that the notice did not ask for costs of the original application.

Judgment was granted, as prayed in the notice of motion.

DARVITT V. STEPHAN.

Mr. Roux moved, under Rule 329d, for judgment for the sums of £57 13s. 8d. (less £48 13s.), £25 18s. 6d., and £6 10s.

Granted.

BEAUFORT WEST MUNICIPALITY V. EDGCOMBE.

Mr. Buchanan moved for judgment, under Rule 329d, for cancellation of the sale of certain property.

Granted

HALBROTH AND SON V. CALCRAFT.

Mr. Wilkinson moved for judgment, under Rule 329d, for £50 7s., for work done, materials supplied, and money expended.

Granted.

X

JUTA AND CO. V. SHAWWE.

Mr. Buchanan moved, under Rule 329d, for judgment for £6 1s. 11d., for goods supplied and 2s. 6d. on dishonoured draft.

Granted.

ARGUS CO. V. PHILLIPS.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £41 18s. 9d., for goods sold and delivered.

Granted.

STEVENSON V. LOCHNER.

Mr. J. E. R. de Villiers moved, under Rule 319, for judgment for £70 for rent.

Granted.

HARRISON V. HARRISON.

Dr. Greer moved for judgment, in terms of consent paper, for judicial separation and division of property as arranged.

Granted.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

TRIAL CAUSES.

RUSSELL V. RUSSELL. { 1904.
Apr. 29th.

This was an action brought by Harriet Russell, of Cape Town, against her husband, Charles Stewart Russell, a fitter, lately of Beira, for restitution of conjugal rights, failing which divorce, with forfeiture of the benefits of the marriage. Mr. Rowson was for the plaintiff; the suit was undefended.

Mr. Rowson said that they had been unable to effect personal service. Substituted service had been made by publication in the "Post" at Beira, a Cape Town paper, and the "Government Gazette."

The plaintiff Harriet Russell said that she was married to the defendant in Johannesburg at the Baptist minister's manse. The defendant got drunk occasionally. They afterwards came to Cape Town, and he there deserted her to go to Beira. He said he did not earn sufficient money down here, and he would go to Beira. Witness was born in Natal. Shortly after the marriage they came to Cape Town, and resided here for three years. The defendant, she believed, was born in England. When the defendant went to Beira he said he

would send for her, but he had not done so.

Buchanan, J., said he doubted very much whether the plaintiff was domiciled in this colony. She was born in Natal, married in the Transvaal, and her husband had gone to Beira.

Witness, replying to counsel, said that she brought an action in the High Court of the Transvaal, and was told that she could not sue in that court, and that she must bring her action in Cape Town.

His Lordship, in giving judgment, said he must say that the question of domicile was very loosely proved, but the desertion took place in Cape Town, and as the plaintiff had been refused redress in Johannesburg, she might take an order. A decree of restitution would be granted, defendant to return to or receive the plaintiff on or before the 15th July, failing which a rule *nisi* to issue for divorce, to be returnable on the 4th August, publication to be as before.

Postea (Aug. 4th.) The rule was made absolute.

MAX V. MAX.

This was an action brought by Polly Max, of Cape Town, against her husband, Julius Max, of Bloemfontein, O.R.C., for divorce, by reason of the defendant's adultery with one Annie Simonds. Mr. Alexander appeared for the plaintiff; the suit was undefended.

The plaintiff, Polly Max, said she was married to the defendant in London, in 1894, according to Jewish rites.

Mr. Alexander put in the certificate, which was in Hebrew, and said that the abstract in English on the back or document was written at the time.

Buchanan, J., said that an abstract was not sufficient. The Court must have a complete translation in English of any document put in.

Mr. Alexander said that he had put in similar documents previously, and they had been accepted by the Court.

Buchanan, J., said that the Court must be furnished with a full translation.

Witness, continuing, said that her husband was at the time of the marriage a cigarette maker. They afterwards removed to Glasgow, and subsequently came out to South Africa. They lived in Johannesburg for a time, and came down to Cape Town on the 2nd October, 1899. They had a house in Cape Town, and later on defendant went to Johannesburg in search of work. All she had had from him was two letters, saying that he had arrived safe and obtained work. There had been one child born of the marriage. Defendant deserted her about 16 months ago. She now asked for divorce, custody of the child of the marriage, and costs of suit. Photographs were produced by witness of her husband and the woman Simonds.

Alexander Harris, at present employed as a cigarette maker, said he knew the defendant in Johannesburg. He saw the woman Simonds go away from Johannesburg with defendant. Witness subsequently went to Bloemfontein, and for some time he was employed by the defendant at his restaurant as a cook. The defendant and Simonds were cohabiting between October and December last year. He spoke to the defendant about his adultery; Max replied that he did not want to live with his wife again. Simonds knew that the defendant was a married man.

Matilda Magolis, of Constitution-street, Cape Town, also gave evidence as to the defendant living with the woman Simonds at Bloemfontein.

Decree of divorce granted as prayed, subject to papers being properly translated and put in.

PIETERSEN V. ESTATE OF { 1904
GABRIELSE. { Apr. 29th.

"Right of way"—Cancellation of sale—"Right of way" is equivalent to "*via*."

Where G. sold land to P. on the following condition of sale: "Purchaser to have a right of way over the remaining extent,"

Held, that an offer by G. to P. of a passage 3 feet wide did not comply with the above condition.

Semble, that 8 feet was the least width that P. could be compelled to take.

This was an action brought by Philip Pietersen sanitary contractor, of Stellenbosch, against the executors in the estate of one Gabrielse, for cancellation of a certain sale of land at Stellenbosch and £100 damages for breach of contract.

The declaration set forth that in April last year the plaintiff purchased at public auction certain land known as the northern half of lot 87 in the town of Stellenbosch. The auctioneer was Mr. Van Wyk. It was a condition of the sale that the purchaser should be allowed a passage for a draught vehicle. Plaintiff paid £650 for the land, and other expenses, amounting altogether to £679 15s. 6d. The defendants failed to give a right-of-way over the said land. Plaintiff claimed an order cancelling the said sale for the said sum of £679 15s. 6d., and £100 damages for breach of contract, with interest *a tempore morae* and costs of suit.

Defendants, in their plea, denied that it was part of the conditions of sale that the purchaser should have a right-of-way over the remainder of lot 87 to Bird-street sufficiently wide to allow the passage of a vehicle. They said that that part of the declaration was bad and embarrassing, and prayed that it should be struck out. They tendered to pass transfer together with right-of-way over the remainder of lot 87 to Bird-street as shown upon the diagram, and in accordance with the terms of the said conditions. They denied that a breach of contract had been committed, or that plaintiff had sustained any damage.

Mr. Gardiner (with him Mr. Rainsforth) for plaintiff. Mr. Upington for defendant.

Mr. Gardiner said the defendants admitted that they had to allow the plaintiff a right-of-way, but they denied that it was to be of such a width as to allow for a draught vehicle to go through.

Mr. Upington said that he would be prepared to argue the exception if the Court thought fit at that stage.

Buchanan, J., said he would first hear the evidence.

Mr. Upington said that his clients had tendered to give transfer in terms of the conditions of sale with a right-of-way over the adjoining property belonging to Fowler without specifying the width. The question of width was one as between the plaintiff and Fowler.

[Buchanan, J.: That is a point for you as the seller. It is a pity that Fowler was not joined as a party to the suit.]

Mr. Gardiner called evidence.

Mr. Haupt, agent, of Stellenbosch, said he had seen the ground in dispute. He had seen Fowler's wall. The distance between the peg on Swartz's estate and Fowler's wall was 3 feet.

The plaintiff, Philip Petersen, said he heard the conditions of sale read out at the auction. There were then no pegs or flags to indicate the boundaries. Both Fowler and witness bought plots. A man named Hunt was at the sale, and he asked the auctioneer how they could approach the property on the north side.

Mr. Upington objected to evidence being led as to statements and warranties given by the auctioneer prior to the conditions of sale. In *Durr v. Bam* (8 Juta, 22) the Court had ruled that parole warranties given by auctioneers were inadmissible.

Mr. Gardiner quoted *Wiid v. Murison* 60, T.R. 484) wherein he submitted that the Court accepted a warranty given by an auctioneer.

Buchanan, J., said he would make a note of the objection, and in the meantime the evidence could be led.

Witness (continuing) said that the auctioneer informed Hunt that he would

have a right-of-way over the adjoining land. A dispute arose as to the property on the north side, and the auctioneer came to witness and offered him the property for £650, promising him a servitude over Fowler's ground and right-of-way, so that he could get in with his cart and horses. The auctioneer told him that he would be able to build a coachhouse on the ground. Witness went three days later and signed the conditions of sale. When he signed the conditions Van Wyk told him he must pay two guineas for his servitude.

Cross-examined: He considered it very important that he should have a right-of-way to his land with a cart. At least a 6 feet way would be necessary. When witness signed the conditions, Van Wyk read out a 10 feet way as contained in the conditions: It was said publicly at the sale that there would be a right-of-way for vehicles to go through.

The plaintiff's wife and son gave corroborative evidence. The latter said he was confident that the auctioneer said there would be passage way 10 feet wide.

William Hunt, of Stellenbosch, also gave evidence as to the conversation which he had with the auctioneer at the sale relative to the right-of-way.

Evidence for the defence having been led, and Counsel heard in argument,

Buchanan, J.: Certain property was sold under the written conditions of sale by public auction. It was sold in two lots, the northern portion being bought by the plaintiff, and in the conditions of sale it was said the buyer of this lot was to have the right of way over the remaining extent. This right of way was not defined. This Court is of opinion that a tender of a three-foot passage is not compliance with the contract. There is nothing in evidence to show that the right of way was limited. The authorities quoted showed that it was usual to give eight feet, and the Court is of opinion that this is the least that should have been allowed. The defendant cannot now give this right of way, and there must therefore be judgment for the plaintiff for the cancellation of sale, and return of the purchase money paid; as the property would be useless for the purpose for which it was bought without means of sufficient access to the back premises.

Plaintiff's Attorneys: Faure and Zietaman; Defendant's Attorney: G. Trollip.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPELY.]

SIEBERHAGEN V. KELLER { 1904.
AND CHANTLER. { May 2nd.

Messenger of Court—Sheriff—
Sale in execution—Damages
for wrongful sale.

The defendant C., a messenger of a Magistrate's Court, having the custody of certain sheep, half of which belonged to the plaintiff, sold them in execution of a judgment obtained by defendant K. against the plaintiff's sons. C. did not know that any of the sheep belonged to the plaintiff, but might have ascertained it if he had made reasonable inquiries. The defendant K. took no part in the sale beyond obtaining the warrant of execution in the ordinary course. The plaintiff had no knowledge of the sale until some time after it had taken place.

Held, that K. was not liable for C.'s wrongful act.

Held further, that C. was liable, and that the measure of damages was the value of the plaintiff's sheep at the time when he wrongfully sold them.

This was an action brought by Elizabeth Sieberhagen, a widow, of Klipkraal, in the district of Fraserburg, against the defendants, the second of whom, in execution of a writ in favour of the first defendant, wrongfully and unlawfully, as it was said, sold certain sheep, the property of the plaintiff.

The declaration set out that the plaintiff was a widow, the first-named defendant a shopkeeper, and the second-named defendant at the time of the occurrence was a messenger of the Resident Magistrate's Court at Fraserburg. About 27th May, 1902, the first named defendant obtained a judgment of the R.M.'s Court against the plaintiff's sons for £42 19s. 10d., and on the 27th and 30th May, writs were issued in respect

of the said judgments, and 1,566 of the plaintiff's sheep were wrongfully and unlawfully attached by the second-named defendant. Plaintiff said that of the total number of sheep so disposed of, a proportion to the value of £450 were wrongfully and unlawfully attached and sold in respect of the said writs for £42 19s. 10d. in favour of the first-named defendant. It had been discovered that a portion of the amount claimed in the writs had been satisfied out of stock other than the sheep in question, and the amount claimed would in consequence be reduced to £305.

The plea set out that about June, 1902, the military authorities took possession of certain sheep, about 1,566, some of which were the property of the plaintiff, and some the property of her sons. They were brought into Fraserburg, and handed over to the auctioneer, under the *bona fide* belief that all the sheep were the property of the sons. A portion of these were sold on behalf of the military authorities. The proportion of sheep sold for the satisfaction of the judgment was 176 of the 1,566. A certain number were the property of the plaintiff, but the remainder were the property of her sons. Defendant tendered £20 in full satisfaction in respect of any sheep found to be the property of the plaintiff.

Mr Burton (with him Mr. Van Zyl) was for the plaintiff, and Mr. McGregor (with him Mr. Close) was for defendants.

Elizabeth Sieberhagen stated that at Klipkraal in April, 1902, a column of troops under Major Brock came to the farm. At that time three of her sons were living with her. There would be 3,740 sheep on the farm, and of that number about 400 belonged to her sons. The military took all the sheep to Steinkampspoort. About 740 of the total number were lambs of three months and younger. Her son-in-law brought 630 of the sheep back.

Cross-examined by Mr. McGregor: The farm was bequeathed to the sons, and it was her husband's custom to give them sheep from year to year. All the sheep had several marks, and as there were five sons, there would be six different marks. She claimed compensation for all the sheep at the Compensation Enquiry, but subsequently withdrew her claim for 1,566 of the sheep. She knew that the sheep fell off very much in quality when the military had them at Steinkampspoort. The sons had not half the sheep. Most of them were hers, although she never looked at the marks. Guilleon was the son who looked mostly after the sheep. In 1901 there were twenty bales of wool, but she would not say of that lot what her proportion was.

By De Villiers, C.J.: Brook's Column burnt the buildings down, and everything was destroyed, including a memorandum of the stock of sheep.

Guilleon Sieberhagen stated that he was at the farm in April, 1902, when Brock's column came up. Witness went to Steinkampspoort with the military, who removed thereto 3,740 sheep from the farm. Of the lot, he owned about 100, and in all the brothers had about 400. He valued the whole lot at 10s. a head.

Cross-examined by Mr. McGregor: Two of his brothers joined the enemy. They got compensation for the burning of the house. As a child he got a certain number of sheep, but did not get them from year to year.

By De Villiers, C.J.: He only got one sheep when he was eight years of age.

Further cross-examined, witness stated he did not get any sheep from his mother. When the sheep were shorn in 1901, the fleeces were separated, but he could not say of the twenty bales how many belonged to his mother. There were 680 lambs in the whole flock.

Hendrik Hanekom, plaintiff's son-in-law, stated that after the sheep were taken to Steinkampspoort he brought some 600 of the sheep back to the farm. The sheep as they ran would be worth 15s. each.

Geo. Henry White, chief constable, and messenger of the R.M.'s Court at Fraserburg, produced the messenger's sale book for the 23rd June, which showed that 1,566 sheep were sold in execution of the writs. The amount realised was £280 7s. 10d. The Civil Commissioner received £150 2s. 11d as the balance of the proceeds of the sale, and on the next day £23 8s. 3d. was paid in as the proceeds of another sale, making a total of £173 odd. Of that amount £54 14s. 1d. was paid out to the last witness on account of the writ, and that would leave a balance of £118 16s. 3d. with the Civil Commissioner. According to the sale book, the sheep were not sold on behalf of the military.

Cross-examined by Mr. McGregor: The only reason he had for saying that the sheep were not sold on behalf of the military was that the balance was paid over to the Civil Commissioner.

Paul Vester, contractor, residing at Fraserburg, stated that in June, 1902, he was at the sale of sheep. The price at which they were disposed of was very low. Some of the sheep were sold at 4d. apiece, and that was a scandalous sacrifice. One buyer alone paid £180 for 980 sheep, and, in his opinion, they were given away.

Cross-examined by Mr. Close: The sheep were thin, and the flock included a number of lambs. He did not take any of the sheep that were given away.

Mr. Burton closed his case.

Mr. McGregor: Before leading evidence I must except to the form of this action, and ask for absolution from the instance. The plaintiff accuses the defendants with what would be known in

English law as "Conversion." There is no question of *rehabilitatio*, because it is not alleged either that we are in possession of the sheep or have made away with them. *Saurie v. Standard Bank* (7 Juta, 27).

[De Villiers, C.J.: What do you say is their remedy?]

An action for damages.

[De Villiers, C.J.: Practically speaking, this is an action for damages.]

I submit they do not claim damages, and they do not allege *culpa*.

[De Villiers, C.J.: They say that you wrongfully and unlawfully took the sheep; surely that is an allegation that they have sustained damages?]

No, the plaintiff must show that she has suffered *damnum*. She has not done so if there is a profit on the whole of the sheep.

[De Villiers, C.J.: You are now going into the measure of damages, but the question now is, "can they sue at all for damages?"]

Here the wrongful act was disposing of 1,500 sheep. There is no allegation of any loss.

[Hopley, J.: She says 1,500 were taken unlawfully, and that 500 were sold at a loss. This is not really an action for damages, but for conversion.]

Then again, there is nothing to show that these which were sold were Mr. Sieberhagen's sheep.

[De Villiers, C.J.: To whom did these sheep belong?]

We do not know; the military may have had other sheep.

[De Villiers, C.J.: It said that 1,500 sheep were wrongfully and unlawfully taken by the military: what was done with them?]

I cannot say, but I would submit that all four defendants should have been joined; why single out Keller. We tender £20, and there is nothing to show that that is not a sufficient tender for the 50 sheep.

[De Villiers, C.J.: But what about the 500 sheep which you admit were killed or lost?]

Suppose they bring actions against (for instance) Conradie, Dr. Mader, etc., etc., they might go on with actions *in infinitum*.

[De Villiers, C.J.: We have nothing to do with what may have been done, but only with the case now before the Court. You had better call your evidence.]

Evidence was then called for the defence.

George Chantler, messenger of the R.M.'s Court of Wodehouse, stated that until the end of 1903 he was at Fraserburg. In June, 1902, he conducted a sale of sheep at Fraserburg, as a result of several writs against the brothers Sieberhagen. Towards the end of June, Major Brock sent in the flock of sheep to be sold on and behalf of the military. The

proceeds of the sale were to be placed to the credit of the military accounts. Witness notified that the sheep were to be sold on behalf of the military. The Civil Commissioner instructed him that it was his duty to attach a number of the sheep to satisfy the writs against the Sieberhagens. The sheep were in a very bad condition, and if he kept them much longer they would have died of hunger. He did all in his power to bring about a good attendance, as it was to his advantage to get the best price. He sold on behalf of the military, who understood that the writs would have to be satisfied first. Under the circumstances, the prices were very good, as the sheep were scabby; there was nothing but wool over bones. It was 135 lambs that were sold at 4d. each.

Cross-examined by Mr. Burton: All the sheep were sold on behalf of the military. The Deputy Administrator ordered him to put the entries in the messengers' sale book. The balance of the sale went to the Civil Commissioner, in his capacity as Deputy Administrator. He did not know that the balance of the money was still in the hands of the Civil Commissioner. He did not take an indemnity from any of the plaintiffs when he sold the sheep. It was not true that Mr. Stofberg made an offer to discharge the writs and save the sale of the sheep. The whole lot of the sheep were scabby.

Johan Keller the first defendant in the case, said that he had received payment for the amounts of his writs against the brothers Sieberhagen through his attorney. He could not say the exact number of sheep that the Sieberhagens had. He had bought certain quantities of wool from the brothers at different times.

Fritz Keller, son of the last witness, stated that he was present at the sale of the sheep. There was a good attendance, but the sheep were in a very poor condition, some of them being unable to get up. Witness would not have bought the sheep.

Cross-examined by Mr. Burton: Those that were sold for ninepence and a skilling he would not have bought, as it was difficult to know what to do with them. About half the sheep were scabby.

Stephanus Marais said he could not say whether the brothers Sieberhagen had any sheep, although it was the custom in the district to give every child sheep, the produce of which were kept distinct as theirs. When he was 21 years of age he had 400 sheep through that custom. About three years ago Andries Sieberhagen offered him £200 and 400 sheep for his farm. The sheep were in a rather poor condition at Steenskamps-poor. After the sale he did not examine the sheep, but he thought they would be worth six or eight shillings.

Chas. Marais said he knew the marks on Sieberhagen's sheep, and approximate-

ly the number was more than 2,000; he put down half of them to the mother and the other half to the sons. At the shearing in 1901 about half the wool belonged to the sons. He thought Guilleon owned six or seven hundred sheep.

Cross-examined by Mr. Burton: He was not certain of the estimates he gave them of the shearing.

Bissol Harrant, labourer and shepherd, stated that he had been on the farm of the plaintiff. He was there in 1900 when shearing took place. Twenty bales of wool were got, and seven of them belonged to Mrs. Sieberhagen.

George Chantler (recalled by the Chief Justice) stated that he was informed by the military authorities that the Sieberhagens were not at the farm, and as he was outlawed to be shot by the rebels, he did not go to the house to demand payment.

Mr. Burton: The plaintiff has a good claim for damages against both the defendants, and the measure of damages is simply the value of these sheep. Keller has clearly derived advantage from the sale of this property. The Messenger has referred to the case of *Olivier v. Keating* (Foorde 102).

[De Villiers, C.J.: How can you sue the messenger. He is merely an officer of the law.]

He is also, in a sense, the agent of the law; but the case against the messenger is stronger than against Keller.

[De Villiers, C.J.: If the seizure was unlawful why did you not follow up the sheep. You cannot follow up the proceeds of the sale.]

That was done in *Olivier v. Keating* (Foorde 102). The Messenger of a Magistrate's Court is in the same position at common law as the Sheriff. In this case he failed to exercise ordinary care and diligence. He never attempted to find out the owner of these sheep. For aught he knew Hendricks may have owned one or two of these sheep, worth (let us say) four shillings each, while any one of the other brothers may have owned 200 or 300 each, worth 12s. Then he took no indemnity from the purchasers of the sheep. Again, he sold more than were required to satisfy the exigency of his writ. He sold no less than 1,566 and handed over a balance to the Civil Commissioner. He says that he sold on behalf of the military, but there is no evidence of that, and if he did so, why did he hand over the balance to the Civil Commissioner? Clearly, he is a tort-feazor and, therefore, the onus is upon him to show that he did not sell any of our sheep. Plaintiff and his sons had 3,840 sheep; but if we take only the 1,566 it is certain that some of them belonged to Mrs. Sieberhagen, and probably not more than 150 belonged to the son. It is absurd to suppose that these sheep were worth only 3s. 7d. on an

average. They were worth at least from 8s. to 10s.

Mr. McGregor: I shall confine myself chiefly to the evidence. It is admitted by the plaintiff that his only case is against the second defendant. As to Sec. 42 of Act 20, 1856, two of the men had joined the enemy and others had been deported by the military, and their houses had been burnt down by the military. I should like to call the attention of the Court to Sec. 8 of Act 17 of 1886. Any action against the Sheriff or Deputy Sheriff must be commenced within six months after the cause of action accrued and a messenger of the Magistrate's Court stands on the same footing.

[De Villiers, C.J.: Oh, no.]

Very well, then, I shall not press that point. It has been said that in this case the onus is on the defendant; but the onus is never on the defendant in an action for damages. The fact that the military stole some of these sheep has nothing to do with us. We are not liable for their torts or their crimes, and I do not appear for them. It is true that we received one sheep from the military and that may very seriously affect the question of damages.

[Hopley, J.: Apparently the military did not sell the sheep: they seem to have been sold under civil execution.]

Yes, but the plaintiff should have claimed compensation from the military. It was only because the sheep had been seized by the military that the messenger could sell them and he then handed over the proceeds to the Civil Commissioner as deputy administrator of martial law.

Another point is that in this case the plaintiff sues for value. If anyone sue for value of a thing he must state what that thing is. Here the defendants were sued jointly for 176 sheep. Only that number of sheep is in suit, and the second plaintiff has accounted for these in his books. Then again, the evidence as to the number of sheep owned by the sons is absolutely incredible. The independent evidence of the herd and of Marais shows that at least half of the sheep belong to the sons. More than half the wool (viz., 13 out of 20 bales) is said to have belonged to them.

As to the tender, 176 sheep were sold on Keller's writs. About 80 of these may have belonged to Mrs. Sieberhagen and for these I submit that 5s. each, or £20 in all, was ample.

Mr. Burton in reply,

De Villiers, C.J.: The plaintiff in this case complains that certain sheep belonging to her were attached and sold in execution of a judgment given against four of her sons. She complains that the act was a wrongful and unlawful one on the part of the defendant Chantler, as the messenger of the court of the Resident

Magistrate of Fraserburg, but she also sues Keller, the first defendant, as the execution creditor. There seems to have been more than one judgment against the sons of the plaintiff, and it was in execution of several of these judgments that the sheep were attached. I confess I cannot understand why Keller was made a co-defendant in the action at all, and if he was to be made a co-defendant, why all the other execution creditors were not joined as co-defendants. The evidence does not show an act of tort on the part of Keller as the execution creditor. He merely left the matter in the hands of the officers of the law, and he does not seem to have done anything when the sale took place to persuade the second defendant to sell the sheep belonging to the plaintiff. In my opinion, therefore, Keller ought not to be made a party at all. But the case is somewhat complicated by the fact that Keller has pleaded a tender. He has admitted his liability to the extent of £20, and with his co-defendant, they both tender to pay £20, with costs up to the date of tender. The Court therefore cannot ignore the tender, and as to Keller, there will be absolution from the instance, except as to the £20 which he has tendered, for which amount there must be judgment for the plaintiff against both defendants, with costs to the date of tender. As to the second defendant, it is clear from the evidence that he sold sheep belonging to the plaintiff. She lived on the farm with her sons, and her sons no doubt had a certain number of sheep. The first question to decide is what proportion of the total quantity of the sheep belonged to the plaintiff. For myself, I am certainly inclined to believe that the witnesses for the plaintiff somewhat minimised the number of sheep belonging to the sons. The manner in which the sons dealt with the wool that was shorn from the sheep from time to time shows that the sons must have had larger interest in the sheep than the plaintiff's witnesses would now wish the Court to believe. It seems almost incredible that these sons—one of them being over 40 years of age—should have had the small number of sheep alleged by them, and I am inclined to accept the statement of one witness for the defence that the sons owned about half the total number of sheep. If the same proportion existed in regard to the 1,566 sheep that were sold by the defendant, then there would have been about 783 sheep of those sold by the second defendant belonging to the plaintiff. The next question is what should be considered a fair value of these sheep at the time when this wrongful sale took place? Upon this point also the evidence is very conflicting, but when it is borne in mind that these sheep had been in the hands of the military for

about two months, with such custody as was likely to be given to them under the circumstances, I can quite understand that the value of the sheep must have greatly deteriorated by the time the sale took place. I am satisfied also that many of these sheep might have succumbed entirely if not sold at the time. The average amount actually realised in respect of these sheep would represent a fair amount of the damages for the sale of 783 sheep, which would be the proportion belonging to the plaintiff. Three shillings and sevenpence I understand to be the price—the average price—and that would make about £140 for 783 sheep, and for that, at all events, I am clearly of opinion that the second defendant is liable. But, seeing that £20 is awarded against both defendants, there will only be judgment for £120 against the second defendant. A great deal has been made of the fact that the sheep were actually in the possession of the military at the time the sale took place, and it is argued that no real damage was sustained by the plaintiff. This argument would have been convincing if the sheep had already been forfeited by the military, for then the Court would not have inferred, but it is quite clear that there was no such forfeiture. The defendant simply took possession of the sheep on behalf of the military, the military being the custodians of the sheep on behalf of the true owners, and when the sale had to take place the second defendant having possession of the sheep, simply proceeded to sell them without complying with any of the formalities required by law. It is said that the defendants in the suite were away, some of them having joined the rebels. But they were not out of the Colony, as some of them were admittedly at Beaufort West. No attempt was made to find them, to ask them to point out any goods or chattels to satisfy the writs. The second defendant never went to the farm. If he had gone to the farm, or made further inquiries, he would probably have ascertained what sheep belonging to the defendants. He made no inquiries from people at the sale, who might have given him information. The very shepherd who guarded the sheep was in Fraserburg at the time, and if the second defendant had taken any trouble he could easily have ascertained that a large number of the sheep did not belong to the defendants, but that they belonged to Mrs. Sieberhagen. Several of the witnesses were in Fraserburg at the time, who could have given information to the second defendant if he had chosen to take the trouble to make the necessary inquiries. He attached the sheep because he knew that they belonged to the Sieberhagens, and he did not even know the proportion. The debts

for which judgment was given against the Sieberhagens were not the same against each of them, and he made no inquiries. He sold the whole lot of the sheep without any further inquiries. Clearly, he acted contrary to the manner in which the Sheriff or Messenger should perform his duties, and for his negligence in the performance of his duties he must pay damages to the plaintiff for the sheep wrongfully and unlawfully sold. As against the second defendant, there will be further judgment for £120, with costs. As to any costs incurred by the first defendant since the date of tender, which would not have been incurred if he had not been made co-defendant, such costs must be paid by the plaintiff.

[Plaintiff's Attorneys: V. A. van der Byl; Defendants' Attorneys: Tredgold McIntyre and Bisset.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

TENNANT V. ZWAIGENHAFT { 1904.
May 2nd.
„ 3rd.

Building contract—Extras.

This was an action to recover the sum of £424, which plaintiff alleged the defendant owed him for work done and material supplied. In his declaration the plaintiff stated that in May, 1903, he entered into a contract to do certain work for defendant for £300. The work was in connection with certain alterations to a building belonging to the defendant at Rondebosch. Plaintiff alleged that certain further work was agreed upon subsequent to the contract, for which defendant agreed to pay £300, and that defendant also agreed to pay half the sum of £112, being the amount of the cost of rebuilding certain walls, which collapsed. Plaintiff allowed £50 in respect of certain work (the erection of a kitchen) not completed under the later contract. The sum of £182 10s. had been paid by the defendant, and the plaintiff now claimed £424. The defendant admitted having entered into a contract for £300, but denied that he agreed to pay the further sum, and that he agreed to pay half the cost in connection with the walls, which collapsed. He had paid on account £182 10s., and now denied that he was indebted to the plaintiff in any sum further than £117 10s., which amount he tendered. Defendant claimed, in reconvention, that he was entitled to payment of 10s. per day after the lapse of three months from the date of the contract—from the 26th July, 1903, to the 29th February, 1904. He claimed £107 in reconvention.

Mr. W. P. Buchanan for plaintiff; Mr. Alexander for defendant.

Wm. Hy. Tennant, the plaintiff said that in April or May defendant came to him, and asked him to do some building and alterations at Rondebosch. They went out to see the place, and defendant showed witness some plans and specifications, on which witness estimated that the work would cost £800. Defendant said he could not spend so much. Subsequently witness tendered for putting on the roof, breaking down a wall, and other work, for £300. A contract was drawn up, signed by both parties. The work could not be started in June, as the weather was too bad. In June, defendant agreed to pay a further £150 for making two bow windows, and for making a kitchen. The latter was to be commenced when the main building was finished, and when payment had been made therefor. Originally there was a penalty of 10s. for every day the work was delayed after three months but witness undertook the further work on condition that this would be cancelled. Witness started work in August. Defendant came to see him, and wanted the floors and walls raised. Witness agreed to do that for a further £150. When the roof was on—it was put on during the wet weather—the inside walls, with which witness had nothing to do excepting to raise them, fell down. Witness had done no work on these walls. Witness proposed to defendant that defendant should furnish the material to rebuild the wall, and that witness should find the labour. Defendant said: "No, you do it, and I will pay half." Witness agreed to this. Witness did not do the kitchen, for which he allowed £50. The rest of the work he did. He had received £182 from defendant. Witness struck work because defendant would not supply him with money for materials.

Cross-examined: Witness did everything possible to protect the walls which fell in. The work was done in a proper manner.

Isaac Sickley, painter, in plaintiff's employ, said he heard defendant tell plaintiff he would agree to the cancellation of the stipulation as to the penalty of 10s. a day, and that plaintiff could do some work in connection with two bow windows for £150.

John Ambrose, bricklayer, in the employ of the plaintiff, deposed to having heard defendant and plaintiff discuss the cost of raising the walls. Plaintiff said he would do the work for £150. There were no foundations under the walls which fell down. Witness heard defendant agree to pay half the cost of erecting the walls. All the work done at the house was worth about £600 or £700.

John Lyon, architect, stated that he estimated the work done at the house at £840, less the kitchen. As regarded the old walls, witness had put his um-

brella through one; it was simply old mud.

Mr. Buchanan closed his case.

Louis Zweigenhaft, the defendant, said the plaintiff tendered £300 for the work, as shown on the plan and specification. The bow windows were shown on the plan, but not on the specification, which simply showed work which could not be seen on the plan. Witness never agreed to pay for the walls which had fallen down; plaintiff said that if he had taken the roof down bit by bit, they would not have fallen. Mr. Schroeder, witness's architect, went to the place and pointed out certain particulars in which the work was not in accordance with the plan. Witness never made any agreement with Tennant for extra work. Witness was willing to pay Tennant the balance of the £300 on his getting the architect's certificate that the work was completed, and on his receiving payment for the loss caused by the delay, which, reckoned at 10s. a day, came to £107.

John Stonier, formerly acting Municipal Engineer of the Claremont Municipality, said he had passed the plans produced. The work which had been done did not agree with the plan. A roof should not be taken off and walls left unprotected in wet weather, or the walls should be protected with galvanised iron. Witness saw the walls unprotected. The painting was very badly done, and on the whole, the work was of what might be called a second-class description.

Percy Askenham, Municipal Engineer at Claremont, said the building was not fit for habitation, owing to the kitchen being filled with debris, and to their being no ventilation and no surface drains.

Daniel Jacobus Steele said he did the carpentering for plaintiff at the house in question. He did all the carpentering in the building—windows, doors, and so on—for £45, working on the plans. Witness was told by Tennant that the reason why he could give no more than £45 was because it was a cheap contract. Witness believed Tennant mentioned that the contract was £300 or £350. He said nothing about any extras except the kitchen. If the roof had been covered the walls might have been saved.

Cross-examined: Witness made the contract for £45, but he might have had £60. The material cost a great deal more than the labour. The doors and windows were already made, and had to be fixed.

Mr. Alexander closed his case.

Counsel having been heard in argument on the facts,

Buchanan, J., referred the matter to Mr. Ohms, a practical builder, to report to the Court upon the value of the extra work done beyond the work specially mentioned in the specifications, taken in

conjunction with the letter of the 25th May, the referee specially to state the cost of the erection of the walls and the value of the old material used up in the erection. On his report the Court will give judgment. He was of opinion that £300 must be paid for work specified for and the value of extra work and half the cost of re-erection of the inside walls, which fell in consequence of rains. The claim in reconvention would be dismissed with costs.

Postea (May 13th).

Buchanan, J., said the plaintiff claimed for the balance of a certain amount due under a contract performed by him in connection with a building at Rondebosch, and for certain extras. The defendant had filed a claim in reconvention, but this the Court had already dismissed, and certain questions in respect to the defendant's claim had been referred to Mr. Ohms, a practical builder. The referee had now reported, and on the plaintiff's claim for £300 he awarded £440, while on the claim of £56, in regard to extras, he awarded the sum of £65. Under these circumstances the plaintiff was fully entitled to the amount he had sued for, and judgment would be given for the plaintiff, with costs.

[Plaintiff's Attorneys: T. P. Peters; Defendant in person].

COHEN V. WHITE. { 1904.
 { May 2nd.

Sale and purchase—Provisional sale — Agency — Scope of agent's authority.

W. had instructed one C. to buy certain property for him at a public auction for £7,000. A portion of the property was put up provisionally and knocked down to C. for £4,500. W. at once repudiated C's agency. W. being sued to complete his purchase and take transfer.

Held, that as C. had not acted within the scope of his authority, and moreover as a provisional sale binds neither purchaser nor vendor, W. was justified in repudiating C. as his agent, and that absolution must be granted from the instance.

This was an action brought by Samuel Cohen, of Woodstock, against Edwin George White, of the firm of White, Ryan and Company, merchants, Cape Town, for a declaration of rights under certain conditions of sale.

The plaintiff, in his declaration, said

that he duly authorised Messrs. Behr to offer for sale by public auction, in two lots, certain premises in Essex-street and Albert-road, Woodstock. The first lot was knocked down to one A. J. Cooper for £4,500. He was acting with full authority to purchase the said premises on behalf of the defendant, who afterwards ratified the said purchase. Plaintiff had tendered, and hereby tendered to pass transfer of the said premises to the defendant, and he prayed for the defendant to be forthwith ordered to pay the sum of £1,500, one-third of the purchase price, or produce such securities as were required by the conditions of sale, otherwise the plaintiff to be empowered to exercise certain rights as to re-sale set out in the conditions.

The defendant, in his plea, admitted that he was present at the sale, but he denied Cooper's agency. He admitted that the sale took place on certain conditions, and he believed that the said Cooper did sign the same in his own name, and he (defendant) had no knowledge of the alleged sale. He did not purchase the property.

Mr. M. de Villiers (with him Mr. J. E. R. de Villiers) for plaintiff. Sir H. Juta, K.C. (with him Mr. D. Buchanan) for defendant.

Samuel Cohen (the plaintiff) said that the defendant was present at the sale. He was accompanied by his representative, or manager, Mr. Cooper. Mr. White went over the property with witness; witness did not show Mr. Cooper over the property. The auctioneer, Mr. Behr, thoroughly explained what properties were comprised in the first lot. Witness's brother made the first bid, and then Mr. Cooper bid £4,000. Another gentleman bid £4,250, and Mr. Cooper then offered £4,500. The property was knocked down to Mr. Cooper, who, in reply to Mr. Behr, said he was buying for Mr. White. The conditions were signed A. J. Cooper.

Cross-examined by Sir H. Juta. Witness did not find out that no sureties had been given until afterwards. Mr. Behr was witness's agent; he did not instruct Messrs. Moore, the attorneys, to write to Cooper and call upon him to provide sureties, or pay the purchase price. The advertisement made no reference to two lots. He heard the auctioneer ask Mr. Cooper for whom he was buying before the property was knocked down. He did not know whether White, Ryan and Co. wanted to buy the property in order to cover their bond. He did not hear Mr. White say that Cooper had no authority to buy for him. Ohlssons held the first bond; Mr. Bultitude, their manager, was present at the sale.

Edward John Moore, attorney, said his firm were instructed by Messrs. Behr and Co. to send the letter to Cooper, calling upon him to complete the sale.

Cross-examined: Behr came to witness as Cohen's agent.

By the Court: So far as his firm were concerned, the matter dropped at that stage.

Archibald Bultitude said he attended the sale in question. He had a conversation with the defendant before the sale in regard to the different bonds. The property was put up in two lots. As far as he knew, White and Cooper were together. The first lot was put up provisionally, and it was knocked down to Cooper; then the second lot was put up provisionally and knocked down. Then the lots were put up together. After the first lot had been knocked down, he thought that the defendant woke up to the fact that they had been bidding on only a portion instead of the whole property. He observed a heated argument between White and Cooper. Mr. White afterwards came to witness, and said that his agent had made a mistake, and that he had bought the first lot only instead of the whole property. Mr. White repudiated the sale. When the two lots were put up together the price offered was not higher than it had been for the single properties. Mr. White afterwards asked witness to go and see the plaintiff's brother, and ask him whether he would not be prepared to pay more for the aggregate than the two separate bids. Plaintiff's brother said that if Mr. White had made a mistake he must stand by it. Mr. White, he thought, told him that he had given Cooper instructions to buy the whole property for £7,000.

Cross-examined: Mr. Ohlsson held the first bond of £5,150. Witness was the manager of Ohlsson's Breweries. He thought Mr. Ohlsson's bond was quite safe. He was quite sure Mr. White told him that he had instructed Cooper to buy the whole property for £7,000. Before the signing of the conditions, Mr. White made it clear that he was not liable for the sale.

Re-examined: The plaintiff told witness that he should hold Cooper to his bargain. After the first lot had been knocked down, White said that his man had made a mess of it. He took it that White was there as representing his firm.

Bensean Cohen (plaintiff's brother) said that before the sale Mr. White said he was going to buy the property. He described what took place at the sale, and said that Mr. Bultitude came and asked him if he could make a larger offer for the whole lot than had been made for the separate lots. They all believed that Mr. White was the purchaser. White told him before the sale that they intended to offer £7,000 for the whole property.

Cross-examined by Sir H. Juta: He understood that the defendant was buying for White, Ryan and Co. There might be certain judgments of the Court against witness. He did not remember saying that if his brother won this case

he would be able to pay one of his creditors, Mr. Behr.

Leopold Cohen, plaintiff's son, Hyman Ginsberg, Cornelius M. van Reenen, and Moses Warman also gave evidence.

Sir H. Juta submitted that there was no evidence of agency or ratification.

After hearing counsel in argument on the facts, the Court gave judgment for absolution from the instance.

Buchanan, J.: This is an action for the specific performance of a contract of purchase and sale of certain landed property, and the plaintiffs say that, though one Behr, their auctioneer, they sold by public auction certain premises to one Cooper, Cooper at the time acting as the agent of the defendant, and being duly authorised by him to purchase, and the defendant being present at the time of the sale, immediately confirmed and ratified the purchase. We have only the evidence of the plaintiff before us, and on that absolution from the instance has been asked. The first question raised by the pleadings is: Was there a sale to Cooper as agent for the defendant? It appears that certain property belonging to the plaintiff had been bonded by him to Ohlssons and White, Ryan and Company, and in consequence, I suppose, of these bonds being called up—there are letters to show that some action was taken in reference to these bonds—the property was put up for auction. One of the witnesses, the plaintiff's own brother, says the defendant White told him several days before the sale that he would buy the property if it went for £7,000. On the day of the sale, Mr. Bultitude, who has given very straight forward evidence, says that White told him he had given Cooper instructions to buy the property for £7,000. There is, therefore, some evidence of agency on the part of Cooper. Now, when we consider the authority of the agent, and to what extent he can bind his principal, one of the fundamental principles of agency is that an agent can only act within the scope of his authority, and the authority proved in this case is to buy property at a sum not exceeding £7,000. At the sale the auctioneer divided the property into two lots. When the first lot was put up Cooper bid, and it was knocked down to him provisionally. Bultitude tells us that the purchaser then seemed to wake up to the fact that he had bought only part of the property and not the whole. White came to the auctioneer and said that Cooper had made a mistake, thinking that he was buying the whole property. Then White repudiated the sale. At this time the property had only been knocked down provisionally. Now, until a final sale it is open to the bidder, at the time until his offer is finally accepted, to withdraw his bid.

The provisional sale did not bind the seller to sell nor the purchaser to buy the property until a sale had been declared, and before any final sale had been declared. White repudiated this bid, and said he had not authorised it. Now, I cannot see how in face of this the Court can hold that there was ratification. On the contrary, instead of there being ratification there was immediately a repudiation before a final sale. After the first lot had been knocked down provisionally the second lot was put up and knocked down. At this time Cooper, the alleged agent, when required to sign the declaration of purchaser and seller, was not allowed to do so by White on his behalf, and here, again, is another emphatic repudiation of the sale. It is said that nobody would have sold to Cooper himself, because before he signed the condition he was not worth five cents, as one witness put it, but it is peculiar that the second lot was knocked down to a person who does not seem worth a straw. Here, then, we have a provisional sale; before the sale is completed there is a withdrawal of the purchaser on the ground of mistake. It may well be argued that there never was even a provisional sale in the first instance because of the mistake, but it is not necessary to decide that in this case. Here is a provisional sale; before that was ratified, the sale and the agency were repudiated, and what was done by the agent did not come within the scope of his authority. There was absolutely no ratification. The case does not end here. After the repudiation by White of any liability the auctioneer persuades Cooper to sign the conditions of the sale. He knew White had repudiated the sale, and the he gets Cooper to sign the conditions, and according to the conditions accepts Cooper as the absolute purchaser. Here is another complete defence: It is impossible to hold in this case that there was a sale by Cohen to White. There was a provisional sale, there was a repudiation of that, there was a mistake in the transaction, there was a refusal by White to accept the authority of Cooper, and the instructions given to Cooper were not carried out in that he bought only a portion of this property for £4,500. It may be quite possible that Cooper, having made a blunder at the sale and having signed these conditions, may personally be held liable, but I think there is a great deal which could be said in his favour if he had refused to sign these conditions. But it is unnecessary to decide what Cooper's position is. Under all these circumstances the application for absolution from the instance will be granted with costs.

[Plaintiff's Attorneys: Michan and De Villiers; Defendant's Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

INSOLVENT ESTATE DE BEER } 1904.
V. DE BEER. } May 3rd.

Mr. Searle, K.C. (with him Mr. McGregor) was for the plaintiff, and Mr. W. P. Schreiner, K.C. (with him Mr. Close) was for the defendant.

Mr. Searle put in a consent-paper and asked for judgment in terms thereof, whereby the defendant withdrew the preferential claim of £1,500 and the plaintiff admitted the £1,500 as a concurrent claim.

Judgment in terms of the consent-paper.

MYBURGH V. MYBURGH.

This was an action brought by Winifred Laura Myburgh, of Constantia, against her husband for divorce, on the ground of the defendant's adultery with one Theodora Osman, with forfeiture of the benefits of the marriage and custody of the children. Plaintiff also asked for payment of £30 a month as maintenance.

Mr. Burton was for the plaintiff; Mr. W. P. Buchanan was for the defendant.

Mr. Buchanan said he only appeared in regard to the amount of maintenance to be paid by the defendant.

Evidence was called for plaintiff.

William Thomas Birch, clerk in charge of the marriage register at the Colonial Office, produced the register of the marriage at Wynberg, in 1894.

Winifred Laura Myburgh, the plaintiff, said she now lived at Constantia. She was married by ante-nuptial contract. She and her husband lived together for about eight or nine years at Hout's Bay, where the defendant had a farm. Defendant was in joint possession of a farm with his brother. There were two children surviving, a boy and a girl—the latter thirteen months of age. She had some information about the defendant in 1902, and in consequence they entered into a deed of separation, the condition being that the defendant should pay her £15 a month. Subsequently, she again had information in regard to his conduct, and on inquiring at the house of a Mrs. Bidulph, at Wynberg, she learnt certain facts which had led to the present action. Witness's health had suffered in consequence of the household work she had to do while living with the defendant. The children had also been in poor health. She had had to pay a good deal to doctors for attending to the children. The children would cost £6 or £7 each if put out to nurse. The defendant had told her that his income from rents this year would be £1,000.

By the Court: Witness had the furniture given her under the deed of separation. Defendant had paid her £15 a month regularly.

Casina Georgina Bidulph deposed that defendant came to her house in September of last year with a woman (not the plaintiff), who represented herself as Mrs. Myburgh. They lived there for some time as husband and wife.

Mr. Burton closed his case.

Mr. Buchanan called

George Conrad K. Myburgh, who said that at present things were very bad with him, and the rents were coming in badly. He could not afford to pay more than £7 10s. a month for the children. His property had recently been valued at £5,750, and it was mortgaged for £5,850. Against his income of £1,000 he had many liabilities. He paid £350 in interest on the bonds. The rates amounted to £60, without the water, and money was required every year for the repair of the property. He had lost money by bad debts, and during the last year the tenants had been paying very badly. If his prospects improved he would be prepared to pay more when the children became of an age to go to school.

Cross-examined: The valuation of £5,750 was made last week for the purposes of this case. Witness had fifty-five houses, of which he built ten four months ago. Thirty-two of the houses cost him £50 each to build. Witness's brother held bonds on the property for more than half the whole amount raised on mortgage. Four of the best houses were at present vacant.

Buchanan, J., said that a decree of divorce would be granted, plaintiff to have the custody of the children, with access to the children allowed to the defendant at all reasonable times and places. Considering the whole circumstances of the parties, and the health of the children, it would be only fair to order the defendant to pay the sum of £6 per month for the maintenance of each child until they attained the age of twenty-one years or previous majority. At the same time, the Court would reserve to either of the parties the right at any time to move to reduce or increase the sum.

KAISER BROS. V. ROSEN. { 1904.
May 3rd.
" 4th.

Landlord and tenant — Sub-letting.

This was an action brought by Kaiser Bros., of Cape Town, to recover from M. Rosen the sum of £65, being the rent of certain premises in Sir Lowry-road.

The declaration set out that in March, 1903, the plaintiffs let to one Chrysacros, hired under a written lease, a portion of

the premises as a restaurant or private hotel, for the period of five years from the 1st March, 1903, and upon certain terms and stipulations, one of which was "should the lessee wish at any time to transfer this lease or to sub-let these premises, he should be allowed to do so provided he received the consent, in writing, from the lessors. On the 27th July, 1903, it was agreed between the parties that the defendant should take over the lease and the occupation from the 1st August, upon the previous terms and stipulations in so far as they were altered in terms of the defendant's letter of the 27th July, 1903. In December, 1903, an agreement was entered into between the parties whereby the hotel was sublet and occupation was given to one Martin, on the express understanding that the defendant should be liable for the rent.

The plea admitted that it was agreed on the 27th July, 1903, that the defendant should take over the lease subject to the terms of his letter of that date, and that he should take occupation of the premises. In December, 1903, defendant ceded and made over to one Norton his interests under the said lease, and gave written notice to the plaintiffs, and the latter consented thereto. He denied there was any agreement or express understanding, as alleged by the plaintiffs, that the defendant should continue liable for the rent.

Mr. W. P. Buchanan (with him Mr. P. Jones) was for the plaintiffs, and Sir H. Juta, K.C. (with him Mr. Gutsche) was for the defendant.

Maurice Kaiser, one of the plaintiffs, stated that in March, 1903, he let certain premises in Sir Lowry-road to one Chrysacros, who left, and the lease fell to the ground. Negotiations were opened with the defendant, and on the 27th July the defendant offered to take over the lease with certain amendments in the clauses. The rent was to increase from £65 a month to £81 at the end of the lease, with an option of renewal for three years. On the 24th August, witness agreed to the terms that the defendant specified. The hotel was carried on by Rosen from August, Norton acting as manager. There was certain furniture in the hotel belonging to the defendant. On the 24th December, the defendant wrote relinquishing tenancy of the hotel, having ceded his interests therein to Norton. Norton called on the 7th January and paid the rent for December, due by the defendant. The defendant called next day and asked witness if he would accept Norton in his place, and witness replied, "Certainly not." Rosen called again on Monday, and witness and his brother again refused to agree to Norton as the sub-tenant. Norton had often come to witness to borrow money. The defendant said that he would be responsible for Norton's rent. At the end of January the rent was not paid, Norton referring

witness to the defendant. Norton afterwards became insolvent. After negotiations between the attorneys, the parties came to a decision to let the hotel pending the decision of this case. Rosen said that if plaintiffs would take back the shops he would take over the rest of the premises for £45 a month.

Cross-examined by Sir H. Juta: The defendant was a dealer in furniture, and had let a lot of furniture to plaintiff's first tenant. According to a letter written in July, the former tenant had been ejected. He was aware that the defendant's object was to protect his furniture when he put Norton there as manager. He did not reply to the letter relinquishing tenancy by the defendant. Rosen did not tell him before he wrote the letter that he could not get on with the business, and that he was assigning everything over to Norton. He did not arrange with Norton to let him have the premises for twelve months at £65 a month. Norton paid the December rent with his own cheque. The defendant could have given witness three months' notice when Norton was refused as tenant. He did not know why the defendant did not give notice of three months and get rid of a place that he alleged was ruining him.

Re-examined by Mr. Buchanan: He signed the receipt for the rent, and it was unnecessary to refer it to his brother. After the summons, the defendant said he might have given three months, but now he was saddled with the whole lease. After Norton left in January witness did not interfere with the letting of the premises.

By Buchanan, J.: He could not explain how it crept into his declaration that there was an express agreement that Rosen would be liable for the rent during Norton's tenancy.

Jacob Kaiser corroborated the evidence of the last witness, his brother.

Cross-examined by Sir H. Juta: The defendant proposed to leave the agreement as it was, and that he would pay the rent if Norton failed. It was agreed that Norton should be the sub-tenant under the defendant. Previous to the defendant notifying the termination of the lease there never was a word about Norton.

Morris Milberg, a painter, in the employ of Kaiser Bros., said he saw Rosen at the beginning of February. He went for the rent, and took a receipt with him. He asked for the rent, and was told that he (Rosen) would see Mr. Kaiser himself.

Charles Hall said he knew the plaintiff and the defendant in the case, and knew the hotel in question. He had received the order from Mr. Herbert, and the latter had received it from the Kaisers. Some time this year he went to see Rosen at the hotel, which was on the sale-list. On the 15th February, witness brought a Mr. Magor to the hotel. There

were certain transactions before that. They wished to sell the premises to Mr. Magor, and the furniture belonging to Mr. Rosen. In the course of an inspection, Rosen said he had a lease for seven years. Witness made a note of what took place. Mr. Magor said he would let them know on the following Wednesday if he would take the place, but the sale eventually fell through. He then went to see Rosen about terms, and he said he would take £350 cash and £1,000 to extend over a period of twenty-four months for the furniture. He only said he had a lease, and would be willing to cancel it if the furniture was taken. He did not refer witness to Kaiser about the lease. Eventually that fell through. Then there was the question of letting it for £100 a month and £75 for the furniture, after which he (Rosen) would be willing to deduct the payments on account of the furniture. He was not told to go to Kaiser. Then one Moss offered to run the place as manager, and Rosen said he was willing that this should be done if security could be found.

Mr. Herbert, partner with Mr. Hall, gave corroborative evidence.

Mr. Buchanan closed his case.

Morris Rosen, the defendant, stated that during last year he entered into an agreement with one Chrysecros who hired furniture of the value of £1,400. Witness then entered into negotiations with Kaiser for the lease of the place, and he asked the latter to have the tenants ejected. Eventually, in July, he came to an agreement with Kaiser, and took over the lease with modifications. He put Norton in charge of the hotel. He then entered into negotiations for Norton to take over the place. As manager the latter received a small salary and commission. Before witness made an agreement with Norton he saw the Kaisers as to whether they objected to Mr. Norton as a tenant. There was no objection, and the arrangement was that Norton was to have the place for £65 for the first twelve months, and afterwards any rent that might be agreed upon. He went to the Kaisers with Norton before the letter produced was written. They then agreed to add some rooms, and witness saw some of the alterations made. Some time in February he received a demand for rent for the month of February. He considered he (defendant) was entirely out of the hotel. He did not hear about the objections to Norton until he received a demand for the rent. An attempt was made to obtain a club licence, but this was refused. He did not say that if Norton did not pay the rent he would.

Cross-examined by Mr. Buchanan: He let out furniture, and even offered to stand security for the rent, but for one month only. He simply wanted to protect the furniture. He believed that Norton had been in the Civil Service.

but could not say if Norton had any money. Witness knew there was no profit from the business. He had seen Messrs. Kaiser early in December, and the lease was signed about the middle of that month. He arranged with the Kaisers to take over Norton, and leave witness out of it altogether. He had taken Norton to see Mr. Kaiser before, and since the letter of the 24th. It had been agreed then that Norton was to come in. Some alterations had latterly been made to the rooms. Witness made the arrangements with Norton in his office. He seldom went to the hotel. He had not seen the lease before the agreement had been drawn up. He had told Kaiser that in the event of anything going wrong with Norton witness would insert in his agreement with the latter a clause to the effect that the lease would revert to him. Until he got the letter of demand he did not know of any dispute about his handing over the lease to Norton. He had called on Mr. Kaiser and said he had no intention of paying the rent, and said he would endeavour to get a tenant. As far as Mr. Hall was concerned, there was no mention of a lease. They wanted to sell the hotel, and witness wanted to sell his furniture. He did not say he had a lease. He had said the furniture was his, and a lease could be arranged. He had not said Norton had a lease.

Re-examined by Sir H. Juta: Mr. Norton got the proceeds of the hotel for December. Witness received the proceeds previously. He had no more interest in the proceeds. Towards the end of February he offered to make arrangements pending the dispute.

Henry Fuller, attorney, said that he drew up the agreement between the parties from instructions received about a fortnight before the 11th January.

Cross-examined by Mr. Buchanan: He did not draw up the agreement between Kaiser Bros. and Norton.

William Norton stated that before November, 1903, he was engaged by the defendant as manager of the Cherm-side Hotel. About the beginning of December negotiations were going on between Rosen and himself with regard to his taking over the responsibility embodied in the lease. After twelve months the plaintiffs had the option of increasing the rent. Witness said in consequence of a letter that the defendant wrote to the plaintiffs on the 24th December the plaintiffs had agreed to make certain alterations with a view to making the place pay, and a plan was drawn up by O'Brien Bros., architects. Previous to the 11th January the plaintiffs sent up to witness for the rent, which he paid with his own money. Witness paid defendant £100 for taking over the furniture on the hire purchase system. When witness presented an agreement

for the plaintiffs to sign they said they would wait to see how the hotel was going, and in the meantime Rosen's agreement would do. He was aware of the terms of the defendant's contract.

Cross-examined by Mr. Buchanan: Before July, 1903, he was in the Civil Service. He had experience of catering. The house had a bad reputation, and it was difficult to make it pay. He paid Rosen £100 for the furniture. He was unable to pay the rent at the end of January, but he did not refer plaintiffs to the defendant. About the 2nd of February he found that he could not meet his liabilities, and he called a meeting of his creditors.

James Carmichael stated that he was the manager of the defendant's business. He took in Norton as manager of the Cherm-side Hotel. He was aware of the negotiations between Rosen and Norton by which it was agreed that Norton should take over the place. Kaiser Bros. were quite agreeable to this. On the 24th December he wrote giving Kaiser Bros. formal notice of the cession to Norton. He kept the books up to November 30, and Rosen took all the proceeds. After that Norton took all the receipts for December and January.

Cross-examined by Mr. Buchanan: He knew of the forms of the arrangement between Rosen, Norton, and Kaiser Bros. before December 24. The letter of December 24 simply confirmed a verbal arrangement.

This closed the evidence, and counsel having been heard in arguments on the facts,

Buchanan, J., said that between Norton and Rosen an arrangement was entered into in December, 1903, with the object that Norton should take over the place and work it on his own account. Rosen paid the rent up till the end of December, but Norton did not pay the £65 rent due for January. Under the lease and letter of July 27th the power was given to the lessee to sub-let with the consent of the lessors in writing, but in this case no such consent in writing was received. It was alleged that a verbal consent had been given. If the plaintiffs' contention was right that the negotiations in December were concerning the proposal that Norton should be taken as sub-tenant under Rosen, then Rosen still remained the tenant. Where parties contracted that certain things should be done in writing, and they were not so done the Court would require very clear evidence to establish such a contention, and the onus lay on the defendant to prove it. There was a conflict of evidence, and defendant had failed to show that such consent was given by the plaintiffs. The letter of December 24 did not refer to any verbal arrange-

ment arrived at before that date. The plaintiffs' explanation about not replying to the letter because they were waiting on Rosen and Norton was a very reasonable one, as both the parties had promised to call. The defence said there was a complete cession to Norton was not supported by the evidence. He would refrain from expressing any opinion as to whether Rosen had lost his chance of getting rid of the premises by giving three months' notice. That was still an open question. Judgment would be given for the plaintiffs for £65 with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

WYNN V. WYNN AND THIRSK.

This was an action brought by James Thomas Wynn against his wife, Annie Wynn, for divorce and for damages against the second defendant. Mr. W. P. Buchanan was for the plaintiff, and neither defendant was represented.

The declaration set out that the parties were married in community of property at Woodstock in 1900. They lived happily together until December, 1903, when the plaintiff noticed a certain intimacy between his wife and the co-defendant, who was master of the steamship Balgowan. During January, 1904, his wife had admitted misconduct with the co-defendant. Plaintiff claimed a decree of divorce, forfeiture of the benefits from the marriage in community and custody of the minor child.

Mr. Buchanan called William Thomas Birch, a clerk in the Colonial Office, who produced the marriage register showing the signatures of the parties.

James Thomas Wynn stated that he was married on the 4th October, 1900, at Woodstock. After his marriage he went to Hoetjes Bay, and lived happily with his wife until September, 1903. About the end of December he noticed an intimacy between Captain Thirsk, of the S.S. Balgowan and his wife, and witness cleared him out of the house. The first defendant in a letter admitted her adultery with the second defendant. Witness had a fight with Captain Thirsk, and after that he forgave his wife. Later on his wife came to live at Woodstock with her sister, and subsequently he followed Captain Thirsk to the Central Jetty, where a boat, belonging to the Balgowan, conveyed the two defendants to the steamer. The following morning he saw the two defendants come from the steamer and walk up Adderley street. His wife admitted to her father that she had stayed with the second defendant on the steamer.

Alvin Park gave corroborative evi-

dence as to seeing the defendants going on board the steamer and coming off the next morning.

Mr. Buchanan said that as the second defendant had paid an amount of damages he did not proceed on that claim.

His Lordship granted a decree of divorce, forfeiture of the benefits accruing under marriage of community, the plaintiff to have custody of the minor child, without costs.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

HATTINGH V. DE WET. { 1904.
May 3rd.
" 5th.

Surety and principal debtor —
Undue preference—Costs of
defending action for undue
preference.

The plaintiff advanced to D. the sum of £40, for which the defendant became surety, and the defendant and D. signed an I.O.U. in favour of the plaintiff. In due course D. paid the amount, but afterwards became insolvent, upon which the trustee of his insolvent estate brought an action for undue preference against the plaintiff. The plaintiff gave notice of the action to the defendant, and informed him that he would be held liable for the costs, but received no answer. The trustee succeeded in his action, but the Court found that there was no collusion with plaintiff, and ordered the trustee to give an indemnity under the 90th section of the Insolvent Ordinance.

Held, in an action brought by the plaintiff to recover the £40 and the costs of the previous action from the defendant, as surety, that he was entitled to succeed.

This was a special case for a ruling of the Court as to the interpretation of section 90 of the Insolvent Ordinance. From the statement of the case it appeared that in 1903 the plaintiffs lent to one Scobell a sum of £40, for the repayment of which de-

defendant agreed to become surety. Subsequently Scobell paid plaintiffs the amount, but a month afterwards, the trustee of his estate, which had become insolvent, sued the present plaintiffs for the money, on the ground that there had been undue preference, and the Eastern Districts Court declared that the payment had been an undue preference, and ordered the present plaintiffs to repay to the trustee the £40, subject to an indemnity being given by the trustee in accordance with the provisions of section 90 of the Insolvency Ordinance. Plaintiffs now contended that defendant was responsible for the payment of the £40, and of the costs of the previous action, of the defence of which he had been advised. Defendant contended that the plaintiffs should have sued the trustee under the indemnity. The point at issue was the construction of section 90 of the Ordinance.

After hearing Mr. Searle in argument, the Chief Justice stated that the Court would intimate later whether it was necessary to hear counsel for the plaintiffs.

On Wednesday, Mr. Searle, K.C., addressed the Court at some length in support of the defendant's contention.

Postea (May 5th.)

De Villiers, C.J., asked counsel for the defendant whether he proposed to address the Court on the question of costs.

Mr. Searle said that he desired to do so.

De Villiers, C.J., said that the Court would now hear counsel on this point.

Mr. Searle proceeded to urge that anybody who took a payment of this kind from an insolvent must take his own risk. He submitted that there was no principle of law upon which the defendant should be made liable for these costs.

De Villiers, C.J.: The facts of this case are fully stated in the special case submitted to the Court. The plaintiff advanced to Doubell £40, for the payment of which the defendant was to be surety, and the defendant and Doubell signed an I.O.U. in favour of the plaintiff. In due course Doubell paid the plaintiff the debt of £40, but afterwards became insolvent. The trustees of Doubell's insolvent estate challenged the payment as being an undue preference, and the Eastern Districts Court found that it was an undue preference, but refused to declare a forfeiture under the 88th section of the Ordinance. The judgment was, however, given on condition that the trustee gave an indemnity to the then defendant under the 90th section of the Ordinance. Before defending that action the defendant, who is the plaintiff in the present case, gave notice of the action to the surty, the present defendant, and informed him that he would hold him liable for the costs of that action. There

appears to have been no answer to this communication. The questions to be determined are whether the plaintiff is entitled to recover the £40 from the defendant, and whether he is also entitled to recover the costs paid by him in the previous action.

As to the first question the Court must assume, after the judgment of the Eastern Districts Court, that the payment by Doubell was invalid, but that the present plaintiff was not aware of the invalidity. He received the money from the principal debtor as he was bound to do if he had no reason to suspect that Doubell was contemplating the sequestration of his estate, and when the payment proved to be illegal, he was entitled to treat such payment as having never been made. As to the costs incurred by the plaintiff in defending the action for undue preference, if he had not given notice to the defendant of his intention to defend the action, and hold the defendant liable for the costs, it would have been impossible, consistently with the case of *Hurley v. Marais* (2 Juta, 155), to hold the defendant liable for the costs. But he gave due notice, and thus afforded an opportunity to the surety of fulfilling the obligation resting on him to pay the debt on failure of the principal debtor to discharge the debt. The surety did not avail himself of the opportunity, and does not even appear to have returned any answer to the communication. What, then, was the creditor to do? If he repaid the money to the trustee he would take upon himself the risk and responsibility of deciding that the payment was an illegal one, with the result that the surety might repudiate his decision altogether. If the creditor allowed judgment to go by default, costs would have been awarded against him, but the surety would, probably have refused to pay them on the ground that the creditor had failed in the duties which he owed to the surety. In principle there appears to me to be no difference between the duty of a creditor to excuse the principal debtor and his duty, after such excuse, to defend the validity of the payment where he has no reason for doubting its legality. The judgment of the Court must be in terms of the plaintiffs' contention with costs.

[Plaintiffs' Attorneys: Michau and De Villiers. Defendant's Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, F.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEX.]

MOHR V. TWYCROSS.

{ 1904.
{ May 4th.

This was an action brought by the plaintiff, a minor (through her father as natural guardian) against the defendant, who resides at Westerdor, Rondebosch, for damages for seduction.

The declaration set out that the defendant, on divers occasions in May, June, and July, 1903, was intimate with the plaintiff, and that as a consequence she had given birth to a male child on the 3rd February, 1904. She claimed £150 damages, and £10 expenses of confinement and maintenance of the child at the rate of £1 a month.

The defendant, in his plea, denied all except the formal allegations.

Mr. Alexander was for the plaintiff; Mr. Burton was for the defendant.

Margaret Mohr deposed that she worked at the defendant's house while his wife was ill in 1902. She worked there for five or six weeks. After she finished working for him, she went into the employment of a dressmaker, at Westerdor Bridge. To go to and from work she had to pass defendant's house. She used to meet defendant at the bridge during the lunch hour. This was from about March, 1903. She met him almost every afternoon, going to the station. On May 25 she met him at his house. He called her into the house, and took her into his bedroom. She did not go willingly. There was no one in the house at the time. Witness described what took place in the room. She was then between 16 and 17 years of age. The same thing occurred on subsequent occasions and a child was born in February of this year.

In cross-examination, the witness denied that in 1903 she ever walked out with any young men; she did not have any young men friends. She never went to dances; had never been to one in her life. She remembered the 25th May because Twycross told her his wife had gone to the Paarl, it being her father's birthday. Witness's mother used to be in Twycross's employ in 1902 as washer-woman, and defendant dismissed her. Her mother was very angry, and used to go to defendant's house and abuse his wife. Her mother was a coloured woman.

Annie Mohr, mother of the last witness, said that in December her daughter made a statement to her, as a result of

which she wrote to Twycross, telling him to come to her house, "or she would know what to do." A reply came from defendant's attorneys, stating that if she wanted to communicate with defendant she must do so through them. The letter further stated that "Mr. Twycross does not know what you mean when you refer to him."

Cross-examined: Witness had never threatened to do all she could to ruin Mr. and Mrs. Twycross after they dismissed her. She never threatened to shoot defendant when she saw him in the street. Witness could not explain why her attorney wrote claiming damages for seduction while the girl was in Twycross's service.

Annie Stephens said she lived in the same street as defendant. In June last she saw plaintiff go into Twycross's house.

Mrs. Duploy gave confirmatory evidence.

Robert Twycross said that the girl was in his service for about a fortnight while his wife was ill, being employed as a general help. While the girl was in his employ he always treated her as a servant. After she left his service he never had anything to do with her, excepting that he met her casually on the street. He denied her allegations as to his having taken her into the house. Witness could only remember one occasion on which she came to the house. She came then to see about a fowl, but she did not enter the house; she only passed through the gate. Mrs. Mohr had greatly annoyed witness and his wife, and had threatened to ruin them. On one occasion he complained to the police about her conduct. Witness had seen the girl writing to men, and had remonstrated with her. He became suspicious. This was while she was in his employ. He had seen her walking arm and arm with a young man at Waterford.

Cross-examined: When witness received the letter from Mrs. Mohr telling him to go to her house or she would go to his house, and would know what to do, he did not know what she meant. He gave the letter to his attorneys at once, as he did not want to have anything to do with these people.

[De Villiers, C.J.: Why did you go to the attorneys to answer that letter? Did you not think there was something behind it that you considered important?]

Yes.

[De Villiers, C.J.: Then why did you consider it important?]

Because there was something in it. There was a kind of threat in it.

Cross-examination continued: Witness's wife was away at her father's farm on May 25. Her father's birthday was on May 26.

Petrus Johannes Hendrik Eyss said that during 1903 he had seen the girl

Margaret Mohr walking out with men on several occasions at night.

Isam Nobel, farm labourer, in the employ of the defendant's father-in-law, gave similar evidence.

After hearing Mr. Alexander in argument, the Court gave judgment for absolution from the instance, with costs.

De Villiers, C.J., said it was expected that in a case of this sort the onus of proving the paternity being on the plaintiff, the plaintiff should give a clear, consistent, and perfectly credible account of the circumstances which led up to the seduction and of the seduction itself. His Lordship reviewed the evidence, and, proceeding, said that, seeing that the burden of proof was on the plaintiff, that her evidence was not consistent, that upon some points she had not spoken the truth, the Court felt bound to give absolution from the instance. The only circumstance which at first weighed with him (the Chief Justice) against the defendant was the fact that when he received the letter from the girl's mother in December, he, instead of going to see the girl's mother, or instead of replying himself, got his attorneys to write a letter; but when the Court bore in mind what had taken place before between the parties and the terms of the letter, this did not seem so extraordinary as at first sight it appeared. The judgment of the Court would be for absolution from the instance, with costs.

SUPREME COURT

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

{ 1904.
May 5th.

Mr. W. P. Buchanan moved for the admission of McLaren Gray Maitland, as an attorney.

Application granted, oaths to be taken before the R.M. of Idutywa.

Mr. W. P. Buchanan moved for the admission of George Warren de Villiers, as an attorney and notary.

Application granted, and oaths administered.

Mr. W. P. Buchanan moved for the admission of Reginald Barker, as an attorney and notary.

Application granted, oaths to be taken before the Assistant R.M. at Indwe.

Mr. W. P. Buchanan moved for the admission of Bazett William Ebenezer Edmeades, as an attorney and notary. The applicant, he said, had now been examined as directed by the Court, and had been certified.

Application granted oaths to be taken before the Registrar of the High Court of the Orange River Colony.

LAWRENCE AND CO. AND OTHERS V.
AH YOUNG.

Mr. Rainsford moved to make absolute a provisional order for the sequestration of the defendant's estate, and to continue the order of attachment of certain property.

Mr. W. P. Buchanan (for defendant) read an affidavit which set out that the defendant had sold one of the shops that he had at Wynberg to one Sheen Faw. He had paid the proceeds to his creditors, the greater part to the petitioning creditors. He had sold the other shop to one Soy, but the shop had been placed under attachment. He denied having been guilty of collusion with intent to defeat his creditors. He declared the sale of the second shop to Soy was a *bona fide* one, and he denied having committed an act of insolvency.

Mr. Rainsford put in answering affidavits to show the value of the stock on the date of sale to be £200, and counsel contended that the sale for £50 to Soy was a collusive act to defeat the creditors.

The matter was ordered to stand over for a further affidavit by an impartial appraiser as to the value of the assets sold by Ah Young to Soy, with liberty to both sides to furnish further affidavits.

Postea (May 25).

Affidavits (for the defendant) were read, showing the sale of certain goods by Young to one Hew Sooye, who had taken over the shop, and that the latter had purchased goods from other sources. According to Sooye, there were now in the shops goods to the value of about £95. The sole act of insolvency alleged, was that Young sold one of the shops fraudulently and collusively to Sooye, with a view of delaying and defeating his creditors. Young sold the goods for £50, and it appeared that the goods actually in the place when the messenger went were valued at about £100 or £110. To this £40 was to be added for sales, and Sooye had bought from independent sources goods to the value of about £100. The applicants alleged that the respondent, Young, sold to Sooye for £50 goods of the value of £100, whereas it appeared that there was very little discrepancy indeed. Counsel proceeded to read several affidavits, in order to show that the sale from Young to

Sooye was *bonâ fide*, and that the allegation on which the proceedings in insolvency were founded was not substantiated.

The replying affidavits of the plaintiffs were to the effect that the value of the stock in one shop was £109, and in the other £183 3s., and that the value of the goods actually sold by Young to Sooye was about £89 odd.

Mr. Rainsford said that they had it on affidavit that at the time of the alleged sale by Young to Sooye, the value of the shop was about £200. On this point of the value at the time of the sale, he submitted that defendant's affidavits were hopelessly weak.

De Villiers, C.J., said he did not see how the plaintiffs were going to substantiate the allegation of fraudulent collusion.

Mr. Rainsford said that they had some proof that the value of the shop was £200.

[De Villiers, C.J.: Yes; but one of your witnesses puts it at £100?]

Mr. Rainsford: Yes; but that is evidently the very lowest estimate. The other deponents say £200.

Mr. Buchanan, replying to His Lordship, said that he did not know that the defence would be able to pay the debts. He believed that the amount of indebtedness represented by the petitioners was about £150. Counsel went on to submit that it could not be proved that the defendant had, as alleged, acted fraudulently and collusively with Sooye.

De Villiers, C.J., said that if it had been necessary for the purposes of confirming the provisional order of sequestration, to find that there was fraud or collusion on the part of Sooye, he would certainly not have confirmed the order, because he was not satisfied there had been anything in the nature of fraud or collusion on the part of Sooye. The allegation that the sale by Ah Young to Sooye was made fraudulently seemed to be wholly unnecessary. If it had been alleged that the sale was made with the intent to defeat or delay his creditors that would have been sufficient to establish an act of insolvency. He was clearly of opinion that the sale to Hew Sooye had the effect of delaying or defeating the creditors. He did not think, if the order had been made that the tender of £50 would have been made. On the affidavits he was of opinion that the property was worth a good deal more than £50, but that did not necessarily prove collusion on the part of Hew Sooye, because if he was offered a property at a lower rate, he might accept it without collusion. He was of opinion that the defendant was really insolvent, and it would be to his own benefit, as well as to the benefit of the creditors to confirm the order.

ESTATE VAN DER BYL V. SNYMAN.

Mr. Gardiner moved for provisional sentence on two promissory notes for £60 and £115, also for judgment, under Rule 329d, for £207 6s. 9d., being balance of account for goods sold and delivered, and £133 and £36 for rent due, with costs.

Order granted.

SPIILHAUS AND CO. V. MULLER BROS.

Mr. Sutton moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

VAN DER BYL AND CO. V. MINAAR.

Mr. Struben moved for a decree of civil imprisonment against the defendant on his failure to comply with a judgment of the Court. There had been a return of *nulla bona*, and personal service had been effected on the 27th April, but counsel had not got the originals.

Ordered to stand over for the originals.

Postea (May 14). Decree granted as prayed.

SPENCE V. BROMLEY.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

PHILPOTT V. HOLZNICHTER.

Mr. W. P. Buchanan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment granted against him in the Supreme Court for £200 damages, with costs. Counsel said that the plaintiff in the original case claimed £1,000 damages against the defendant for abducting his wife. In the pleadings he tendered £50 in full settlement, and made a claim in reconvention for an alleged slander uttered by the plaintiff. In the original case the defendant admitted that he used to get remittances from Germany, and there was also evidence that he had paid fares for two ladies to Johannesburg.

The defendant appeared in person, and stated that he had got no money at all, that he had no billet, and that he had got no remittance for nine months.

[De Villiers, C.J.: What is your occupation?]

I have been through the war.

[De Villiers, C.J.: What is your present occupation?]

I used to be a farmer at Drakenstein, but at present I have no occupation.

[De Villiers, C.J.: Is the lady staying with you at present?]

I am staying at the same house.

[De Villiers, C.J.: Will you undertake to pay any amount per month?]

I have got no billet. I don't know how to do it.

[De Villiers, C.J.: D you wish to give evidence as to your means?]

Yes.

The defendant then entered the witness-box, and swore that he had no means whatever. He did not support the lady, as she was able to support herself. He had lost £1,800 in speculation on the Stock Exchange, and at present had absolutely nothing. He was living on the generosity of his friends.

Cross-examined by Mr. Buchanan: He did not know that he was better known in the bars than anybody else. When he offered the £50 in full settlement he had money, but he had since spent that. His remittances from Germany had been stopped, probably on account of his people hearing of this case. He did not take up the position that he would not pay anything.

[De Villiers, C.J.: What shares had you?]

I had 10 Premier Diamonds, and sold them about three months ago, along with some Natal Oceans.

De Villiers, C.J., said there would be no order at present, but the summons would stand, with leave to apply again when there was proof that the defendant had means.

PANTREY V. ZACHARIAS JOHANNES AND
CARL JOHANNES DE BEER.

Mr. Struben moved for provisional sentence for £400, less £75, paid on account, with interest from 10th July, 1903.

Mr. Van Zyl appeared for the second defendant, and asked for a postponement until 14th May, in order that his client might have an opportunity of perusing the plaintiff's affidavit.

Order granted against the first defendant, and as against the second defendant ordered to stand over until May 14.

Postea (May 14). Provisional sentence was granted against the second defendant.

ESTATE HALL V. WALLIS.

Mr. Struben moved for provisional sentence on a promissory note for £250 10s., with interest from December 24, 1903.

Order granted.

TOWNSEND V. IRVINE.

Mr. M. Bisset moved for provisional sentence on a promissory note for £115, with interest from March 12, and costs.

Order granted.

LEWISON V. APPEL.

Mr. Struben moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SCHOLTZE AND CO. V. LUBALIN.

Mr. Russel moved for provisional sentence for £65 18s. 9d., the balance on certain bills of exchange.

The defendant appeared in person, and said that he could pay £20 at the end of the month, but could hold out no definite promise as to the future.

Order granted, execution stayed for fourteen days.

PHILLIPS V. LOUW.

Mr. W. P. Buchanan applied for provisional sentence for £82 18s. 8d., on an unsatisfied judgment of the Witwatersrand Special Court.

Order granted.

S.A. MUTUAL CO. V. LOCHNER.

Mr. W. P. Buchanan moved for provisional sentence on a bond for £5,000, less £975 paid on account, with interest from June 10, 1903, less £3 10s. 7d. interest paid on account, and also for £1,000. The bonds had become due by reason of non-payment of interest. Counsel also asked that the property specially hypothecated be declared executable.

Order granted.

NOLAN V. SIBBETT AND STEPHAN.

Mr. Gardiner moved for the discharge of a provisional order of sequestration.

Granted.

ILLIQUID ROLL.

NONES V. FARMLIA. { 1904.
May 6th.

Mr. W. P. Buchanan moved, under Rule 329d, for judgment for £81 1s. 3d., being the balance of money lent.

Judgment as prayed.

JEFFEREY V. HERBERT.

Mr. Gardiner moved, under 329d, for judgment for £132, being the price of land sold to the plaintiff, less £50 paid on account.

Granted.

WILSON, SON AND CO. V. DICKER.

Mr. Rainsford moved for judgment, under Rule 329d, for £122 5s. 3d., for goods sold and delivered.

Granted.

GREENSTREET V. FALSE BAY FISHING CO.

Mr. Rainsford moved for judgment, under Rule 329d, for £187 17s. 3d., for professional services rendered in the preparation of plans, etc.

Granted.

SWINTON V. CORBALLIS.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £144 for rent.

Granted.

PIENAAE V. ESTATE SLUITER.

Rule 319—Removal of Bar.

Mr. J. E. R. de Villiers moved for judgment in terms of three declarations.

Mr. Gardiner appeared for the defendant, and moved to purge default, and remove bar.

In support of the defendant's application to remove bar, an affidavit was read made by Mr. Roos, secretary to the Board of Executors, executors of the defendant estate, stating that the plaintiff's declaration was filed on the 5th April. Instructions were sent by defendants to their agents in Colesberg, to collect information, in order to frame a plea. The defendants, however, had been unable to get the information necessary to the framing of their plea in the time allowed, and had asked for an extension of time, in which to file their plea, and for a postponement of the case until next term. To this, however, plaintiff had declined to agree. Deponent stated that in the short time allowed it was impossible to collect the necessary information for the defence.

In an answering affidavit, the plaintiff's attorney stated that the defendants were aware of the claims made against the estate fully twelve months ago, and that the whole matter had been fully gone into and discussed. The defendant had brought an action against the plaintiff for perpetual silence, and had knowledge of his claims. The matter was one of long standing, and the plaintiff had deferred proceedings in the hope that an amicable settlement would be arrived at; but the matter had been long delayed, and it was urgently necessary should be heard this term.

In an answering affidavit, Mr. Roos denied that the defendants knew what the plaintiff's claims were until the service of the declaration, and stated that it had been impossible to collect the ne-

cessary information to meet the plaintiff's claims.

After hearing counsel in argument on the facts, the Court ordered that the bar be removed, and the defendant allowed to plead, the question of costs to be reserved.

[Before the Hon. Sir J. BUCHANAN and the Hon. Mr. Justice HOPLEY.]

DE WAAL V. VAN DER WESTHUYSEN. { 1904.
May 5th.

Mr. De Waal moved for judgment, under Rule 329d, for £255, for goods sold and delivered, with interest and costs.

Order granted.

ZEEDERBERG AND DUNCAN V. LIPSCHUTZ.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £35 8s. 8d., for goods sold and delivered, with interest and costs.

Order granted.

FAURE, VAN EYK AND CO. V. ZIN.

Mr. Gutsche moved for judgment, under Rule 329d, for £184 18s. 4d., for professional services rendered and money advanced, with interest and costs.

Order granted.

REHABILITATIONS.

Mr. W. P. Buchanan moved for the rehabilitation of Robert Moodie. The estate had been sequestrated on the 25th August, 1891, but the trustee's report was not exactly favourable, in that he stated that the insolvent had kept no exact record of his cash receipts, and the books handed to him were only written up about the time of the surrender.

Granted.

Mr. Gutsche moved for the rehabilitation of James Greer, a hotel keeper, of Mowbray. Counsel put in a consent paper signed by the creditors.

Granted.

GENERAL MOTIONS.

Ex parte BERGH. { 1904.
May 5th.

Mr. W. P. Buchanan moved to have a rule nisi granted under the Derelict Lands Act made absolute.

Rule made absolute.

Ex parte THE UITENHAGE AND PORT ELIZABETH DUTCH REFORMED CHURCHES.

Mr. Gardiner moved to make absolute the rule nisi calling on all persons interested to show cause why a certain piece of land should not be transferred to the applicants.

Order granted.

Ex parte BLIGNAULT.

Mr. J. E. R. de Villiers moved for an order authorising the sale of certain property, which the applicant, as executor, had bought out of the estate of his father.

Order granted.

COHOON V. COHOON.

Mr. Upington moved for leave to sue by edictal citation. The parties were married at Johannesburg in 1894, but in 1901 the defendant left his wife to take up an engagement at Umtali, and since he left she had only received two letters from him. He was last heard of in Pretoria.

Leave granted, return day fixed for July 15, personal service to be effected, failing which one publication in the “Gazette” and one in a Rhodesian and Pretoria newspaper, with leave to serve the notice of trial with the citation.

Ex parte SIMPSON.

Attorney—Admission—Registration of articles.

Where a clerk had duly served articles, these articles, owing to a misunderstanding not having been registered, the Court granted leave for the applicant's examination and ordered the articles to be registered; the registration to date back to the date when the service commenced.

Mr. W. P. Buchanan moved for leave to have the applicant examined as an attorney and notary of the Supreme Court. The applicant had duly served his apprenticeship with Mr. Elliot, of Kokstad, but through a misunderstanding the articles had not been registered.

Leave granted, the petition to be referred to the examiners, the registration on proper cancellation of the stamp to date from March 30, 1901.

Ex parte DYER.

Mr. W. P. Buchanan moved for leave to pass transfer of certain property.

Rule nisi granted in terms of the petition, returnable June 9, to be served on the Registrar of Deeds, and one publication to be effected in the “Gazette,” and an East London paper.

Ex parte BOTHA AND ANOTHER.

Mr. W. P. Buchanan moved to raise certain money on mortgage in the interest of a minor.

Order granted.

Ex parte THE PAARLSOHE LANDAANKOOP MAATSCHAPPY BEPERKT.

Mr. W. P. Buchanan, for the liquidators, presented the second and third reports, and moved for leave to place them in the office of the company and the Master's Office for the usual term.

Leave granted.

LOGAN V. COLONIAL GOVERNMENT.

Mr. Close (with him Sir H. Juts, K.C.) moved in this matter to have the award of the arbitrators in connection with the expropriation of land at Touw's River made a Rule of Court. The amount was £11,710, with costs in favour of the applicant. Mr. P. Jones appeared to consent on behalf of the Government.

Order granted.

Ex parte THOMPSON.

Mr. Pyemont moved for an order authorising the amendment of a certain deed of transfer, and also of the letters of administration.

Order granted.

Ex parte INGRAM.

Mr. M. Bisset moved for an order authorising the sale of certain property. The petitioner was an executor in the estate of John Ingram, and when the matter was last before the Court it was ordered that if the petitioner paid the Divisional Council value the sale would be confirmed. He had now done so.

Order granted.

Ex parte WATSON.

Mr. M. Bisset moved for leave to sell certain property. Petitioner's husband had been declared of unsound mind. It was essential to dispose of certain property to keep the remainder of it in pro-

witness to the defendant. Norton afterwards became insolvent. After negotiations between the attorneys, the parties came to a decision to let the hotel pending the decision of this case. Rosen said that if plaintiffs would take back the shops he would take over the rest of the premises for £45 a month.

Cross-examined by Sir H. Juta: The defendant was a dealer in furniture, and had let a lot of furniture to plaintiff's first tenant. According to a letter written in July, the former tenant had been ejected. He was aware that the defendant's object was to protect his furniture when he put Norton there as manager. He did not reply to the letter relinquishing tenancy by the defendant. Rosen did not tell him before he wrote the letter that he could not get on with the business, and that he was assigning everything over to Norton. He did not arrange with Norton to let him have the premises for twelve months at £65 a month. Norton paid the December rent with his own cheque. The defendant could have given witness three months' notice when Norton was refused as tenant. He did not know why the defendant did not give notice of three months and get rid of a place that he alleged was ruining him.

Re-examined by Mr. Buchanan: He signed the receipt for the rent, and it was unnecessary to refer it to his brother. After the summons, the defendant said he might have given three months, but now he was saddled with the whole lease. After Norton left in January witness did not interfere with the letting of the premises.

By Buchanan, J.: He could not explain how it crept into his declaration that there was an express agreement that Rosen would be liable for the rent during Norton's tenancy.

Jacob Kaiser corroborated the evidence of the last witness, his brother.

Cross-examined by Sir H. Juta: The defendant proposed to leave the agreement as it was, and that he would pay the rent if Norton failed. It was agreed that Norton should be the sub-tenant under the defendant. Previous to the defendant notifying the termination of the lease there never was a word about Norton.

Morris Milberg, a painter, in the employ of Kaiser Bros., said he saw Rosen at the beginning of February. He went for the rent, and took a receipt with him. He asked for the rent, and was told that he (Rosen) would see Mr. Kaiser himself.

Charles Hall said he knew the plaintiff and the defendant in the case, and knew the hotel in question. He had received the order from Mr. Herbert, and the latter had received it from the Kaisers. Some time this year he went to see Rosen at the hotel, which was on the sale-list. On the 15th February, witness brought a Mr. Magor to the hotel. There

were certain transactions before that. They wished to sell the premises to Mr. Magor, and the furniture belonging to Mr. Rosen. In the course of an inspection, Rosen said he had a lease for seven years. Witness made a note of what took place. Mr. Magor said he would let them know on the following Wednesday if he would take the place, but the sale eventually fell through. He then went to see Rosen about terms, and he said he would take £350 cash and £1,000 to extend over a period of twenty-four months for the furniture. He only said he had a lease, and would be willing to cancel it if the furniture was taken. He did not refer witness to Kaiser about the lease. Eventually that fell through. Then there was the question of letting it for £100 a month and £75 for the furniture, after which he (Rosen) would be willing to deduct the payments on account of the furniture. He was not told to go to Kaiser. Then one Moss offered to run the place as manager, and Rosen said he was willing that this should be done if security could be found.

Mr. Herbert, partner with Mr. Hall, gave corroborative evidence.

Mr. Buchanan closed his case.

Morris Rosen, the defendant, stated that during last year he entered into an agreement with one Chrysecros who hired furniture of the value of £1,400. Witness then entered into negotiations with Kaiser for the lease of the place, and he asked the latter to have the tenants ejected. Eventually, in July, he came to an agreement with Kaiser, and took over the lease with modifications. He put Norton in charge of the hotel. He then entered into negotiations for Norton to take over the place. As manager the latter received a small salary and commission. Before witness made an agreement with Norton he saw the Kaisers as to whether they objected to Mr. Norton as a tenant. There was no objection, and the arrangement was that Norton was to have the place for £65 for the first twelve months, and afterwards any rent that might be agreed upon. He went to the Kaisers with Norton before the letter produced was written. They then agreed to add some rooms, and witness saw some of the alterations made. Some time in February he received a demand for rent for the month of February. He considered he (defendant) was entirely out of the hotel. He did not hear about the objections to Norton until he received a demand for the rent. An attempt was made to obtain a club licence, but this was refused. He did not say that if Norton did not pay the rent he would.

Cross-examined by Mr. Buchanan: He let out furniture, and even offered to stand security for the rent, but for one month only. He simply wanted to protect the furniture. He believed that Norton had been in the Civil Service.

but could not say if Norton had any money. Witness knew there was no profit from the business. He had seen Messrs. Kaiser early in December, and the lease was signed about the middle of that month. He arranged with the Kaisers to take over Norton, and leave witness out of it altogether. He had taken Norton to see Mr. Kaiser before, and since the letter of the 24th. It had been agreed then that Norton was to come in. Some alterations had latterly been made to the rooms. Witness made the arrangements with Norton in his office. He seldom went to the hotel. He had not seen the lease before the agreement had been drawn up. He had told Kaiser that in the event of anything going wrong with Norton witness would insert in his agreement with the latter a clause to the effect that the lease would revert to him. Until he got the letter of demand he did not know of any dispute about his handing over the lease to Norton. He had called on Mr. Kaiser and said he had no intention of paying the rent, and said he would endeavour to get a tenant. As far as Mr. Hall was concerned, there was no mention of a lease. They wanted to sell the hotel, and witness wanted to sell his furniture. He did not say he had a lease. He had said the furniture was his, and a lease could be arranged. He had not said Norton had a lease.

Re-examined by Sir H. Juta: Mr. Norton got the proceeds of the hotel for December. Witness received the proceeds previously. He had no more interest in the proceeds. Towards the end of February he offered to make arrangements pending the dispute.

Henry Fuller, attorney, said that he drew up the agreement between the parties from instructions received about a fortnight before the 11th January.

Cross-examined by Mr. Buchanan: He did not draw up the agreement between Kaiser Bros. and Norton.

William Norton stated that before November, 1903, he was engaged by the defendant as manager of the Cherm-side Hotel. About the beginning of December negotiations were going on between Rosen and himself with regard to his taking over the responsibility embodied in the lease. After twelve months the plaintiffs had the option of increasing the rent. Witness said in consequence of a letter that the defendant wrote to the plaintiffs on the 24th December the plaintiffs had agreed to make certain alterations with a view to making the place pay, and a plan was drawn up by O'Brien Bros., architects. Previous to the 11th January the plaintiffs sent up to witness for the rent, which he paid with his own money. Witness paid defendant £100 for taking over the furniture on the hire purchase system. When witness presented an agreement

for the plaintiffs to sign they said they would wait to see how the hotel was going, and in the meantime Rosen's agreement would do. He was aware of the terms of the defendant's contract.

Cross-examined by Mr. Buchanan: Before July, 1903, he was in the Civil Service. He had experience of catering. The house had a bad reputation, and it was difficult to make it pay. He paid Rosen £100 for the furniture. He was unable to pay the rent at the end of January, but he did not refer plaintiffs to the defendant. About the 2nd of February he found that he could not meet his liabilities, and he called a meeting of his creditors.

James Carmichael stated that he was the manager of the defendant's business. He took in Norton as manager of the Cherm-side Hotel. He was aware of the negotiations between Rosen and Norton by which it was agreed that Norton should take over the place. Kaiser Bros. were quite agreeable to this. On the 24th December he wrote giving Kaiser Bros. formal notice of the cession to Norton. He kept the books up to November 30, and Rosen took all the proceeds. After that Norton took all the receipts for December and January.

Cross-examined by Mr. Buchanan: He knew of the forms of the arrangement between Rosen, Norton, and Kaiser Bros. before December 24. The letter of December 24 simply confirmed a verbal arrangement.

This closed the evidence, and counsel having been heard in arguments on the facts,

Buchanan, J., said that between Norton and Rosen an arrangement was entered into in December, 1903, with the object that Norton should take over the place and work it on his own account. Rosen paid the rent up till the end of December, but Norton did not pay the £65 rent due for January. Under the lease and letter of July 27th the power was given to the lessee to sub-let with the consent of the lessors in writing, but in this case no such consent in writing was received. It was alleged that a verbal consent had been given. If the plaintiffs' contention was right that the negotiations in December were concerning the proposal that Norton should be taken as sub-tenant under Rosen, then Rosen still remained the tenant. Where parties contracted that certain things should be done in writing, and they were not so done the Court would require very clear evidence to establish such a contention, and the onus lay on the defendant to prove it. There was a conflict of evidence, and defendant had failed to show that such consent was given by the plaintiffs. The letter of December 24 did not refer to any verbal arrange-

ment arrived at before that date. The plaintiffs' explanation about not replying to the letter because they were waiting on Rosen and Norton was a very reasonable one, as both the parties had promised to call. The defence that there was a complete cession to Norton was not supported by the evidence. He would refrain from expressing any opinion as to whether Rosen had lost his chance of getting rid of the premises by giving three months' notice. That was still an open question. Judgment would be given for the plaintiffs for £65 with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

WYNN V. WYNN AND THIRSK.

This was an action brought by James Thomas Wynn against his wife, Annie Wynn, for divorce and for damages against the second defendant. Mr. W. P. Buchanan was for the plaintiff, and neither defendant was represented. The declaration set out that the parties were married in community of property at Woodstock in 1900. They lived happily together until December, 1903, when the plaintiff noticed a certain intimacy between his wife and the co-defendant, who was master of the steamship Balgowan. During January, 1904, his wife had admitted misconduct with the co-defendant. Plaintiff claimed a decree of divorce, forfeiture of the benefits from the marriage in community and custody of the minor child.

Mr. Buchanan called William Thomas Birch, a clerk in the Colonial Office, who produced the marriage register showing the signatures of the parties.

James Thomas Wynn stated that he was married on the 4th October, 1900, at Woodstock. After his marriage he went to Hoetjes Bay, and lived happily with his wife until September, 1903. About the end of December he noticed an intimacy between Captain Thirsk, of the S.S. Balgowan and his wife, and witness cleared him out of the house. The first defendant in a letter admitted her adultery with the second defendant. Witness had a fight with Captain Thirsk, and after that he forgave his wife. Later on his wife came to live at Woodstock with her sister, and subsequently he followed Captain Thirsk to the Central Jetty, where a boat, belonging to the Balgowan, conveyed the two defendants to the steamer. The following morning he saw the two defendants come from the steamer and walk up Adderley-street. His wife admitted to her father that she had stayed with the second defendant on the steamer.

Alvin Park gave corroborative evi-

dence as to seeing the defendants going on board the steamer and coming off the next morning.

Mr. Buchanan said that as the second defendant had paid an amount of damages he did not proceed on that claim.

His Lordship granted a decree of divorce, forfeiture of the benefits accruing under marriage of community, the plaintiff to have custody of the minor child, without costs.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

HATTINGH V. DE WET. { 1904.
May 3rd.
„ 5th.

Surety and principal debtor—
Undue preference—Costs of
defending action for undue
preference.

The plaintiff advanced to D. the sum of £40, for which the defendant became surety, and the defendant and D. signed an I.O.U. in favour of the plaintiff. In due course D. paid the amount, but afterwards became insolvent, upon which the trustee of his insolvent estate brought an action for undue preference against the plaintiff. The plaintiff gave notice of the action to the defendant, and informed him that he would be held liable for the costs, but received no answer. The trustee succeeded in his action, but the Court found that there was no collusion with plaintiff, and ordered the trustee to give an indemnity under the 90th section of the Insolvent Ordinance.

Held, in an action brought by the plaintiff to recover the £40 and the costs of the previous action from the defendant, as surety, that he was entitled to succeed.

This was a special case for a ruling of the Court as to the interpretation of section 90 of the Insolvent Ordinance. From the statement of the case it appeared that in 1903 the plaintiffs lent to one Scobell a sum of £40, for the repayment of which de-

fendant agreed to become surety. Subsequently Scobell paid plaintiffs the amount, but a month afterwards, the trustee of his estate, which had become insolvent, sued the present plaintiffs for the money, on the ground that there had been undue preference, and the Eastern Districts Court declared that the payment had been an undue preference, and ordered the present plaintiffs to repay to the trustee the £40, subject to an indemnity being given by the trustee in accordance with the provisions of section 90 of the Insolvency Ordinance. Plaintiffs now contended that defendant was responsible for the payment of the £40, and of the costs of the previous action, of the defence of which he had been advised. Defendant contended that the plaintiffs should have sued the trustee under the indemnity. The point at issue was the construction of section 90 of the Ordinance.

After hearing Mr. Searle in argument, the Chief Justice stated that the Court would intimate later whether it was necessary to hear counsel for the plaintiffs.

On Wednesday, Mr. Searle, K.C., addressed the Court at some length in support of the defendant's contention.

Postea (May 5th.)

De Villiers, C.J., asked counsel for the defendant whether he proposed to address the Court on the question of costs.

Mr. Searle said that he desired to do so.

De Villiers, C.J., said that the Court would now hear counsel on this point.

Mr. Searle proceeded to urge that anybody who took a payment of this kind from an insolvent must take his own risk. He submitted that there was no principle of law upon which the defendant should be made liable for these costs.

De Villiers, C.J.: The facts of this case are fully stated in the special case submitted to the Court. The plaintiff advanced to Doubell £40, for the payment of which the defendant was to be surety, and the defendant and Doubell signed an I.O.U. in favour of the plaintiff. In due course Doubell paid the plaintiff the debt of £40, but afterwards became insolvent. The trustees of Doubell's insolvent estate challenged the payment as being an undue preference, and the Eastern Districts Court found that it was an undue preference, but refused to declare a forfeiture under the 88th section of the Ordinance. The judgment was, however, given on condition that the trustee gave an indemnity to the then defendant under the 90th section of the Ordinance. Before defending that action the defendant, who is the plaintiff in the present case, gave notice of the action to the surety, the present defendant, and informed him that he would hold him liable for the costs of that action. There

appears to have been no answer to this communication. The questions to be determined are whether the plaintiff is entitled to recover the £40 from the defendant, and whether he is also entitled to recover the costs paid by him in the previous action.

As to the first question the Court must assume, after the judgment of the Eastern Districts Court, that the payment by Doubell was invalid, but that the present plaintiff was not aware of the invalidity. He received the money from the principal debtor as he was bound to do if he had no reason to suspect that Doubell was contemplating the sequestration of his estate, and when the payment proved to be illegal, he was entitled to treat such payment as having never been made. As to the costs incurred by the plaintiff in defending the action for undue preference, if he had not given notice to the defendant of his intention to defend the action, and hold the defendant liable for the costs, it would have been impossible, consistently with the case of *Hurley v. Marais* (2 Juta, 155), to hold the defendant liable for the costs. But he gave due notice, and thus afforded an opportunity to the surety of fulfilling the obligation resting on him to pay the debt on failure of the principal debtor to discharge the debt. The surety did not avail himself of the opportunity, and does not even appear to have returned any answer to the communication. What, then, was the creditor to do? If he repaid the money to the trustee he would take upon himself the risk and responsibility of deciding that the payment was an illegal one, with the result that the surety might repudiate his decision altogether. If the creditor allowed judgment to go by default, costs would have been awarded against him, but the surety would, probably have refused to pay them on the ground that the creditor had failed in the duties which he owed to the surety. In principal there appears to me to be no difference between the duty of a creditor to excuse the principal debtor and his duty, after such excusation, to defend the validity of the payment where he has no reason for doubting its legality. The judgment of the Court must be in terms of the plaintiffs' contention with costs.

[Plaintiffs' Attorneys: Michau and De Villiers. Defendant's Attorneys: Syfret, Godlonton and Low.]

sent him in all matters regarding the partnership and the winding-up of the partnership business. Certain accounts still remained to be adjusted. Ransome deputed the work to one Thunder; but deponent found that Ransome and Thunder did not keep appointments, and deponent could not obtain a settlement. Owing to bad health, and upon medical advice, witness was going to England on the 11th May next.

The replying affidavit of Mr. Thunder (accountant) said that he was appointed by respondent to act and he had acted on behalf of the respondent in connection with the winding-up. Mr. Adamson had ever since the dissolution of partnership acted as receiver, and he was in a position to frame a statement of accounts. Deponent denied that he had almost invariably failed to keep appointments. He wished the whole matter to be settled. He did not object to the appointment of a receiver; but he objected to the appointment of Mr. Mouat.

The replying affidavit of the applicant said that the books of the partnership were in the hands of Mr. Mouat, and deponent had rendered a statement to him which Mr. Thunder could obtain. Deponent stated that Mr. Mouat was fully acquainted with the entire partnership and was well fitted to carry out the winding-up.

Counsel having been heard in argument,

His Lordship said that Mr. J. E. P. Close would be appointed liquidator and receiver of the partnership business, costs to be costs in liquidation.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

THOMSON V. MCKENZIE	{	1904.
AND CO.		May 8th.
		" 10th.
		" 17th.

Contract—Installation of electric lift—Unskilful workmanship—Damages.

This was an action for damages for breach of contract for the supply and erection by plaintiff of a direct-coupled electric lift. The plaintiff, William Chas. Thomson, is a general importing merchant carrying on business in Cape Town, and the defendants are also carrying on business in this city.

The declaration set out that on the

25th June and the 1st July, 1902, plaintiff sent in to the defendant a tender and amended tender to erect a certain electric goods lift at the defendant's premises in Cape Town, for £395, and to maintain the same for 12 months from date of erection. Defendants accepted the tender. Thereafter the plaintiff proceeded with the work, and on or about the 17th October, defendants agreed to pay the plaintiff a further sum of £25 in connection with the erection of a switchboard. The goods lift was erected and completed on the 28th October. The defendants had paid £250 on account, and neglected and refused to pay the balance. Owing to the default of the defendants in not obtaining the services of a competent man to manage the lift, the same got out of order. A new motor had to be fixed and other work had to be done in the way of repairs and so on, in consequence of which the plaintiff made a further claim for £155, making £325 in all.

The defendants, in their plea, said that the plaintiff had failed to carry out the terms of his contract in regard to the speed of the lift, its carrying capacity, and the time within which it was to be completed. The lift was constantly getting out of order and had never been delivered to the defendants in accordance with the terms of the contract. They denied that they owed to the plaintiff the sum of £155, and they admitted that they refused to pay the balance of £170 claimed by the plaintiff.

In re-convention the defendants said that the plaintiff wholly failed and neglected to perform his contract, and the defendants refused to accept the work. By reason of the said breach of contract they had sustained damages, and they counter-claimed as follows: £250 on account of the contract; £800 damages by the plaintiff having failed to supply and erect a lift in accordance with the terms of the contract; £216 by the plaintiff having failed to carry out the contract within the period agreed upon.

Plaintiff's Replication stated that there was a delay of about a week owing to the defendants not having the necessary structural work finished. He denied that the lift did not work at the speed agreed upon. He said that the repairs and so on were rendered necessary owing to the default of the defendants. He denied other points alleged by the defendants to have been contained in the agreement, and joined issue.

Mr. Searle, K.C. (with him Mr. Pyemont); for plaintiff, Sir H. Juta, K.C. (with him Mr. Upington), for defendants.

William Charles Thomson (the plaintiff) said he was a general importing merchant, carrying on business in Castle-street. He supplied and erected lifts. He was not an engineer, but he employed

competent men. He submitted an amended tender to McKenzie's on the 25th June, the amount being £395. He sent a letter to the defendants on the 1st July, in which he agreed to erect the lift before the 4th October, 1902, under a penalty of £3 a week. He also told them he should have to cable to England for the lift. Correspondence took place in regard to several points. There was no delay in the shipping of the lift from England; a portion arrived on the 12th August, and the whole was delivered by September. He would have had the lift completed by the 11th or 12th October if the defendants' overhead girder had been erected. He had actually offered to pay penalty for seven weeks—£21. He did not think any payment was made specifically on account of the switchboard. About this time witness went to Johannesburg, and his business was under the superintendence of Mr. Dawson. Witness returned to town in December, 1902, when he received certain reports about the lift. He remained in town from December. In January, 1903, he had to cable for a fresh armature for the motor through the first one having been burned, probably on account of overloading. There was certain trouble in regard to the underground travel. The tender was made out on the understanding that the lift should not go below the ground floor; then the defendants said they wanted the lift to go down into the basement. There was an accident to the brake coupling. He found in March last year that the lift would not carry the maximum load of 2,000 lbs.; it would carry 1,500 to 1,600 lbs. It was working from October right on until now, except for a few weeks when it required repairs. Finding that the lift would not carry the maximum load, he imported a new resistor and had it erected; this was included in the second account that witness had filed for £155. All the repairs he had made and the extra parts he had had to get out he had included in the second account. Afterwards a new motor was supplied to the lift owing to the negligence of the defendants.

No agreement had been entered into to the effect that the defendants could use the lift with his permission. He took it that the defendants had taken over the lift from the 28th October. This was the first lift he had put up in the town, and he was most anxious that it should be satisfactory. Witness had seen the lift working several times, and he had been told by the foreman and engineer at McKenzie's that it was working all right. There had never been any complaint made to him about the speed; the speed depended on the power of the electric current. The lift was a cheap one.

By Sir H. Juta: There were tenders for the lift other than witness's, and Mr. Sexton asked whether he had not made a mistake, as his tender was so

low. Witness told him this was the first lift he had had to put up in Cape Town, and that he wanted to get an advertisement out of it. Witness did not know what horse-power was required to start a lift.

Sir Henry Juta: Do you know that it requires 25 horse-power to work this 10 horse-power lift of yours?

Witness: You are asking me technical questions which I cannot answer.

Bert Whiting, electrical engineer, formerly in the employ of Mr. Thompson, said he was employed to erect this lift with another engineer now in the Transvaal. The Town Council people tried the lift, which worked properly with about the full weight on. The lift worked satisfactorily. A week or so afterwards a fuse went, and witness went there and put it right. This might have been caused by carrying an excessive load or by reversing the lift too abruptly. In December witness went to repair the lift, which had been damaged, apparently by letting the lift down sharply on a pile of boxes of butter. Witness saw some of the butter cases smashed, but they had not suffered so severely as the lift. Witness refused to repair the lift, but was afterwards instructed to do so. It took witness and a labourer two days to repair the damage; the cost of repairing that damage was about £5. The shock put a great strain on the armature, and witness thought it went a long way towards causing the armature to fuse later on. As to the controller, witness thought the damage was caused through overloading the lift; the same applied to the fusing of the armature. A new armature was cabled for, witness fixing up the lift to be worked by hand in the meantime. The armature came in six weeks, and witness put it up. For some time it seemed to be working all right. The old motor was taken down because the armature had broken down, and they could not get it re-wound in town. Witness attributed the different stoppages to overloading and to working it from the bottom without a man inside. Hence the lift might overshoot the mark, and would be reversed suddenly, which would put a great strain on the insulation. Witness had told them in the first instance that they should have a man inside to work it. He had seen the lift reversed in the sudden manner he had described. He had also seen Cape boys working it from the bottom.

Mr. Searle closed his case.

Sir Henry Juta called

John Denham, Government Electrical Engineer, who said he had recently examined the lift. To work the lift satisfactorily seven or eight horse-power was required if properly worked and applied. It took 48 amperes to start the lift at present; whereas to start it quickly it should only require 35 amperes. It should only require 15 amperes to

work it. The effect of the excessive amperes required was that the electricity consumed was greater, and that the armature coils would be destroyed more quickly. The present motor was 10 h.p. When the 8 h.p. motor was working the same power was required to start the lift. The brake was useless when witness saw it. The lift was in his opinion very dangerous. To make the lift do its work properly a motor of 15 h.p. or more was required. If witness had to work the lift he would give it a minute examination to find out the excessive friction and what caused the gigantic consumption. The defects, he thought, were removable, and if they were removed a 10 h.p. motor would be sufficient. The cause could not be discovered without a lot of trouble. The whole thing would have to be taken down.

Edward George Jones, electrical engineer, deposed that he accompanied Mr. Denham when the lift was inspected by the latter. He confirmed what Mr. Denham said with regard to the imperfections in the machinery. To trace the cause of the excessive friction would be very difficult. The lift would have to be taken down, and elaborate tests made. This would be very expensive. Witness thought the best thing to do with the lift would be to put in an entirely new and adequate winding gear, which would cost between £200 and £400.

George Sexton, director of Messrs. McKenzie and Co., and other witnesses also gave evidence for the defendant. The former stated that the claim made by the defendants was made up of the charges of £3 a week for demurrage. Witness was not aware until recently that the firm had had to pay for extra current consumed owing to imperfections in the machinery; hence nothing was claimed for this. Other witnesses stated that the lift was frequently out of repair, and had to be kept idle for days.

Counsel were heard in argument on the facts.

Cur. Adr. Full.

Postea (May 17th.)

Hopley, J.: In the month of July, 1902, the plaintiff and defendants entered into a contract, the material portions of which were that the plaintiff should supply and erect an electric direct coupled goods lift of a specified size in the defendants' stores to work from a continuous current at a speed of 75 to 100 feet per minute, and lift a load of 2,000 lb.; cage to be fitted with safety gear and two wire ropes; cut worm gear running in an enclosed oil bath, and coupled to a compound wound motor. The price for the machine and its erection was to be £395, which was to include its maintenance for twelve months, after it was handed over by plaintiff to defendants, and the plaintiff bound himself to hand it over in working order before October 4, 1902, under a penalty

of £3 a week for delay. Upon the conclusion of the contract the plaintiff cabled to England for the lift. There seems to have been some delay in fitting the lift when it arrived, not altogether due to the default of the plaintiff, but eventually, on 28th October, or about three weeks after the specified time, the plaintiff notified to the defendants that he was ready to hand over the machine in good working order, and that the electrical engineers of the Town Council should be called in to pass it. This was done, and, according to the evidence of Mr. Sims, one of the engineers of the Corporation, on the third journey of the lift during the test, part of the resistance was burnt, with the result that the current leaked away to a neighbouring stable, where it nearly killed some ponies. He says that the resistance and controller of the machine were then defective, and they could not pass the machine as fit for use. He noticed that the machine required much more than the proper current of electricity, and he thought at the time it was unsatisfactory. The machine was not passed for use on the occasion of that visit, but on the damage being repaired, a further inspection was made by a Mr. Roberts, who had accompanied Mr. Sims on the first test, and upon his report, permission to use the lift was duly given. An attempt has been made by the plaintiff to utilise the permission thus given by the responsible officers of the Corporation as conclusive evidence, not only of the fitness of the lift to work at all, but of its compliance with the terms of the contract, and of the defendants' acceptance of it. It is, however, obvious that the Corporation engineers inspect only for the Corporation, and that they in no way bind the parties to such a contract of their finding. Their duty is, as explained by Mr. Sims, merely to see that such a lift is safe from fire—that the earth connections are so made that an escape of electricity will not give anyone an electric shock, and that the machine does not consume more motive power than the Corporation can afford to supply. It is also perfectly clear from the correspondence between the parties that until the law suit was imminent the plaintiff never attempted to treat the passing of the lift by the Corporation as a formal taking over thereof by the defendants. The lift soon gave trouble, and it must be admitted that the plaintiff, who was anxious to make a good name for himself in this line, did everything he and his advisers could think of to attain a satisfactory and successful result. He is, however, only an importer and merchant, and has no scientific or practical knowledge of electrical machinery, which, nevertheless, it is part of his business to erect and instal. For carrying out that part of the obligations which he undertakes he relies upon practical working men, who have been through workshops, and thereafter

seem to be described, and to describe themselves, as electrical engineers. It seems to me that much of the trouble and the considerable expense which have been incurred in this case are due to the plaintiff's confidence in the remedies suggested by men of that class, to whose every suggestion he acceded, instead of calling in the advice and experience of more highly-trained and educated men, who would in all probability have traced the troubles that arose in the working of this lift to their proper source. The troubles were numerous, and the complaints frequent. So early as November 6, 1902, the defendants wrote complaining of the unsatisfactory working of the lift—adding in a postscript that it had just stopped altogether. No doubt Whiting, the practical engineer, then went down, but he admits in his evidence that in that month the controller broke, and the resistance burnt entirely out. Slightly later, owing to the safety stop not working, the cage crashed into a pile of cases of margarine, and the whole lift was thrown out of gear for some days. That was, however, repaired, and then again in January part of the armature fused, once more stopping the working. Attempts were made locally to re-wind the armature, but with no really beneficial result, whereupon a new armature was cabled for from England, and a shaft cone was put in to work the lift by hand-crank, pending the arrival of the new gear. This mode of working lasted some six weeks, but it was not particularly successful, even as a hand-worked machine. And the defendants' patience seems to have been nearly exhausted, for on February, 1903, they wrote threatening to have the entire lift removed if it was not put into proper order by March 1. To this the plaintiff, on February 23, replied, "regretting exceedingly the inconvenience that the delay in having the lift in working order has caused," and promising to have it put right; and on February 24 he wrote saying that he considered the lift then complete, and suggesting that it should be formally taken over by the defendants. This suggestion was, however, not adopted by the defendants, who wrote, on March 4, that they had never yet succeeded in getting the lift to carry the maximum load. To this the plaintiff replied on March 6: "I quite acknowledge that the lift will not take the maximum load, and recognising this, I am getting out a different resistance-arrangement for the controller, which will enable the motor to utilise its full 8-horse-power, which is considered to be ample for raising the load required. I expect this will be here in about a month. Meantime, I hope you will be able to make the lift serve your purpose, by taking such loads as it will carry. You may rely upon it I will not be satisfied with the lift myself till I see it perform its work pro-

perly. As I have heavy payments to make, you would exceedingly oblige me by letting me have a cheque for £100, keeping the balance of £70 in hand till the lift is passed and approved by you." This letter contains a clear recognition that the lift was not according to contract, and had not been accepted by defendants, who, however, are asked to make such use of it as they can. And the defendants, in reply, on March 7, state very emphatically that if they do use the lift, they will not be taken to have accepted it, and they refused to pay any money. About this time, or shortly after, the new armature arrived from England, and some improvement took place for a time. So that, about June 8, plaintiff made another attempt to obtain payment of the £170 still owing (the rest of the contract price having been paid on account). The defendants, however, refused to pay, saying that they had a counter-claim for the delay due to plaintiff's failure to perform his contract in proper time. Thereupon the plaintiff wrote a letter making various charges against the defendants of negligence and unskilful working, and threatening that, unless they paid him the £170 due, he would charge against them the various repairs his workmen had in consequence been obliged to make. The defendants thereupon put the matter into their attorneys' hands, who wrote to plaintiff on June 9 a letter in which they state their client's position, and reiterate the claim for damages for delay. They further stated that the lift had raised the maximum load for the first time on May 30. After this letter the plaintiff remained silent for some time, but there seems to have been further unsatisfactory working of the lift, as the plaintiff, on the advice of his practical men, in July purchased locally an expensive 10-horse-power motor, which he attached to the lift, in order that it might do its work properly; and in September, 1903, he again tried to get the £170 due under the contract. This was, however, refused, and counter-claims for delay were again put forward, as well as a denial that the lift was even then performing its work properly. Thereupon the plaintiff boldly took up the position that the lift had been taken over by the defendants on October 30, 1903, and that all that he had since done to it had been rendered necessary by their unskilful use of the machine; and he furnished them with an account, not only for the £170, but also for £155 odd for labour, repairs, and new parts to the machine, all said to have been rendered necessary by the defendants' negligence. These claims were repudiated by the defendants, and the plaintiff issued his summons in November, 1903. In the present action the plaintiff claims both the above amounts, and the defendants deny that the plaintiff has ever carried out his contract, and that they are liable

to him in any sum whatever. They counter-claim for £1,266, being the amount of £250 paid to the plaintiff under the contract; £800, the cost they allege of such a lift as the plaintiff agreed to supply; and £216, as damage sustained by reason of the plaintiff, the cost they allege of such a lift, in terms of his contract, on October 4, 1902. Now, it is perfectly clear from the evidence that this lift was never a satisfactory machine. The defendants' witnesses say that they were obliged to be constantly sending for plaintiff's servants to obviate delay and to effect repairs—a statement borne out by the account which plaintiff sent in just before starting his action, and now relied upon by him, in which he charges for no less than 353 hours of work by his various engineers and 201 hours of unskilled labour, all expended on this lift in less than a year. Parts of the machine were broken or rendered useless, and had to be replaced, armatures were burnt out, fuses were constantly blown, stops did not act, and altogether there were so many vicissitudes, accidents, and eccentricities as to render it, for a large part of the first year of its existence, rather a nuisance than an assistance. Whiting, the plaintiff's engineer, who erected it, admitted that it was "unique" among lifts in the multiplicity of the troubles that fell upon it; and the plaintiff admits that he has written strongly to the manufacturers complaining of the defective nature of the machine supplied by them. I may say at once that there is not any evidence whatever of negligent or unskilful working of this machine by the defendants, nor, indeed, was anything of the kind imputed to them by the plaintiff until they were on the verge of the present suit. What, then, was the cause of all the troubles that arose? It is impossible to say that any certain answer can ever now be given, but it is certainly some defect in the machinery, and for my part I believe that if professional men of the standing and ability of Mr. Denham and Mr. Jones had been called in when the troubles first arose the causes would have been discovered, and might have been remedied at comparatively small expense. Of course, it was not incumbent on the defendants to call in competent men. They were entitled under the contract to await its due fulfilment by the plaintiff, who was satisfied with the advice given to him by the various electrical engineers employed by him from time to time. When, for the purposes of this case, Mr. Denham and Mr. Jones were called in, they found that even now the lift is dangerous, that it takes by far too much current owing to the resistance or controller being defective that the brake and safety stops do not work, that it cannot go when carrying 2,000 lb. at a greater speed than 65½ feet when ascending, and 70½ feet

when descending. Moreover, it is patched; the motor is too large, and the rheostat too small, all of which causes too much strain to be put upon the machinery, tending to break it down, and to shorten its period of usefulness. Moreover, the motor is not a "compound wound motor" as contracted for, but a "shunt motor." Both Mr. Denham and Mr. Jones attribute the unsatisfactory running of the machinery and the excessive use of motive power, which is both dangerous and extravagantly expensive, to the presence of excessive friction in some parts of the machinery; but they are unable to specify in what part without a thorough examination. They say that an eight-horse power machine should be amply sufficient to raise the maximum load at the stipulated speed if it were properly fitted and installed. It is, on the evidence, quite impossible to say that the plaintiff has fulfilled the terms of his contract, or that he is in a position to claim anything save by way of a *quantum meruit*, for the machine and work actually supplied by him. Taking the machine as it stands to-day, and as it has been in use for the last eight or nine months, by the defendants, as being on the whole about equally good as the one contracted for, if it were in good order, what would be required to put it into decent working order? Mr. Jones seems to think that the only sensible thing to do is to get new winding gear at a cost of £300 or thereabout, but Mr. Denham thinks the machine could be taken down and examined, and the cause of the friction discovered, for about £30 to £50, and that in all probability it could then be repaired, but no one can say exactly at what cost. In this, as in many other respects, the case is one very difficult to deal with, for the fact remains that the defendants have got the machine and that it has been doing their work, on the whole satisfactory, for about eight or nine months. I am inclined to think the most equitable course is to allow them to keep the machine at cost price, and make a reasonable allowance for them to examine and repair it. The amount to allow must necessarily be arrived at mainly by guesswork, for the matter when discovered may be small or large, but in all probability will be found to be some defective bearing, not difficult to replace or repair. On the whole, I am inclined to allow the defendants the sum of £70, for the purpose of repairing the defects in the machine, some of which are possibly due to their own working since the plaintiff ceased, in October last, to have anything more to do with it. Coming next to the defendant's counter-claim for damages, there is abundant evidence that they have suffered inconvenience and loss in their business, and there is general evidence given as to how it was incurred, but unfortunately the Court is again left to

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte VAN NIEKERK. { 1904.
May 9th.

Mr. M. de Villiers moved, on behalf of the petitioner, the pastor of the Dutch Congregational Church, Roelandstreet, for leave to sell the burial ground belonging to the Church in Somerset-road.

Sir Henry Juta, K.C., appeared on behalf of the Town Council.

In his petition applicant stated that it was intended to remove the remains of the dead from Somerset-road to a piece of ground at Maitland, to be purchased out of the proceeds of the sale of the present burial ground, and to erect a monument there to the memory of the dead.

Mr. De Villiers said he would suggest that a more proper time for opposition would be on the return day of a rule nisi.

Sir H. Juta said the position the Town Council took up was that it was not proved to begin with that the present petitioner was the successor in title to the ground. As to opposing after the granting of a rule nisi, he would not object to that course, but he would point out that a rule nisi was not asked for. He would ask that, if a rule nisi were granted, petitioner should be ordered to be in Court on the return day for the purposes of cross-examination.

A rule nisi was granted, returnable on the 2nd June, the Court further ordering that the petitioner appear in Court there for the purpose of being cross-examined on his affidavit.

T. B. HARBOUR BOARD V. { 1904.
BUCKNALL S.S. LINES. } May 9th.
" 13th.

Harbour Board — Regulations —
Ultra vires — Negligence —
Tacit agreement.

The master of a ship in the Table Bay Docks, with full knowledge of the Harbour Board regulations, which stated that the Board would not be liable for any neglect of the masters or crews of the Board's tugs, engaged the services of two of its tugs to tow the ship out of the Docks. In the course

conjecture and speculation as to the exact amount, no notes having been kept nor notice given at the time to the plaintiff of any particulars of losses now alleged to have been incurred. Nor does the amount laid down in the contract—of £3 a week—materially assist in the assessment of the damages: for a lift of a kind and capable at times of use was supplied and erected shortly after the specified time, and it was not totally rejected, but such use as was possible was from time to time made out of it. And yet the lift behaved in such an uncertain and spasmodic way that the defendants could not, until September last, with safety reduce their staff of labourers from 12 to 4, as they might have done if a proper lift had been supplied, and so they probably lost a difference on wages of about £12 or £14 a week for about 40 weeks. But, as I have said, no particulars have been kept or supplied to the plaintiff, and this source of damage was not even specifically set forth in the pleadings—nor has it been traced how the servants engaged were actually employed and whether all their time was wasted, and whether all their services would have been supplied by the lift. Another claim for damages is made by reason of excessive consumption of electricity, which, it is said, must have been going on since the erection of the lift, and for which defendants have had to pay. This, however, is by no means certain, though it seems probable, and it is possible that the large current may have been necessitated by the state to which the machinery had been reduced shortly before the tests applied by Mr. Denham and Mr. Jones. Nor do I think that damage through loss of one rice storage contract, and through having to employ extra labour to carry out another in October, 1902, has been clearly established as against the plaintiff, who, at that time, was complaining that the defendants had caused delay in erecting of the lift. Yet I am satisfied that between October, 1902, when the lift ought to have been running satisfactorily, and September, 1903, when it began to run more or less satisfactorily, considerable damage must have fallen on the defendants. I feel that in cutting the amount down to £100, I am leaning as far as I possibly can in favour of the plaintiff, and I think that in the circumstances that amount will be fair and equitable to award to the defendants on their counter-claim. The result, therefore, is that of the £170 in their hands, the defendants retain £70 towards repairing the lift, which they are to retain as their property, and they are also entitled to retain the £100 as against the damages which I have awarded to them. The plaintiff must pay the costs of the action.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

of the towing, the ship was damaged through the negligence of the master and crew of one of the tugs. The acknowledged usage of the port was that no other tugs than those of the Board were allowed to tow ships out of Dock, and that the masters and crews of the tugs towing had to take their orders as to speed, direction, and so on from the master or pilot of the ship in tow.

Held, on a case stated by arbitrators, that the regulation was not on the face of it so unreasonable that the Court could, without any evidence that the regulation acted unfairly and without any statement to that effect by the arbitrators, declare the regulation to be ultra vires.

Held further, that the condition of the regulation should be deemed to have been tacitly incorporated with the contract by which the services of the tugs were engaged.

This was a special case stated under section 27 of the Arbitration Act of 1888, which provides that a referee or umpire could refer a question of law to the Court. The case is one which the parties submit to arbitration in a claim for damages in connection with the collision of a certain tug, the property of the Harbour Board, with the S.S. Fort Salisbury, which it was engaged in towing out of the harbour. Two tugs were engaged to take the steamer out, and it is alleged that owing to the negligence of the master and crew of one of the tugs, that the ship suffered damage in a collision.

Mr. Schreiner (for plaintiffs): The arbitrators say that the master was aware of the regulations. The master evidently knew what he was doing.

[De Villiers, C.J.: This vessel was a steamer. I suppose a steamer can get out?]

Many do, but if they attempt to do so they must make the attempt at their own risk. The Act 36 of 1886 prescribes the manner in which regulations are to be framed. I suppose it will be argued that section 13 of the Harbour Board is ultra vires. No doubt the Court can say that the regulations are unreasonable, but can they be said to be unreasonable in the present case? The docks only occupy a very limited space, and it would not be in the interest of

the port to allow anybody and every body to come and work in the docks. They submitted to arbitration under Act 29 of 1888. The servants of the tug were the servants of the master of the ship. See *Carrier on Carriage by Sea* (sec. 102). My point is that the Harbour Board did not show negligence.

Mr. Upington (for defendants). It is useless to say that these Harbour Board regulations are contracts rather than bye-laws; for there is absolutely no freedom of contract. If a steamer wants to get out of dock she must engage a tug, and no tug can be engaged save a Harbour Board tug. See the judgment of Lindley, L. J., in *London Association v. London Dock Company* (3 Ch. 1892, 242 and 252). This was not a question of a contract but of a bye-law. But even supposing it was a contract: (1) Was it in the power of the Harbour Board to make it? (2) Was it reasonable? I submit it was not reasonable. See *Peck v. N. Staffordshire Railway* (10 H.L. 473, and 473 and 32 L.J.Q.B., 241). I therefore submit that the conditions laid down by the Harbour Board are neither just nor reasonable. See *Peck v. N. Staffordshire Railway* (32 L.J.Q.B., 241) and "*The Halley*" (L. Rep. 2, P.C. 193), see particularly the judgment of Selwyn, L.J. (at p. 201). Here all competition of people outside the Harbour Board is excluded, and the Harbour Board thus oblige us to use their tugs. This being so, it is surely unreasonable that they should attempt to limit their liability. See *Addison on Contracts* (p. 960). But I would say that this is not a question of contracts, but of a bye-law.

Mr. Schreiner (in reply): If it is contended that this bye-law was invalid, the defendants could have come to Court. If it is good it is valid. See *MacLachlan on Merchant Shipping* (4th edit., p. 295). Who, then, in this case was the pilot? Obviously the master, who had control of the whole matter. East London is a compulsory pilotage port, and yet the rules of the East London Harbour Board say that the master is to pay the pilot, but is responsible for his torts. I should like, in conclusion, to refer to the case of *Glan Line Steamers v. Alrook and Co.* (13 S.C.R., 104) *Cur. Ade. Vult.*

Postea (May 13th.)

De Villiers, C.J.: The question raised by the special case is whether the Table Bay Harbour Board is relieved, under the 13th section of its regulations, from liability for injury caused to a ship through the negligence of the master and crew of a tug belonging to the Board while towing the ship out of the Docks. The regulation is as follows: "The Board will not be responsible or liable for any loss or damage occasioned by accident, collision of tug or tow, defect or imperfection in machinery or ropes, stoppage or slackness of speed,

however occasioned. The masters and crews of the tug or tugs towing will be deemed to be the servants of the owners, masters, or pilots of the vessels towed, and will act under their instructions, the Board being in no way liable for any neglect or act of the masters or crews of the tugs when towing." The case states that on the 13th of March, 1903, the master of the steamship Fort Salisbury engaged the services of two tugs, the property of the Board, to tow his ship out of the Table Bay Docks, he being then aware of the terms of the said regulation. The case further states that tugs not belonging to the Board are not permitted to tow ships out of the Docks, and that, owing to the negligence of the master and crew of one of the tugs engaged by the master of the steamship in question, the tug came into collision with the ship while she was being towed out, and caused her some injury. The case further states that the master or pilot of a ship being towed out of the Docks may give orders to the master of the tug as to speed, when to go ahead or astern, when to stop, in what direction to go, and the like; but the master or pilot of the ship is not permitted to interfere with the master and crew of the tug in its management and control. If the question had arisen for decision between two ordinary individuals, the answer would clearly have been in favour of the relief from liability of the owner of the tug. Public notice had been given that the Board would not be liable for any neglect or act of the masters or crews of the tugs when towing, and the master of the ship, with full knowledge of this condition, engaged the services of the tugs. There was no express agreement that the Board should be relieved from liability in case of injury done to the ship through the negligence of those on board the tug, but there was a tacit agreement to that effect arising out of the fact that the master engaged the services of the tugs with full knowledge of the condition on which the other contracting party would allow those services to be rendered. There is no averment in the special case that there was any want of due care on the part of the Board in the selection and appointment of the masters and crews of the tugs. Negligence of that kind would not have been protected by the terms of the regulation in question, but the Court is bound to assume that due care and diligence had been exercised in the appointments. It is said, however, that there are special reasons in the present case why the Board should not be allowed to contract itself out of the ordinary liability for negligence attaching to persons who, for reward, render services similar to those rendered by the Board. One of those special reasons is that the

shipowner was obliged to employ the Board's tugs, and would not have been permitted to employ tugs belonging to anyone else. It is not, however, by any means clear that it would have been impossible for the ship to get out of the Docks without the assistance of tugs. She was a steamship, and no reason is stated why she should not, with careful management, have gone out of the Docks without the aid of a tug. There is no regulation prohibiting steamers from going out without the aid of a tug, but even if there had been, it would not have affected the decision of this case. The ship's coming into the Docks was a perfectly voluntary act on the part of the master, and if he came here with a knowledge of the regulations of the port it would be impossible to hold that the subsequent employment of tugs to take the ship out, was such an involuntary act as would relieve him from the consequences of his acceptance of the Board's conditions, whether such acceptance were express or tacit. He made no protest at the time when he engaged the tugs against the terms upon which the services of the tugs were rendered, and it was too late for him, after the injury had been done, to rely upon the involuntary nature of the engagement. Another special ground relied upon for not relieving the Board from liability is that a regulation or bye-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. This statement is, no doubt, perfectly correct, but where an agreement is entered into subject to the terms of any regulation, that regulation may be regarded as an indivisible part of the contract. In the case of *London Association v. London Docks* (L.R. Ch. Div., 1892, p. 242), to which the Court has been referred, the bye-laws had not been duly made and confirmed as bye-laws, and they were consequently held not to be binding upon the plaintiffs, "save so far as the plaintiffs may have agreed to be bound by the same." *A fortiori*, therefore, where, as in the present case, any regulation has been duly confirmed in the manner required by the Statute which created the Board, and authorised it to frame regulations, any person contracting with the Board may do so subject to any conditions imposed by the regulations of the Board. The regulation is not an agreement, but where the shipowner, with full knowledge of the regulation, contracts with the Board for the use of its tugs, and by his conduct leads the Board to believe that he accepts the conditions contained in the regulations, such conditions must be held to form part of the contract.

The main ground, however, on which the shipowner in the present case relies is that the regulation in question is so unfair and unreasonable as to be *ultra*

vires, and therefore incapable of being incorporated as part of the contract with the Board. There would have been much force in this contention if the regulation had gone further than it does, by relieving the Board of its duty to supply proper tugs, and to employ competent masters and crews for the navigation and handling of the tugs. That duty, however, is not affected by the terms of the regulation, and, therefore, if the collision had occurred by reason of the Board having supplied improper tugs or appointed unfit masters or crews, the Board would not have been relieved from liability by virtue of the regulations. But the arbitrators have not, in the case stated, expressed it as their opinion that the regulation is unreasonable, and I am not prepared to express that opinion without some evidence in support of it. I can well understand that a regulation of that nature may have been necessary, in view of the admitted custom of the port that the master of the ship being towed may give his orders to the master of the tug as to speed and direction, and as to the other matters mentioned in the special case. It may well be that the regulation was framed because of the extreme difficulty there would be in apportioning the blame between the master of the ship, who gives the orders, and the master of the tug, who executes these orders, but who can prevent any interference with the management and control of the tug. At all events, there is nothing before me to justify the view that the regulation is so unjust as to be incapable of being relied upon on behalf of the Board. The conclusion, therefore, at which I have arrived is that the Harbour Board is relieved from liability for the injury caused to the ship. Question of costs left to the arbitrators.

[Applicant's Attorneys: Reid and Nephew; Respondent's Attorney: G. Trollip.]

**KAISER BROS. V. CAPE TOWN } 1094.
TOWN COUNCIL. { May 9th.**

Interim valuation—Cape Town Municipality—Basis of valuation.

In making an interim valuation of properties under the 93rd section of Act 26 of 1893, the valuer acted upon the basis indicated by the solemn declaration required by the 88th section, and valued properties belonging to the applicant at the price which they would realise if brought to voluntary sale and not according to the

amount actually expended on improvements.

Held, that the applicants' objection to this mode of valuation could not be sustained.

The valuer included properties which had not been improved since the previous valuation by the erection of new buildings or otherwise.

Held, that this was a good ground of objection and was maintainable in the Supreme Court, although it had not been specially mentioned as a ground in the objection lodged by the applicant under the 92nd section.

This was an application on notice of motion, calling upon the respondents to show cause why the valuation of certain properties belonging to the applicants should not be reduced for the purpose of Municipal taxation, and why the name of Kaiser Bros. should not be expunged in the valuation record in regard to certain property (4,023), which the applicants stated did not belong to them.

The affidavit of Messrs. Kaiser Bros. set out that the Municipal authorities valued their property in 1904 at a figure considerably beyond their value, and they had also certain property against Kaiser Bros., which did not belong to them.

The answering affidavit of J. R. Finch, Town Clerk, set out that in consequence of the improvements made on applicants' property an interim valuation had been made, and had been reviewed by the valuation Court, and great reductions had been allowed.

The affidavit of Mr. Muller, auctioneer and appraiser, set out that he had valued the property on the price it would bring if sold in the ordinary way.

Mr. Graham, K.C. (for the applicants.) We object to this valuation on the ground (1) that it is not based on the cost of our buildings, but on the price it is suggested that they would realise if sold in the open market. That is manifestly an unfair standard. No doubt our property (in common with other city property) has increased in value, but that is not our fault.

(2.) The interim increased valuation was made upon portions of our property which had not in any way been improved. That is quite contrary to the provisions of sec. 93 of Act 26 of 1893.

(3.) Rates have been imposed upon us in respect of certain property which does not belong to us.

Mr. Schreiner, K.C. (for the respondents), argued against the first of these objections, and urged that if the respondents succeeded upon this point they should be allowed costs.

De Villiers, C.J.: The objections to the valuation in the present case are three-fold. The first objection is that the valuation was made not on the basis of the cost of building, but upon the basis of the actual value. I am clearly of opinion that the basis adopted by the valuator is the proper one. The solemn declaration which the valuator has to make under the 88th section of the Act 26, 1893, indicates the basis on which the valuation should be made. He makes a solemn declaration that he will conscientiously value the property for the full and fair price which such property would realise at a voluntary sale under the usual terms and conditions. This declaration applies to the interim valuation as well as to the general valuation. Therefore, it is clear to me that whatever the cost to the owner of the additional building may be the valuator can only look to the improvement of the property. The value of the property may increase to a much greater extent than the actual expenditure by the owner, and it is the actual improvement which will form the basis of the valuation. The first objection, in my opinion, falls to the ground. The second objection is that properties were included in the valuation which had not been improved in terms of the 83rd section. This clearly is a good objection. In fact, it is surprising to me that such a valuation had ever been made, and I cannot understand upon what principle the Town Council acted in sweeping into their net for the purposes of interim valuation properties which had not been improved at all. The third objection is that properties were valued which did not belong to the applicants. Well, it is now admitted one of these properties, at all events, No. 4,023, does not belong to the applicants, and clearly that property ought to be omitted. The real discussion in the present case has been on the question of costs. It is said that a notice should have been given as required of any objection under the 89th section, but, in my opinion, it was clearly the duty of the Town Council not to include in its interim valuation any property which had not been improved. I am not satisfied that the Town Council had done everything to prevent a mistake. The present applicants have succeeded in obtaining a considerable reduction, and, of course, there must be a reduction of from £5,750 to £4,400, and from £17,000 to £7,000. These are substantial reductions, and, seeing it is the original mistake of the Town Council in valuing property in the interim valuation, which ought not to have been valued, I consider that the

applicants should not be deprived of their costs in the present case. The costs will follow the result, and the Court will make an order for these reductions, and for the omission of the names of the applicants in connection with the property 4,023.

[Appellant's Attorney: Bosman; Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and a Jury.]

BRETT AND WIFE V. DIVISIONAL COUNCIL OF VICTORIA WEST. { 1904.
May 9th.

Divisional Council—Excavation in road—Negligence.

This was an action brought by James Brett and Ellen Brett against the Divisional Council of Victoria West, plaintiffs suing to recover £5,000 damages for injuries received through the defendants' negligence. The case was the outcome of a trap accident due, it was alleged, to the defendants' negligence in failing to take proper precautions in guarding certain excavations on a bridge close to Victoria West-road. Mr. Upington (with him Mr. D. Buchanan) was for the plaintiffs, and Mr. Burton (with him Mr. J. E. R. de Villiers) was for the defendant.

Mr. Upington, in stating the case to the jury, said the action was one in which the plaintiffs claimed £5,000 damages from the Divisional Council of Victoria West. The first plaintiff was an accountant, and had been in the employ of the S.A. Milling Company. On the 10th August last he proceeded with his wife to Victoria West, and on the evening of the 15th August he left with his wife for Victoria West-road, and travelled in a Cape cart along a certain road under the management of the defendant Council. About 7 o'clock in the evening, as he approached a bridge near Victoria West-road, the cart he was travelling in was upset through going into an excavation that had been made by the defendant Council. Mr. Brett and his wife were thrown out of the trap, and sustained severe injuries, the former being so severely hurt that the doctors would tell that jury that his life was still in danger. The first plaintiff had been ordered to England for a complete rest, and the evidence of Mr. and Mrs. Brett had been taken on commission. The defendant Council had tendered £1,000, which Mr. Brett considered was wholly inadequate. Mr. Brett's evidence went to show that he was in receipt of a salary of £500 a year from the S.A. Milling Company. On the night in question, with his wife, he was driving in a Cape cart, and approach-

ing Victoria West-road the cart was driven into an excavation about one foot four inches deep. The cart fell on Mr. Brett, and after about half an hour he was extricated. He was removed to a farmhouse close by, and remained there for five weeks, when he was removed to Cape Town. After treatment in Cape Town he was unable to stay at business for more than an hour a day. At present he was suffering from a complete derangement of the nervous system, spinal and heart trouble, and had to resign his position as accountant. In disposing of his property to go to England he calculated that he had lost £100 on the furniture and £400 on his property. The evidence of the second plaintiff showed that she had received more or less serious injuries, and corroborated the testimony of her husband with regard to the details of the accident.

Mr. Upington then called evidence.

Dr. Edgar Jones, of Victoria West, stated that on the night of the 15th August, he saw Mr. Brett lying in bed in a farmhouse. He was greatly collapsed, and had a fractured rib and bruises. His heart was beating very irregularly, and on the third night after the accident he remained all night with him, as his life was in danger. Witness had seen him every day for five weeks. After the general concussion passed off witness found that there was symptoms of spinal concussion. Mrs. Brett sustained a painful fracture of the left arm. His account of £70 had since been paid. He would not be at all surprised if the plaintiff developed serious heart trouble in Cape Town.

Cross-examined by Mr. Burton: He had never seen Mr. Brett previous to the accident. He could not trace any valvular disease of the heart. There was no specific mention in his report made in January of any heart trouble.

Dr. Charles Kitchen, of Cape Town, stated that on the 16th November last he made a detailed examination of Mr. Brett. He found him suffering from pains in the back and legs, walking with difficulty, and from what he heard he concluded that the spinal concussion was due to an accident of some months previous. His heart too was very irregular, and there was evidence of valvular disease. It might be a long time before he recovered from the injury to the back, but he would probably never get over his heart trouble. In his opinion he would never be able to pursue a regular avocation again. Assuming there had been a latent heart complaint, the accident would precipitate the disease. Mrs. Brett was run down from time to time looking after her husband.

Cross-examined by Mr. Burton: The valvular part of the disease of the heart might not have been caused by the accident. It was quite possible that the plaintiff would be able, after a long rest, to take light work, but he would never be able to take a responsible position.

By the Court: All the symptoms he found in the heart might have existed before the accident.

Dr. Charles Elliott, of Cape Town, stated that in January he saw Mr. Brett. He noticed symptoms of spinal complaint, but the most serious part of his complaint was his heart trouble. A crisis like the accident would bring out any latent disease. In his opinion, Mr. Brett would always be an invalid. On May 3 he was in danger of death. In his opinion, the plaintiff would never be permanently cured.

James Harper, of R. M. Ross and Co., stated that he had known the plaintiffs for about twelve or thirteen years. He had lived near them, and never knew of them being laid up. Mr. Brett, although not robust, was certainly healthy, and was of a genial, jovial, and quiet disposition. Witness saw him before he left for Victoria West, and he looked very well; but on his return there was a decided change for the worse. He had never noticed any signs of laboured breathing when Mr. Brett was out walking.

Cross-examined by Mr. Burton: Since his attack of insomnia eight years ago he had never made any subsequent complaint.

Cecil White Harry, of Ohlsson's Cape Breweries, said that he had known the plaintiffs since October, 1902. He had been a constant visitor at the house, and had noticed Mr. Brett in good health. After the accident he looked a total wreck.

James M. Stephen, joint general managing director of the South African Milling Co., in whose employ the first plaintiff had been engaged as their chief accountant, stated that his regular salary was £500, and sometimes he got bonuses. Mr. Brett he would not call a delicate or a robust man; he was rather inclined to biliousness. When he returned from England about eight years ago he had recovered from his attack of insomnia. When Mr. Brett came to the office after the accident, it was merely to supervise for an hour or so. In his opinion, Mr. Brett would never be able to take up his position again, and his resignation was a matter of extreme regret by the directors.

Eliza Emma Legg deposed that she drove the cart. They approached the bridge carefully, and when about half over, the wheel fell over a ledge. The cart capsized, and witness and the other occupants were thrown out. Mr. Brett was found under the cart, and seemed seriously injured. There was no sign to let witness know that there was any excavation on the bridge.

Mr. Burton called no evidence for the defence.

Counsel having been heard in argument, His Lordship addressed the jury.

After a brief deliberation, the jury found for plaintiffs for £3,000 damages.

Judgment was entered accordingly, with costs.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

WIID V. WIID. { 1904.
{ May 10th.

This was an action brought by Hendrick Carl Moller Wiid, against his wife, Johanna Maria Wiid, for decree of divorce, custody of the children, and forfeiture of the benefits of community of marriage.

The declaration set out that the parties were married in community of property, at Rondebosch, in 1895. There were three children of the marriage, aged 7 years, 3 years, and 15 months respectively. Plaintiff claimed a decree of divorce on the ground of the defendant's adultery at various times during 1901-02-03.

Mr. Close was for the plaintiff, and the defendant was in default.

Wm. Thomas Birch, of the Colonial Office, produced the marriage register, showing that the parties were married on the 5th March, 1895, at Rondebosch.

Hendrick Wiid, plaintiff, stated that in June, 1902, he was on the railway construction at Piquetberg, and in November, 1902, he returned to Salt River, and found a man named Robert Wells living with his wife as a lodger. Up to that time she was a good wife, but she became very neglectful, and ultimately refused to occupy the same house with him. The children slept in Wells's room, and she made that as an excuse to visit the room. On the 17th January last he saw Wells come out of the defendant's bedroom under suspicious circumstances. Witness on the 26th January, was obliged to force the drawers open in Wells's room to get some papers, and the defendant took Wells's part, and asked the latter to admit his intimacy to witness. Witness then left the house, and subsequently the defendant sent the children to him. Wells remained in the house after witness left. The defendant said that she had sold some of the furniture to Wells. On the 26th March, the defendant admitted her misconduct with Wells and another man.

Frederick Smith stated that, in his opinion, the defendant was a woman of very low moral character, as she evidently thought nothing of admitting her offences to him. When she was living in separation from her husband he had seen

Wells go into her room, and remained there with the defendant for hours.

Decree of divorce granted, plaintiff to have custody of the children, and forfeiture of any benefits arising out of community of property, without any order as to costs.

HEYDENRYCH V. HOCTOR.

Promissory note—Principal and agent—Agent's authority to receive payment.

This was an action brought by Benjamin J. Heydenrych against Michael Hctor to recover £25 on a promissory note given by the defendant to the plaintiff in August, 1902, and due payable a month later.

The defendant in his plea admitted having received the £25, and signed a promissory note in plaintiff's favour for the same, but further stated that the money was paid by his attorneys through James Scott, to the plaintiff. Scott was the duly authorised agent of the plaintiff, and was entitled to receive the money.

Mr. Burton for the plaintiff; the defendant in person.

Michael Hctor, the defendant, stated that he had a witness in Court to prove that he had had transactions with the plaintiff, and paid through Scott. Scott took the cheque for £25, and went to the bank and handed witness £20, taking £5 back to the office. He could not say why his attorneys paid the £25 without getting the promissory note back.

Cross-examined by Mr. Burton: He subsequently told his attorneys to get the note back, and they told him it was right. When he got the letter from the plaintiff, he went again to his attorneys, who told him that everything had been settled.

A witness named Solomon stated that he had paid £40 back to the plaintiff through Mr. Scott.

Benjamin Heydenrych, the plaintiff, stated that Scott applied to him for a loan on behalf of Hctor. He had lent money through the agency of Scott before. He had received repayment through Scott, but that was not with his authority.

Buchanan, J., said that after the note became due, the defendant went to the attorneys and asked them to pay it. Had they been careful to get back the promissory note, there would have been no necessity for this case. It was a very hard case, as the defendant had paid his debt back. The plaintiff was entitled to judgment, but he would suggest to him to show some leniency in regard to interest, and he would also suggest to the defendant that he should put the matter before his attorneys, who did not act with the discretion one would expect.

RIX V. RIX.

This was an action brought by Gertrude Rix against her husband, Peter George Rix, for a decree of judicial separation on the ground of the defendant's cruelty, and ill-treatment.

The declaration set out that the parties were married in Cape Town on the 23rd March, 1892. There was no living issue of the marriage. Nine years ago the defendant adopted a male child of three weeks old. The parties lived happily together until the year 1902, but by reason of the defendant's familiarity with another woman, differences arose, and the defendant had on several occasions violently assaulted her. On the 10th February, 1903, it was agreed they should separate, the defendant paying £3 a month, and maintaining the child. The defendant had not paid any maintenance since September last. Plaintiff claimed a decree of judicial separation, division of the joint estate, termination of the community of marriage, and maintenance for herself and the boy.

Mr. Alexander appeared for the plaintiff, and the defendant appeared in person.

Wm. Thomas Birch produced the marriage register of Wm. Thomas Rix and Gertrude Crawley on March 23, 1892.

Gertrude Rix, plaintiff, stated that in 1900 she found it necessary to remonstrate with the defendant on account of his familiarity with another woman. The defendant had held her down in September, 1902, while the other woman gave her a thrashing. Subsequently, they had several quarrels on account of this woman, and on a few occasions she had to visit a doctor. In February of last year they agreed to live apart, the defendant agreeing to contribute £3 a month, and something to the support of the adopted boy; but at present he was some six months behind with his payments. The defendant had put an advertisement in the "Cape Times" that he would not be responsible for any debts contracted by witness, although that was altogether unnecessary. She would be satisfied now with £6 or £7 a month. The defendant made about £20 a month.

Cross-examined by the defendant, witness said it was not since she received letters in her maiden name in Johannesburg that the quarrelling started. It was not against the defendant's wish that the child was adopted. Witness refused to say what her mother was doing before the child was adopted. It was quite true that she grabbed a chair and a chopper when the woman Sarah Moses appeared on the scene.

Another witness, named Leo. Waterloo, was called to testify to the ill-treatment of the plaintiff by the defendant.

Buchanan, J., said that the parties had agreed, as far back as 1902, that £3 would be a fair amount

of maintenance for the plaintiff. There had been sufficient evidence to justify a decree of judicial separation, and that decree would be granted. The plaintiff asked for custody of the child, which was not a child of the marriage; but the Court could not make any order as to the maintenance of the child. As the parties agreed to £3 before the dispute came into Court, he thought that was a reasonable amount of maintenance. There would be a decree of judicial separation, with costs, defendant to pay plaintiff £3, the first payment to be paid at once, and subsequent payments to be made on the 10th of each succeeding month, with leave to either party to move to vary this order at any time.

JOSEPH V. NATHAN.

This was an action brought by Morris Joseph against David Nathan, for the recovery of £57 17s. 7d., being the balance of salary due to the plaintiff.

The declaration set out that about April, 1903, the defendant hired the services of the plaintiff as a shop assistant, at a monthly salary of £10 a month. Plaintiff duly served the defendant up to the 15th February, 1904, when the plaintiff was wrongfully and unlawfully dismissed by the defendant. His salary had been paid in small instalments, and allowing £12 2s. 5d. for goods and money received on account, there was a balance of £57 17s. 7d. due to the plaintiff. The plea admitted the formal allegations, but the defendant denied that he was duly served. After the date of the contract, and before the plaintiff's dismissal, he had dishonestly converted defendant's money to his own use. He denied any liability, but tendered £15 in full settlement.

Mr. Alexander appeared for the plaintiff, and Mr. Burton appeared for the defendant.

Morris Joseph said that he was employed as a shop assistant by the defendant. He joined the defendant for the second time in 1903 on a salary of £10 a month. He was allowed to take what he liked out of the shop, and to debit himself for the same. He did not get his salary regularly. No complaint was made about the stock when he transferred from Waterkant-street to Caledon-street. He had made continual complaints about his salary not being made up, but the plaintiff kept putting him off, as things were bad. An account was sent in for his salary on February 8, and the defendant entered all goods sold. Subsequently the defendant asked witness to make out an account, which on the 16th February amounted to £38 1s. 1d. The defendant said there was £104 short in the stock, and if witness did not take £15, he would get nothing. The defendant told witness to leave the

shop, but before he left he offered him £15. On one occasion he lent a young man 3s. 6d. out of the cash drawer, which was returned the same day.

Cross-examined by Mr. Burton: Witness was not short of money when he joined the defendant. It was untrue that he was paid regularly. Witness did not remember selling a suit which was unaccounted for in the cash register. The following day the defendant merely mentioned about the £104 short in the stock, when his services were dispensed with.

David Sharp stated he was with the defendant as manager in Waterkant-street. Witness had an arrangement with the defendant to take goods for himself at cost price. He got his November and December salary in February. He remembered on the 16th February the defendant offering the plaintiff £15, but he heard no charge of dishonesty.

Cross-examined by Mr. Burton: Nathan had told him that Joseph had not entered an article amounting to 3s. 6d. He understood from the defendant that if he wanted a couple of shillings he could take it from the drawer, but he seldom got the chance, as defendant cleared the drawer when there was a couple of pounds in it.

Mr. Alexander closed his case.

David Nathan said that the plaintiff was paid his salary regularly every month. He was dismissed in February because, after giving him one chance, he found 11s. short on February 13. Witness then found £100 short in the stock. On the Monday he asked a man named Singleton to go into the shop, and witness gave him £2 10s. to purchase a suit value 38s., and a hat worth 5s. 6d. Witness then went back to the shop, and plaintiff, in reply to a question, said that nothing had gone out, and that everything was quiet.

Cross-examined by Mr. Alexander: His books showed he had received £1,500 less than he paid out, but he met the difference from a private account. Witness admitted that he had mistakes in his cash entries, but he could not see how they affected the case.

By the Court: He always paid the salesmen their salary regularly.

Thomas Robert Singleton, formerly a brewery employee, at Woodstock, said he bought at the defendant's shop, from the plaintiff, three shirts, a singlet, and a hat. This was at the request of the defendant. On a subsequent occasion he received £2 10s. from the defendant at the corner of Harrington-street. He went by way of Primrose-street to the defendant's shop, and bought from the plaintiff a suit for 38s., and a hat for 8s. 6d. He was served by the plaintiff. He took charge of the goods (produced), and gave the defendant the change. Plaintiff came forward and examined the tickets on the suit of clothes. He said that the cost price marked on the ticket

was £1 2s. 6d. The suit would be sold at anything from 30s. to 35s. or 38s.

Cross-examined: He went to the shop in the evening after his work was done. He did not know at first that he was being used as a "trap."

Henry Wolfe, hairdresser, Caledon-street, said he was with the defendant when the latter gave money to the last witness. He saw Singleton go away, and return with a parcel, and give the defendant some change. He saw defendant afterwards go to the shop and open the cash sales book and the till.

Cross-examined: The plaintiff was not in the shop when the defendant made his investigation of the sales book and till.

Samuel Cohen, an employee of the defendant, spoke to there being 11s. short in the cash in the clothing department on one occasion. Defendant called the plaintiff, and dismissed him, offering first £10 and then £15. The plaintiff refused the money.

Cross-examined: Witness appealed to the defendant not to have the plaintiff arrested.

Mr. Burton closed his case.

Mr. Alexander asked for the cheque alleged to have been made out by the defendant in favour of the plaintiff.

Mr. Burton produced a cheque in favour of Friedlander and Du Toit.

Mr. Alexander said that this was not the correct cheque at all.

Mr. Alexander having been heard in argument, on the facts, without calling upon Mr. Burton

Buchanan, J., said that the plaintiff entered the service of the defendant on the 16th April, 1903, and was dismissed on the 15th February, 1904. The plaintiff brought this action to recover two sums of money as his wages from the 10th September to the date of dismissal, and £10 damages in lieu of notice. When he looked at the accounts he must say that there was a distinct conflict between the plaintiff and defendant on the matter of payments. The only documents produced for the plaintiff and the defendant respectively were the books which had been put into court. Both books were most unsatisfactory, but the more satisfactory of the two were certainly the defendant's books. On the question of credibility, he accepted the defendant's statement that he paid the defendant's wages up to the 10th January last. The defendant dismissed the plaintiff about the middle of February, he alleged, because he was justified by the dishonesty of the plaintiff in converting money to his own use. Plaintiff himself admitted that he had taken 3s. 6d. out of the till to lend to a friend, and that he had not put the money back until he was accused of selling a shirt for 3s. 6d., and not having entered the sale in the books. Subsequently, in February the defendant sent a man to the shop to buy certain goods,

and on that he returned to the shop, and it was clear from the books that these goods were never entered in the books. He thought the books corroborated the defendant's statement, and that he had good and just grounds for dismissing the plaintiff. The defendant had tendered £10 to the plaintiff in respect of the arrears of wages for one month, and also £5 for the portion of another month, during which the plaintiff had been employed, which more than covered the wages that the plaintiff was entitled to. The defendant was still willing, and he tendered £15 wages, and judgment would be given for the plaintiff for that amount, but the plaintiff must pay the costs of the action.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

Ex parte AURET.

1904.
May 11th.

Mr. J. E. R. de Villiers moved as a matter of urgency, for an interdict restraining one Geo. Stanley Smith from withdrawing or dealing with a sum of £560 now deposited in the Standard Bank, Muizenberg, also to restrain the manager of the said bank from paying out such money. The petition was to the effect that in November, 1903, the petitioner, W. F. Auret, opened a boarding-house at Muizenberg, and installed one, Mr. G. S. Smith there as manager. The said G. S. Smith was a stepson of petitioner's wife, and the object of placing him in the boarding-house was to afford him a fair start in life. The arrangement was that Smith was to share equally in the profits. Smith had, however, disappeared since Friday, May 6. He had left without making proper provision for the carrying on of the boarding-house. The petitioner had now taken charge of the house, and there was nothing to warrant the conclusion that Smith had done anything wrong during the time he was managing. Several bills had since come in, but could not be paid, as, although there was £560 in the Standard Bank, Muizenberg, it was in the name of Smith. The petitioner was wishful to pay the liabilities off, but was unable to do so without an order from the Court. The cheque-book appeared to have been taken away by Smith, and if he was al-

lowed to draw cheques, petitioner would suffer. Therefore petitioner prayed for an interdict restraining Smith from drawing, and the manager of the bank from paying any moneys, and for an order authorising petitioner to pay all debts up to the end of April last.

The Court granted a rule *nisi*, calling upon Smith to show cause why the prayer of the petition should not be granted, rule to be returnable on June 2, and in the meantime to operate as an interdict restraining respondent from drawing, and the bank from paying the said money, rule to be served personally if possible, failing which one publication in the "Government Gazette" and "Wynberg Times."

LIQUIDATOR OF "YE MECCA" 1904.
CAFE V. WEBNER. May 11th.

Company—Winding up as insolvent—Liability of shareholders, past and present—Act 25 of 1892, Sec. 97.

One T. had entered into a contract on behalf of a certain joint stock company with the defendant for the purchase of defendant's business, for which it was agreed that defendant should receive £100 in cash and 100 fully paid-up shares in the company. This payment was referred to in the duly registered Articles of Association of the Company, but the contract for the issue of these shares to the defendant was neither reduced to writing nor registered. Thereafter the defendant disposed of 50 of his shares. Subsequently the Company became insolvent, and the trustee now sought to hold the defendant liable for the full value of the 100 shares originally issued to him.

Held, that as there was no evidence that the then holders of the 50 shares he had disposed of were not solvent, he could not be held liable as a past shareholder in respect of those shares.

Held further, that as he had neither paid the full value in cash for the 50 shares still held by him, nor had these registered in the manner provided by Sec. 97 of Act 25 of 1892,

he was liable as a contributory in respect of these.

This was an action brought by the liquidator of the Mecca Cafe, against Isidore F. Webner, to recover £100, the value of 100 shares in Ye Mecca Cafe Co. (Ltd.). It was alleged in the plaintiff's declaration that when Ye Mecca Cafe Co. was formed, an agreement was entered into between one Tuck, on behalf of the company, and the defendant, whereby the latter was to receive 100 £1 shares in the company in consideration of his transferring to the company his interest in the lease of the rooms in the Savings Bank Chambers, St. George's-street, Cape Town. Defendant, in accordance with this agreement, received the scrip for the said shares in April, 1903. For these no payment in cash or otherwise had been made to the company. Fifty of these shares had been transferred to one Tuck, who subsequently became insolvent. There had been no registration of the contract between "Ye Mecca" Co. and defendant. There was a large deficiency in the company in liquidation, and plaintiff claimed: (a) That it be declared that the 100 shares must be deemed to have been issued subject to the payment of the whole amount thereof (£100); (b) that the defendant be placed on the list of contributories in respect of the fifty shares transferred to Tuck, plaintiff tendering to defendant to cede to him all his rights against Tuck's insolvent estate.

In his plea the defendant said that the contract in respect of which the shares were issued was specially referred to in the memorandum of association of the company, which memorandum was duly registered in the office of the Registrar of Deeds, and was a sufficient compliance with the terms of section 97 of Act 25 of 1892. As a further plea the defendant said that he accepted the shares as fully paid up shares on the faith of the share certificates issued by the directors of the company, and contended that the plaintiff was estopped in law by the terms of the certificates from claiming that the shares had not been fully paid up. Defendant further stated that the shares transferred to Tuck were afterwards transferred by the latter to other persons.

In his replication, the plaintiff admitted that in the Memorandum of Association it was stated that one of the objects of the company was to purchase and take over the lessee's interest in the lease, in terms of the contract entered into between defendant and Tuck, but contended that the nature of the consideration was not stated in the memorandum, and that the reference as aforesaid was not sufficient in law to satisfy the requirements of the 97th section of

the Act. Plaintiff denied that the fact that the share certificates issued stated that the shares were fully paid up was any answer to this claim.

Mr. Searle, K.C. (with him Mr. Close), for plaintiff; Mr. Burton for defendant.

Mr. Searle called

Donald Tuck, who said he entered into the agreement with Webner in 1903. Witness was managing director of the company. It was agreed that witness was to divide with Webner the shares and money that Webner might obtain for his interest. Witness received £50 and 50 of the shares allotted to Webner. He (witness) was instrumental in getting out the articles of association. The contract was not registered. In May, 1903, witness made over 25 shares to Hart and Neave, who took the shares on the understanding that they were full value. Witness, in one case, paid the greater part of the amount himself.

(Cross-examined by Mr. Burton: Witness believed the shares were given to Hart, while Neave paid £18 15s., witness paying the balance in order to try to get in more shares. The defendant got no cash. Witness received his £50; defendant did not get his £50, because there were not sufficient funds. Witness and his clerk omitted to register the contract. Webner was to have received £100 and 100 shares in consideration of his transferring the lease of the buildings.

Mr. Burton said he could not dispute defendant's liability as to the 50 shares he still held, but as regarded the other 50, these had been transferred to persons who must be presumed to be solvent, and who could therefore be proceeded against.

Counsel were then heard in argument.

Buchanan, J.: This matter raises a question of considerable importance, and if there was any doubt in my mind as to what the judgment of the Court should be. I would take time to consider it; but it seems to me the Act is clear on the subject. The facts are that in February, 1903, one Tuck and the defendant entered into a contract for the purchase of a certain business belonging to the defendant, with the object of floating the business into a joint stock company. The terms of this contract between the two, as far as they are relevant to this case, were that the seller, the defendant, was to receive £100 in cash and 100 fully-paid-up shares in the company about to be floated. This fact was advertised in the prospectus, and was not concealed in any way, and there is no question of want of bona fides in the transaction on anybody's part. The articles of association of the company stated that the object of the company was to purchase and take over the business of the defendant, in terms of a contract entered into be-

tween the defendant and Tuck on behalf of the company. The articles of association were duly registered. The defendant received his 100 shares, but had parted with 50 of them to Tuck, and he is still the registered owner of 50. The company having been placed in liquidation, and there being a considerable deficiency, the liquidator wishes to place the defendant on the list of contributories for the amount of the 100 shares which were issued to him without payment thereon of the face value, in consequence of the non-compliance with the 97th section of the Company's Act. The section says that every share in every company shall be deemed and taken to be issued and to be held, subject to the payment of the whole amount thereof in cash, unless the same has been otherwise determined by contract in writing and filed with the Registrar at or before the issue of such shares. The words "unless the same" have been interpreted by the English Courts on a similar section in the English Act to mean, unless the terms of payment otherwise have been determined by a contract made in writing. Now these shares, it is admitted, were not issued on account of payment in cash, but were held under a contract which determined the terms of payment otherwise, viz., that they were issued as the consideration for the goodwill or purchase price of the business. By this section, therefore, not only ought the articles of association to have been registered, but also the contract between the defendant and the company, under which these shares were issued, without being paid for in cash. The contract was not registered, and, consequently, after hearing the authorities, I have no doubt that the defendant is liable to be placed on the list of contributories for the amount unpaid on the shares held by him. But 50 of the shares which were issued to the defendant were subsequently transferred and are not now held by him. They were first transferred by him to Tuck, who was fully acquainted with the contract, and Tuck says they were given away by him as, he says, a bait to induce other persons to take shares in the company. Now the principle of liquidation is this: when persons are called upon to contribute, the liquidator takes the list of the shareholders on the register, and applies to them in the first instance. Section 96 of this Act makes past shareholders liable in certain eventualities. A past shareholder is not to be made a contributor under a liquidation unless it appears that the existing members are unable to satisfy the liabilities. Now there is nothing to show that the existing shareholders are unable to do so, that they are not liable upon these shares. It may well be, had the evidence been more complete, that the Court could have dealt

with this question now, but the evidence is not complete. We have nothing beyond Mr. Tuck's statement. We do not know the terms upon which these shares are now held; whether they were received as representing fully-paid-up shares, or whether any value was paid for them by the present holders. Therefore, I think judgment can only be given for the plaintiff on the 50 shares in the defendant's name, and absolution from the instance must be given as to the 50 shares transferred away, and not now held by the defendant. The judgment of the Court will be for £50, with costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Herold and Gie.]

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

COHEN V. CARN.

{ 1904.
" May 11th.
" 16th.

Witness—Privilege—Defamation.

A witness is civilly liable for any defamatory statements he may volunteer in the course of his evidence in any judicial proceeding respecting the character of any person not before the Court if such statements are made falsely, maliciously and without reasonable or probable cause.

Diepnaar v. Haumann (Buch. 1878, 135) followed.

This was an action in which Mr. and Mrs. Cohen, at present of Johannesburg, sued Israel Carn, a well-known member of Tattersall's, for £5,000 damages, by reason of certain defamatory statements made by the defendant in respect of Mrs. Cohen.

The declaration set out that about October and November, 1903, an action was pending in the Witwatersrand High Court, Transvaal, between Miriam Cohen, plaintiffs' daughter, and one David Langleben, of Johannesburg, in which she claimed damages for breach of promise of marriage. The said High Court granted a commission to take evidence on oath at Cape Town, and at that commission the defendant stated irrelevantly that Miriam Cohen's mother associated with men, including one Samuel Pross, who had been convicted of crime, and had served sentences on the Breakwater, and by such a statement he contrived to injure the plaintiff in her good name,

fame, and character. Further in answer to the question: "Where did you see Miss Cohen (meaning the then plaintiff, Miriam Cohen, aforesaid) speaking to Samuel Pross?" he answered that Mr. Pross had committed adultery with plaintiff's mother (meaning the aforesaid plaintiff, Clara Cohen, the mother of the then plaintiff, Miriam Cohen). Subsequently, on the 10th November, 1903, in Plein-street, and in the presence of witnesses, the defendant, in answer to a question, said that what he had said before the Commission was true scores of times, and that he would prove it any time they liked. Plaintiff claimed \$5,000 damages.

The defendant, in his plea, admitted the words referred to in evidence on oath, but stated that he had probable cause for believing them at the time to be true, and in making use of the words he was not actuated by any malice. He denied that he had repeated the defamatory statement on November 10th in Plein-street.

Counsel then read voluminous evidence taken on commission in connection with the first action for breach of promise.

[Mr. W. P. Buchanan (for the plaintiffs). Mr. Graham, K.C. (with him Mr. D. Buchanan) for defendants.]

Clara Cohen, the plaintiff, denied having had any intimacy with the man Pross. She left Bloemfontein because she was afraid of enteric fever. Her husband was not deported from Bloemfontein. She never allowed gambling in her house. Since the defamation reached Johannesburg, her friends refused to speak to her.

Cross-examined by Mr. Buchanan: There was no gambling going on in her house. She had not seen Pross since his conviction, and never once had she seen him. The allegations against her daughter were absolutely untrue.

Morris Cohen, plaintiff's husband, stated that he had been in this Colony since 1899. He was promoted to Johannesburg in the same employ as he occupied in Cape Town. At the sitting of the Commission he heard the evidence of Mr. Carn, whose allusion to his late father was so insulting that he had to appeal to the Commissioner. That was before he gave his evidence. Carn said that he was not so clever as witness's father as to get up a case in White-chapel Court in five minutes. He said that any time that witness wanted to have a divorce that he (Carn) would be a witness. The statement simply dazed him. About a week after he had given evidence, the defendant said that witness's wife had committed adultery scores of times and that he would prove it. At that time an apology had been published in Cape Town and Johannesburg papers, and £250 damages paid. His wife was in Johannesburg at the time he met the defendant, and the

news travelled to Johannesburg within a few days.

Cross-examined by Mr. Graham: The other witnesses did not apologise. The whole time he had been here he was in the same employ. When he was in Bloemfontein he was in a different employ. He knew a man named Stracey, and he denied that he had kept a gambling house. Solo whist was the only game he understood, and it was absolutely untrue that he kept a "bank." The defendant positively spoke to him in Plein-street, and he was certain that Carn offered to give him a card, although he did not know that the defendant ever had a card. He had never got into trouble in England, nor was he ever a private detective. Mr. Stracey knew him in England, and he never had a man in his employ named Humberstone. It was untrue that he was convicted with Humberstone in England in October, 1897, for theft of goods from Salmon and Gluckstein. The record which counsel read did not refer to him. The same case had been put to him at the Rand High Court. He had a brother-in-law in Johannesburg with two names, but he was not certain whether his name was Prince or Vincent. He would be surprised to know that Prince or Vincent brought the record which counsel read to South Africa. Mr. Vincent knew him in 1897, and would be in a position to say whether he was the party convicted in England.

Re-examined by Mr. Buchanan: The conviction against Morris Cohen did not refer to him.

David Nimino, attorney, of Johannesburg, stated that at the commission the defendant's demeanour was very extraordinary. Before the evidence commenced Carn shouted out to Cohen, "I'm not like your father, I can't get up evidence in five minutes," and Mr. Close had to remind him that he was in a court of law. The defendant made use of the irrelevant answer imputed to him at the commission. The news of the slander had arrived in Johannesburg within a few days.

Cross-examined by Mr. Graham: He did not know whether the husband had telegraphed the slander to his wife. Mr. and Mrs. Cohen sat right through the case, and listened to the disgusting evidence. When the settlement was arrived at he was not in communication with the defendant's attorneys. There had been a lot of mud slung, which had broken down under the cross-examination of witnesses. There had been an abundance of evidence about Mr. and Mrs. Cohen's character before the defamatory statement was made.

Peter Hulse, of Johannesburg, stated that in 1901 he was lodging with the plaintiff in Plein-street, Cape Town. He had seen Pross there three or four times before Mr. Cohen went to England. When Cohen left for England, Pross

ceased to visit the house. During the time that witness was there it was not a gambling hell; with the exception of a game of solo whist or nap there was no other game. It was a deliberate falsehood that anyone could come into the house. He remembered meeting the defendant on election day in Cape Town, when he said that what he said at the Commission was quite true, and he added "scores of time during the period Cohen was in England." Mr. Cohen looked very agitated after Carn reiterated his defamation.

Cross-examined by Mr. Graham: He had heard about the commission, although he did not come down as a witness. It was untrue that the Magistrate reprimanded him when he was in the box giving evidence for Cohen in an assault case. His limit at whist was sixpence; he was not a gambler. He was not one of a party that walked deliberately over to Carn to hear what was going on. He did not know Cohen before he came to South Africa.

Re-examined by Mr. Buchanan: He would travel twice as far as from Johannesburg to Cape Town to tell the circumstances of the case. The defamation was the topic of conversation among his co-religionists.

Dr. D. B. Hewitt stated that he had Mrs. Cohen under his care for about five weeks, when she was suffering from mental worry.

Bert Davis, in the same firm as Cohen, corroborated the other witnesses as to what transpired in Plein-street.

Samuel Pross denied any intimacy with Mrs. Cohen. He had never been seen with her later than eleven o'clock at night.

Cross-examined by Mr. Graham: He kept a little establishment known as the "Cosy Club," in Harrington-street, which was a gambling hell. Mrs. Cohen never visited him in Caledon-street. He would deny that he ever told Carn that he was on intimate terms with Mrs. Cohen. It was not a fact that he admitted to Mr. Moore, the attorney, that he had told Carn that he had committed adultery with Mrs. Cohen. He himself had been convicted for trying to defeat the ends of justice by bribing a witness. Mr. Moore never put a question to him at all about Mrs. Cohen when Carn brought him round to the office. Cohen asked him to go to Mr. Trollip's office to make a statement. He gambled for a living at that time.

[Hopley, J.: What are the hours of business at the "Cosy Club"?]

Generally in the afternoon.

Further cross-examined: Witness stated that he did not go out to collect clients for the Cosy Club. There was no limit to the boys ages that he picked up. He attempted to bribe a witness to leave town. More or less, he acted as commission agent to back horses for gentlemen.

Re-examined by Mr. Buchanan: The bribery was in connection with the prosecution of his brother. At the time he ran the Cosy Club there was no law about gambling. Carn often visited the club, and on one occasion he drew the faro bank. He was positive that he never told Mr. Moore anything about intimacy with Mrs. Cohen.

Blanche Burton stated that she lived with Mr. and Mrs. Cohen, in Plein-street. She had never seen Mr. Pross at the house. There was no gambling going on in the house beyond quiet games of cards that might be played in any family. The place was not kept as a gambling saloon.

James Purton stated he was living in the same house as Mrs. Cohen in Plein-street. He did not see Mr. Pross visit the house. There was no gambling going on in the Plein-street house.

Miriam Cohen, daughter of the plaintiffs, stated that she was the plaintiff in the breach of promise case against Langleben. She was present at the commission. Carn said everything that was untrue. Sometimes Pross saw her mother and herself home from the music-hall. After Pross had the row with Miss Greenberg, he never visited the house. The allegations by Barrington were untrue. Witness corroborated the other witnesses as to what Carn said in Plein-street. She was eighteen years of age on the 17th March last.

Cross-examined by Mr. Graham: There were all sorts of untruthful charges made about her at the commission. They said such terrible things. A little professional jealousy was the cause of the row she had with another actress, but it did not end in broken furniture, windows smashed, and the police called in. The New Pavilion was a better class of institution than the Pekin. She did not sit and gamble with young men at a table. Carn's statements were absolutely untrue.

By Hopley, J.: She had never been to the hall when it was called the Pekin. Previous to the New Pavilion opening, she had been engaged at the Masonic Hall. She knew nothing about anything that might have happened between her mother and Pross during the time she was in England.

Mr. Buchanan closed his case.

Edward John Moore, attorney, swore that when Mr. Carn brought the letter of demand claiming £5,000 damages, Pross admitted positively to him that he had told Carn that he had committed adultery with Mrs. Cohen.

[Hopley, J.: Pross might have been lying.]

He might, my lord.

Cross-examined by Mr. Buchanan: Carn, he believed, told him that Pross had been convicted. He was acting for a client, and he had nothing to do with the grave charge against the lady. He

did not think there could be two different views of the interview; he was sure his was the correct one. He did not suggest that inquiries should be made before he put the charge in writing.

Mr. Graham asked leave to recall Morris Cohen, as some fresh evidence had been brought to his mind since the last hearing.

His Lordship allowed the witness to be recalled.

Morris Cohen, recalled, and cross-examined by Mr. Graham, emphatically denied that he had been convicted in England while Vincent was in court. Last year he was charged with the theft of watches, but the Crown withdrew the charge.

Re-examined by Mr. Buchanan: There was an action pending by him against Vincent for £92.

Edward Vincent stated that he was in court when Cohen was convicted.

Mr. Buchanan objected to the evidence.

Hopley, J., said that it was not strictly evidence, and Mr. Graham said, in deference to the ruling, he would not ask Vincent any further questions.

John Arthur Stracey, clerk to Carn, was called, and was about to give evidence as to the alleged conviction of Cohen.

Mr. Buchanan objected.

Hopley, J., said that it was utterly irrelevant to the present case.

Evidence was then called for the defence.

Israel Carn, the defendant, stated that he was a turf commission agent. Pross stated to him during the commission that he had only just come out of gaol. Pross asked him to state that he had intimacy with Mrs. Cohen, and when witness made the statement he believed it to be true. He had been to the gambling house in St. John-street, where faro was played at high stakes. He never made any statement to the witnesses in Plein-street. He never had a private card printed.

Witness: This is the only card, my Lord.

[Hopley, J.: What is on it?]

Witness: The Manchester Cup, my Lord.

Continuing, witness stated that what Mr. Moore said about the interview was absolutely correct.

Cross-examined by Mr. Buchanan: He had been in South Africa eight years. He was not charged with robbery at Pretoria. The complainant in that case said that witness had tried to steal his purse, but in the court the complainant said that he had made a mistake.

Mr. Buchanan: Was there another little incident on the Johannesburg race-course?

Witness: No.

Continuing, under cross-examination, witness said that he never had been

under lock and key in his life. It was true that he had kept a betting shop in St. George's-street. He never knew that Langleben was engaged to Miss Cohen when his daughter supplanted her in his affections.

Further cross-examined: He did not give any worse evidence at the Commission than anyone else. Langleben had often seen Miss Cohen speak to women of ill-fame at the Pekin.

He never said that Sheila Cohen worked up a case at the White-chapel County Court. He did not marshal the witness at the commission; in fact, all the witnesses took a couple of hours each, so that they did not want much marshalling. It was only when the newspaper came out that he knew there had been a settlement during the commission. He had never seen Langleben since.

[Hopley, J.: You did not think anything the worse of the Cohens for keeping a betting-shop?]

Well, I did not like to see betting in front of the daughter.

Further cross-examined: Miss Cohen used to speak nicely to the young men, and entice them to bet. Pross came off the Breakwater in October, and came to witness, who had a lot of money for him. If Pross said that he rode Galtee More in the Derby, he would not believe that. Nor would he believe him if he said he had an interest in Galtee More. After Pross told him of the intimacy with Mrs. Cohen, and he had seen them together late at night, he believed Pross's statement to be true. He did not give the irrelevant answer at the commission with any malice.

[Hopley, J.: Where did you see Miss Cohen speak to Pross?]

At the Pekin.

[Hopley, J.: Why didn't you give that answer at the commission?]

I gave the answer without malice.

Further cross-examined: He was not glad to seize upon the statement; he put two and two together, and thought that it might be true. He thought that Pross had schemed with the other man to extract money from him.

Mr. Buchanan: He tried to bribe a witness to get his poor brother off?

Witness: You may call him poor. He has been longer under the Government hands than I have.

Mr. Buchanan: Oh, then, you have been under the Government hands?

Witness: I have never been under the Government hands.

Mr. Buchanan: Oh, be a little candid, Mr. Carn; you know pretty well you have been under the Government hands.

Witness: I don't think I was ever under the Government hands. They got plenty of money off me.

Further cross-examined: Holz might have been a professional witness, but he had never been up for perjury or

libel. All the witnesses about the Plein-street affair were telling lies.

Mr. Buchanan: They all agree.

How long have they been rehearsed?

Continuing, witness said that all plaintiff's witnesses were in league to blackmail him to get money. He never repeated the statement about Mrs. Cohen in Plein-street.

[Hopley, J.: You believe Hols and Davis will share in the spoil?]

I believe everyone of them will share in it.

Continuing, witness said that when Pross told him about Mrs. Cohen, he made no further inquiries. He did not know what to think of Pross, as he had kept £200 for him while he was on the Breakwater. It might be that he also was standing in on the result of the case. He had made a good deal of money out of speculation.

Re-examined by Mr. Graham: He went to St. John's-street to take a boy named Samuel Abrahams out of the house.

Ralph Brown said that at one time he lived with the Cohens in St. John-street. When he came home late at night, he saw gambling going on in the house.

Cross-examined by Mr. Buchanan: Cohen had collected ticket money on one or two occasions for him. Witness lost a case at Durban through blackmail.

Joseph de Vries stated that he was a commission agent, and a member of Tattersall's. He had played faro at Cohen's house.

Mr. Buchanan (for plaintiff.) The defendant while being examined by the Commissioner in the former case voluntarily made a most defamatory statement regarding Mrs. Cohen. He did not make it in answer to any question put to him by the Commissioner or by Counsel; had he done that he would have been protected, but he volunteered the statement. Such a statement is not privileged. Even Counsel are not privileged unless such accusations or innuendos they make in some way or other bear on the case in hand. See *Pollock on Torts*. (p. 251, 5th edit.) Colonial law hardly goes as far as English law in protecting statements made on oath. See *Norden v. Oppenheim* (3 Menz. 42), and *Diepenaar v. Hauman* (3 Roscoe, 41). Defendant repeated the slander in Plein-street.

Mr. Graham, K.C. (for defendant): The defendant honestly believed the truth of what he said, and he made the statement on oath in the course of a judicial proceeding, such a statement is not actionable, *R. v. Hilliard* (1 L.T.R.); *Odgers* (p. 210). In England not a single reported case can be found of a person being convicted of defamation for any statement made by him in the course of judicial proceedings. The cases of *Diepenaar v. Hauman* (3 Roscoe, 41), and *Norden v.*

Oppenheim (3 Menz., 42), are quite in my favour, and show how similar our law is to the English in this respect. The onus of showing that a witness makes a prejudicial statement *mala fide* is upon the plaintiff, and in the present case the plaintiff has not discharged that onus.

As to the words spoken by the defendant in Plein-street, the plaintiff had himself to blame, for they were spoken in answer to a question asked by himself.

Mr. Buchanan was not called upon in reply.

Hopley, J.: A great deal has been said in argument about the law and the protection afforded to a witness when giving his evidence, and cases have been quoted specially from the English Courts to show how far he is protected from civil liability for anything defamatory which he may say in the course of his evidence. The law of England seems to be more favourable to a witness than the law of this Colony, as was pointed out in the judgment of the Chief Justice in the case of *Diepenaar v. Hauman* in 1878. In the course of that judgment it was pointed out that in this Colony a witness may be proceeded against for statements made in a Court of Justice in the course of his evidence in a judicial proceeding, in case it is proved that the statements he made were false, malicious, and made without probable cause.

In the present inquiry we have to deal with the following circumstances. The plaintiff's daughter had in 1903 brought an action for breach of promise of marriage against one Langleben, who it is alleged, and admitted, had at that time become engaged to marry Miss Cohen, the present plaintiff's daughter. The breach of promise case was pending in the High Court at Johannesburg, which Court granted a commission to examine witnesses in Cape Town. In defending the action, Langleben, by his pleadings, imputed to Miss Cohen looseness and impropriety of behaviour, and among other things it was alleged that she was in the habit of associating with men who had been convicts on the Breakwater. One of such men was a man called Pross, and the present defendant who was called as a witness before the Commissioner in Cape Town, on being asked "Where did you see Miss Cohen speaking to Pross?" made the reply, "Pross had connection" (meaning carnal connection) "with her mother." It is clear that this was a wholly irrelevant answer. It did not reply to the question put, and it attacked the character of a person not before the Court, in any way save that she was related to the then plaintiff. It is claimed for the defendant in this action that he was privileged in making that statement, as he be-

lieved, or had reason to believe, that it was true, and that it cannot, therefore, be held to have been made maliciously or without probable cause, and it therefore becomes your duty to examine that answer with the facts and information on which it was founded as well as the probable motives which prompted it. In *Diepenaar v. Havemann* it is stated that "the privilege of a witness is supported on the express ground that he is compelled to give evidence; and to extend that privilege to cases in which a person volunteers to go out of his way to make a certain charge, I think would be very dangerous indeed;" and in *Norden v. Oppenheim* it is stated that a witness if asked must state not only what he knows but what he believes, and what are the grounds of his belief.

I take that to mean that a witness giving an honest reply to any question put to him is absolutely protected; but it would be monstrous to hold that a witness could seize the opportunity of being in the witness-box to say anything he liked about someone else however defamatory it might be, and without being questioned on the point. In the present case the statement made by the defendant was quite voluntary and highly defamatory. Was it false, malicious, and without probable cause? As to its falsity no attempt had been made to prove that there had been improper relations between Pross and the plaintiff. Pross had been introduced to plaintiff by her own husband, and there was evidence that he used frequently to escort her and her daughter to their home from the musical-hall in which Miss Cohen was one of the performers, and to which her mother used to accompany her; but no serious attempt has been made in this action to substantiate the charge, and both plaintiff and Pross, who had been called as a witness, denied it. Was there probable cause at the time he made the statement in the defendant's mind? He swears, and there is some evidence to support him, that Pross had told him he had had connection with Mrs. Cohen. Probably Pross had told him so—that seems likely in view of Mr. Moore's evidence—but ought a loose statement of that sort, made by a man of Pross's character, to be without corroboration, a ground for making such a charge in such a manner? Then was there malice? It seemed clear that at the time he made the statement defendant was interested in shielding his prospective son-in-law Langleben from a judgment for heavy damages, and that might be a sufficient inducement to a man of his class to volunteer such a statement, as it would through her mother cast discredit on Miss Cohen, the then plaintiff. Moreover if the words were used it does not lie on the plaintiff to prove

express malice, but the defendant must disprove it, the use of the words raising the presumption of malice, especially when the circumstances and the manner of the use of the words are taken into consideration. If you come to the conclusion that the defendant did not honestly, when giving the answer he did, speak his mind as a witness, but that he used the words to further his private ends or to indulge in a personal spite you will be justified in finding for the plaintiff.

There is also the further slander claimed for in this action when the defendant in answer to a question put by the plaintiff's husband in a public street, and before her daughter and three witnesses, is alleged to have repeated the charge in an aggravated form. This he entirely denies, and it is a matter of evidence which you will weigh. Two of the three witnesses besides the plaintiff's husband and daughter who were present have been called, and they seem to have no interest in the case, and to have given their evidence fairly.

[His Lordship here dealt with the evidence and the circumstances of the parties as disclosed by the evidence.]

All the circumstances of the parties should be taken into consideration by you, and the manner in which they have as far as you can judge behaved themselves, and the question of the damage sustained by the plaintiff, if you find for her is a matter in your discretion.

The jury returned a verdict for the plaintiff for £5 damages.

Judgment was entered for that amount, with costs, including the costs of the witnesses.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorneys: Moore and Son.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

{ 1904.
{ May 13th.

Mr. Van Zyl moved for the admission of Stanley Yorke de Villiers as an attorney and notary.

Applications granted, and oaths administered.

Mr. W. P. Buchanan moved for the admission of James Hall Evans as an attorney.

Applications granted, oaths to be taken before the R.M. of Alice.

APPEALS.

REX V. ANIM—REX V. JESSUB.

This was an appeal from judgments of the High Court of Southern Rhodesia. The accused had been charged before the Magistrate of the district of Salisbury with the crime of contravening section 16 of Ordinance No. 7, of 1901, in that on or about the 1st December, 1903, at or near Salisbury they did wrongfully and unlawfully offer for sale at the Market Square by private sale or by auction certain cattle infected with scab. The defendant Jessub was charged with offering 100 goats so infected, and he was fined £10, or in default one month's imprisonment. The other defendant was charged with offering a number of sheep so infected, and he was similarly dealt with. An appeal was then noted to the High Court of Southern Rhodesia on the ground that the convictions were not supported by the evidence, and were contrary to law. It was contended that there was no evidence that the said stock were offered for sale, and that they could not be considered to have been offered for sale seeing that the auctioneer had not asked for bids. The appeal was dismissed and leave was granted to appeal to the Supreme Court. The presiding Judge in his reasons said that the Magistrate seemed to have disbelieved that part of Bernstein's evidence in which he said that the sheep were not to be put up to auction until the inspector had seen them. Mr. Grimmer argued the appeal on this assumption and rested his appeal solely on the ground that, until the auctioneer called for bids, there was no offering for sale. He said that only the opportune arrival of the cattle inspector prevented them from being sold, and he considered that bringing cattle to the market for the purpose of being sold was sufficient to constitute an offence under the Ordinance.

Mr. W. P. Buchanan for the applicants. Mr. Pyemont for the Attorney General of Southern Rhodesia.

Mr. Buchanan (for appellants). As is usual in criminal appeals, the Magistrate gives no reasons, but I cannot understand how the Magistrate could have accepted one part of Bernstein's evidence and rejected the other part. It is not criminal to be in possession of scabby sheep, but it is criminal to attempt to send them by train, or not to give notice of infection. See sec. 28, sub-sec. (2) of the Ordinance (p. 474); also sections 30 and 31. I submit that sec. 15 refers only

to an offer for sale by public auction.

[De Villiers, C.J.: It refers to all offers of sale.]

I submit not.

[De Villiers, C.J.: Does the inspector say that he makes it a practice to go to market?]

He does not say so in so many words, but the evidence of Bernstein shows that the inspector usually attended the market. There is no evidence that the sale of those sheep was entrusted to the auctioneer. Had that been the case, I can argue only that the auctioneer was agent of the vendor. In case of an auction, nothing is offered for sale until it is put up. The offering for sale by auction does not mean entrusting the property to the auctioneer. The offence is in offering for sale. In such a case as this the law must be strictly interpreted. See *Queen v. Töppen and Another* (1 Ap. 471), and *Queen v. Bussow* (8 Juta, 174). The inspector says that he refused permission to sell. If he refused he must have been asked, and if he was asked, that fact in itself shows that there was no intention to sell without his leave. Then the section deals with selling, both by private sale and also by public auction. I submit that the appeal should be upheld with costs.

Mr. Pyemont argued that the presumption was that there were magistrates' reasons on which the learned judge based his judgment. The truth of that portion of Bernstein's evidence which the learned judge accepted was borne out by the subsequent action of the accused. The term "offer" was a general term and had subsequently been specialised. Counsel proceeded on the technicalities of the word "offer" from a standard dictionary and contended the word was put in the Ordinance to have a wide field to catch in the net every act which tended to the spread of the disease, otherwise the word "expose" would have been inserted as in the English Act. In support of his contention that the word was not used in any technical way, counsel referred to the different sections of the Ordinance in which he submitted everything tended towards isolation. When a person was aware of disease among his sheep he was bound not only to notify the authorities, but his nearest land owners.

De Villiers, C.J., was proceeding to give judgment, stating that he did not see on what principle the Court could altogether reject the evidence of the chief witness for the prosecution, when

Mr. Pyemont pointed out to the Court that Bernstein was a witness for the defence in one case.

[De Villiers, C.J.: That is not on record.]

If your lordship has any doubt on the point, it might be advisable to telegraph to Rhodesia.

De Villiers, C.J., said he was not sure whether that would make any difference

in the final decision of the Court, but it might be as well now to refer the record back in order to ascertain whether the auctioneer gave evidence for the prosecution or not. The Court would give judgment after receiving the record back.

SALISBURY BUILDING CO. § 1904.
V. BRITISH S.A. CO. (May 13th.

Beneficial occupation—Destruction of premises—Act 8 of 1879, Sec. 7.

Act 8 of 1879, Sec. 7, does not apply to cases in which buildings have been destroyed by fire or other unavoidable misfortune, and hence in such cases a tenant is liable for the rent of such buildings only in respect of the time during which he has had beneficial occupation.

This was an appeal against a decision of the High Court of Southern Rhodesia sitting at Salisbury in a special case, which came before the Court in March last.

From the evidence in the Court below it appeared that on the 27th November, 1902, plaintiffs (now appellants) and defendants entered into an agreement by which the plaintiffs let certain premises to the defendants in 1902. The premises, including part occupied by defendants, were destroyed by fire in September, 1903. Plaintiffs took steps for the re-erection of the building in order that the defendants might occupy the same. Plaintiffs maintained that notwithstanding the loss the defendants were liable for the rent of the premises in terms of the lease. The Court, after hearing argument, decided in favour of the defendants' contention that they should not be liable to pay for the period they did not occupy tenancy. In his reasons for judgment, Mr. Justice Watermeyer said that he did not think the case could be brought under the decisions cited for the plaintiffs. Leaving aside the question whether the lease of one or two rooms in a building was a lease of land within the meaning of the Act of 1879, or whether fire was an unforeseen calamity within the meaning of this Act, he thought the case must be decided on another principle of law, viz, that in any contract *de certo corpore*, the destruction of the subject matter of the contract releases each contracting party from further liability under the contract. It was the total destruction of the subject matter that, in his opinion differentiated the case from the cases quoted from the Cape. In each of them the subject mat-

ter remained, but the occupation had ceased to be beneficial to the tenant. It had been argued for the plaintiffs that the Act of 1879 was meant to assimilate our law to the law of England on this point, but if that were so the case of *Taylor v. Caldwell* (3 B. and S., 826, 833) cited was conclusive against the plaintiffs. The case of *Taylor v. Caldwell* had been recently much quoted, and the principle had been carried even further in the case of *Krell v. Henry* (K.B. 1902-2-740) *Civil Service Co-operative Society v. The General Steam Navigation Co.* (K.B. 1902-2-756), *Blakely v. Muller and Co.* (K.B., 2-760), and *Hobson v. Pattenden and Co.* (K.B. 1902-2-760). These cases professed to be decided on the principles of Roman law, and were, therefore, binding on them, and, in his opinion, it was conclusive that when the subject of the contract was destroyed both parties remained where they were and neither could call on the other for further fulfilment. There must be total destruction, for if the contract was performable in part it still remained good. (See *Herne Bay Steamboat v. Hutton*, 19, "Times" Law Report, p. 680.) For those reasons he thought judgment should be in favour of defendants' contention. He would point out, however, that the action, though brought in the form of a special case, was practically an action for rent, and that was a calling on the defendant to perform his part of the contract. In such an action the defendant having had no beneficial occupation, he thought it would have been incumbent on plaintiff to show whether he had received any insurance money for the building, and if so to account to defendant for any profit he might have made from such insurance money by way of interest or otherwise. (See *Logan v. Beit*, 7 J., 197.) The judgment on the special case would be for defendants' contention, with costs.

Mr. Searle, K.C. (with him Mr. Close) for appellants Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.) for respondents.

Mr. Searle argued that it had been held in many cases where the occupants had been deprived of beneficial occupation owing to war, plague, etc., they were still liable for the rent. He contended that the present case was analogous. In support of his contention he quoted the *United Mines* case (10 C.T.R., 665), *Logan v. Colonial Government* (11 C.T.R., 84), and *Joe v. Mohammed* (11 C.T.R., 816).

[De Villiers, C.J.: In those cases the property remained. It was not swept away as the premises in this case were.]

The tenants of the building from which they had been turned out by the Government on account of plague had just as little beneficial occupation as the tenants in the present case.

[De Villiers, C.J.: Where the premises in respect of which the contract was made were entirely destroyed, the obligations on the other side terminated.]

The ground was still there, and the tenants would have the right to go upon it. The lease was one not only of the premises but of the land as well. *Leake on Contracts* (p. 485) laid it down that the rent was not excused by the accidental destruction of the property, unless some express provision were made in the lease. This principle was also laid down by *Pothier on Obligations* (section 613) and by *Woodfall on Landlord and Tenant* (p. 434), and *Fox on Landlord and Tenant* (p. 475). English law was therefore quite clear on the point. In the case of the United Mines, the Court had laid it down that the object of the General Law Amendment Act was to assimilate our law to the English law.

[Buchanan, J.: This was only in unforeseen circumstances.]

It is a fallacy to say the property was gone because the building was burnt down. The tenant could go on the site and rebuild if he liked. The lease of a house meant also the lease of the land on which it was built. In *Raphael v. Clutterbuck* (10 Shiel p. 320) it had been agreed that if the premises were burnt down during the tenancy the owner was to rebuild at once and the tenant was to pay the rent. The Court in that case made an order declaring the tenant entitled to the remainder of the lease and directing the owner to rebuild. Counsel went on to discuss the Coronation cases which arose in connection with the postponement of the King's coronation, quoting *Crowther v. Henry* (1903 L.R., K.B., pt. 2 p. 740). He also quoted *Ison v. Gordon* (5 Bingham N.R. 501), and *Marshall v. Schofield* (52 L.J., Q.B., p. 58). Van der Linden said that the lease expired with the destruction of the property. But in this case the lease was still going on, and the respondents were rebuilding as quickly as possible in order that appellants might return [De Villiers, C.J.: Can there be a lease of a thing that does not exist?]

The English law clearly says that there can.

Mr. Schreiner said that his learned friend had not addressed himself to the following point. Certain rooms in a large building were let on lease, and it was not certain whether they were on the ground floor. The appeal had been argued as if the premises were an entire house let with the land on which it stood. Unless the statute applied, the Common Law came into operation, and there was no principle clearer than that a tenant could not be made to pay rent unless he had beneficial occupation. English law in this respect differed from Roman-Dutch law, and the Act of 1879 did not bring in the whole body of English law.

Mr. Searle, in reply, said that his learned friend had admitted that the contract still went on; therefore there must be a property lease as there could not be a lease of what was non-existent. If there was a property lease, it was producing nothing, and all the cases decided by the Court had gone on the principle that the tenant was bound to pay the rent, even if the property produced nothing.

De Villiers, C.J.: It is common cause that if the case had arisen for decision before the passing of the Act of 1879 the defendants would have been entitled to succeed. On September 13, 1903, the premises leased by defendants from plaintiffs were destroyed by the burning of the building in which they were situated. On the principles of Common Law defendants would not be liable for the rent. But plaintiffs now contend that the Act of 1879 placed our law in exactly the same position as the English law. In some respects doubtless it had this effect, but it did not go so far as to bring in the whole body of English decisions on this point. In certain cases beneficial ownership of property was lost, but the property remained, and it had been held that the tenant was liable under the Act of 1879. But the further case, where the property was completely destroyed, was not in contemplation of the Legislature when the Act was framed. The question must therefore be decided by the Common Law. The appeal would be dismissed with costs.

Buchanan, J., and Hopley, J. concurred.

Applicants' Attorneys: G. Trollip. Respondents' Attorneys: Syfret, Godlonton and Low.

BULAWAYO MARKET CO. V. BULAWAYO CLUB. { 1904.
May 13th
June 14th.

Principal and agent—Tacit agency
Notice of revocation of
authority.

The defendant Club had for several years been in the habit of buying their market supplies on credit from the plaintiff Company, through the Club steward, until the appointment of G. as steward. G. continued for two months to buy market supplies on credit from the plaintiff Company, and the Club continued to pay for them. The Club then entered into an agreement with G., by which he was appointed manager, charged with the duty of catering for the Club, but

without authority to pledge the credit of the Club. No public notice of this agreement was given nor was private notice given to the plaintiff Company, which continued for seven months, to supply goods on credit to G., in the belief that they were selling to the Club.

Held, that in the absence of any knowledge on the plaintiff Company's part of the change in G.'s position, they were entitled to recover from the Club the price of the goods thus supplied.

This was an appeal against a decision of the Senior Judge of the High Court of Southern Rhodesia, by which a judgment of the magistrate was confirmed in favour of the defendants, who were sued by the plaintiffs for £61 for goods sold and delivered.

The Market Company sued the Club for goods sold and delivered, and they were called on to show cause why they should not be called upon to pay to the plaintiffs £61 for goods sold to the Club during January and February, 1902. The plea of the Club was that the goods were sold by the plaintiffs in their capacity as auctioneers to one Gordon, who contracted for the defendants, although he had no authority to incur any liability on behalf of the Club. On the 29th May, 1903, it was agreed that Gordon should contract on his own account for the catering of the Club, and had since then paid the respondents by his own cheques.

The Magistrate's reasons are as follows:—

In my opinion I held that it was not incumbent upon the defendants to have informed third parties (plaintiffs in this case) that an agreement had been entered into by Mr. Gordon and themselves. It might certainly have been done but the defendants were merely negligent in not doing so. This omission did not hold them liable.

I held too that the Market Master should have been aware of the change as from the 1st May, 1903. Cheques previously signed by the club were signed by Mr. Gordon up to the end of December. This was sufficient notification. No notice was however taken of this. Mr. Soutter however states that he did not see the cheques. He should have seen them or his attention drawn to them by his clerk.

In face of the Market Master's notice of October 2nd 1903 the right of demanding security for goods purchased, or that some arrangement be entered

into was not done. Mr. Gordon should have been asked whom he was buying for. Gordon would have been bound then to state that he was buying for himself and the Market Master would either have allowed Gordon credit or asked for a guarantee. The Market Master by not doing this renders himself liable.

According to the agreement Mr. Gordon had expressly no authority to pledge the club's credit or incur any liability.

I held too that it was Gordon's duty to have informed the Market Master of the change, he buying goods and knowing these were put down to the defendants, whereas in reality he was the person buying, making a contract thereby and knowing he had no authority. The club further did not hold themselves out as guarantors.

All cheques were payable to and by Gordon, the sole catering rights and orders being in his hands.

The club derived no profits but only a fixed amount for these rights.

Gordon therefore becomes a contractor, being manager in name only.

The judgment in the Court below was as follows:—

In my opinion this appeal must be dismissed with costs. It can be disposed of in a very few words for I consider the real issue, which is a very simple one, was somewhat lost sight of. In order to ascertain what is the exact position it becomes necessary to have regard to the summons and plea in the case.

Now what is plaintiff's claim? It is a claim in which the plaintiff demands from the defendants the sum of £61 4s. 7d. for goods sold and delivered by plaintiff to defendants during the months of January and February last, that is, that these goods were delivered to the defendants at their own special instance and request or at the special instance and request of some one who was the duly authorised agent of defendants.

What is the plea? Defendants admit the actual sale of the goods, but say that the sale and delivery was to one Gordon, a contractor for defendants, but that the said Gordon had no authority to and did not pledge the credit of the defendants.

A mass of evidence was led to show that the club is liable, on the ground that by their conduct they must be considered to have held out or represented Gordon as their agent in the matter of these purchases. The judgment of the Magistrate proceeds almost entirely on the question as to whether there was or was not a holding out.

On the pleadings, I can find nothing to show that this question of holding out is raised.

What then is the real issue? It is,

who ordered the goods and who received the benefit of the goods.

It is abundantly clear from the evidence that the goods were ordered by Gordon, were received by Gordon at the club, and were used by Gordon for the meals of the members of the club. What was the position of Gordon at the time of the purchases?

It appears that previously to the 29th day of May of last year, Gordon was the Steward of the club and as such was authorised by the club to effect purchases on the Morning Market of vegetables, etc., for the benefit of the club, which was then catering for the members of the club and receiving the price of the members' meals. From the 29th May and up to February 1st Gordon's position was different—he entered into a contract with the club by which he undertook to supply the members of the club at his own expense.

It was strongly urged by the Solicitor-General, on behalf of the applicants, that this agreement in no way affected the previous position of Gordon—that in view of his being called "Manager" in the agreement, and of certain clauses in the agreement by which the club exercised control over Gordon and his servants in certain respects, Gordon was still the club's agent so far as the purchases on the Market were concerned, and that therefore these purchases must be regarded as being on behalf of the club. I cannot assent to this proposition. It is clear to my mind that on the contract Gordon was not the club's agent. He was, so far as the supply of vegetables, etc., from the market is concerned, and that is the only question I have to deal with in this case, an independent contractor, running the dining-room at the club for his sole benefit; and he was, moreover, expressly by the contract forbidden in any way to pledge the credit of the club.

Gordon therefore, not being the club's agent, and the goods being ordered by Gordon for his own use and benefit, it is impossible, in my opinion, to arrive at the conclusion, from the nature of the claim disclosed in the summons and the issue raised by the plea, that the goods were in fact sold to the club.

Being then of opinion that the form of this action in no way involves the doctrine of what by English Law is termed "holding out," the appeal must, for the simple reasons I have indicated, be dismissed with costs.

Mr. McGregor (for the appellants) said that the club provided meals for its members. Gordon was the manager, and it was part of his duties to provide the food that was required. In *Watto v. Pennick* (67 L.T.R., p. 831), it was held that an agent was impliedly invested with the right of doing all things

necessary to the performance of his duties. For seven years the club had been buying on the market. When Gordon got into difficulties the club then on February 1 gave notice to the Market Company that Gordon was no longer authorised to buy on their behalf. This was after the date of the last purchase. If the club held out Gordon as their representative or acquiesced in his doing so, they were liable. All the decided cases from *Faure v. Louw* (1 Juta, 5) down to *Holliday v. Van Blommestein* (14 C.T.R., 64), laid down this principle. There was a private agreement made between the club and Gordon on May 1, 1903, by which Gordon undertook to supply the club with provisions on his own behalf, but this private agreement could not affect the position of a third party, to whom no notice of the agreement was given (*Rich v. Coe*, Cowper's Reports, vol. 2, p. 636). The notice sent to the Market Company in February was a tacit acknowledgement that Gordon had some sort of authority to pledge their credit. Counsel also quoted *Kent's Commentaries* (vol. 2, p. 629) as laying down the doctrine that the principal was bound as to a third party by an agent acting within the apparent scope of his authority. *Cababe on Estoppel* (p. 65) and *Fruman v. Loder* (11 Adolphus and Ellis, p. 589), *Todd v. Robinson* (Ryan and Moodie Reports, p. 217), *Edmonds v. Bushell* (35 L.J., Q.B., p. 20), *Pilot v. Cuase and Others* (4 T.L.R., p. 453), all supported this doctrine.

Mr. Close (for the respondents) said that it must be established as a fact that Gordon was the agent of the club or held out by the club as such before the appellant could succeed. By the May agreement Gordon was to take over on his own private account the business of the club and private refreshment for for the members. He was not entitled to pledge the credit of the club. He was then not a manager at all. He ran the refreshment part of the club as a private business. The transactions by Gordon on behalf of the club before May 1 were very few and trivial. The cheques after May were signed by Gordon, and this ought to have put the market authorities on inquiry. There was, therefore, contributory negligence on the part of the club. The market-master had been negligent in his duty in not refusing to give credit. In support of this contention counsel quoted *Storey on Agency* (p. 209).

Mr. McGregor, in reply, said that Gordon had specifically stated that he bought for the club in the market during the time that he was manager. The club acknowledged that Gordon initially had authority to act. What happened to divest him of that authority? The goods were always debited to the club and not to Gordon.

Cur. Adv. Vult.

Posten (June 14th).

De Villiers, C. J.: In this case the Bulawayo Market Company appealed against a judgment of the High Court of Southern Rhodesia, confirming the judgment of the Resident Magistrate of Bulawayo in an action brought by the company against the Bulawayo Club for goods sold and delivered to the club. The defendants, by their plea, admitted that goods to the value of £61 4s. 7d. had been sold by the plaintiffs to one Gordon, but they alleged that Gordon was only a contractor for the defendants, and had no authority to pledge the credit of the defendants. There was no replication to this plea, and, indeed, the mode of procedure in the Magistrate's Court does not require a formal reply to the defendants' plea; but evidence was given on behalf of the plaintiffs, and not objected to, that by the previous course of dealing between the parties the defendants had led the plaintiffs to believe that Gordon, as club steward, was duly authorised to buy ordinary supplies for the club on credit. It is not clear from the reasons of the learned judge in the Court below whether he would have decided in favour of the plaintiffs if they had formally replied that the defendants were estopped by their previous conduct from setting up the defence of want of authority on the part of Gordon. He held that the question of estoppel or of tacit authority was not raised by the pleadings, and that as Gordon was an independent contractor, and was forbidden by the contract between him and the club to pledge the credit of the club, the Market Company could not recover from the club the price of goods bought by Gordon from the company. Seeing, however, that evidence of tacit as opposed to express authority was given without objection, and that the mode of procedure in the Magistrate's Court did not require a formal replication, I am of opinion that the case should be decided according to the law applicable to the facts which have been actually proved. What then, are the facts of the case? On the 2nd of March, 1903, Gordon became steward of the defendant club, and in that capacity he used to buy ordinary supplies at the plaintiffs' market on behalf of the club. Before that time, articles bought on credit at the market by different stewards of the club had been regularly paid for by the club. From March until May, 1904, goods so bought on credit by Gordon were also duly paid for by the club. On the 23rd of May, 1903, a formal agreement was entered into by which the club, "having full confidence in the honesty and ability" of Gordon as "manager," entrusted him with the management of the club, subject to certain conditions. Among the conditions were the following: The manager was

to supply the members with meals of first-class quality at a certain tariff, and supply all provisions himself, except liquors, cigars, and cigarettes, which were to be supplied by the club and sold by the manager at scheduled prices, he receiving the profits. Another condition was that the manager should have no power or authority to pledge the credit or incur any liability on behalf of the club. No public notification, however, of the terms of this agreement was given, nor was any notice given to the Market Company. After the date of the agreement, Gordon continued to buy goods on credit from the Market Company, ostensibly on behalf of the club, but, in settling the accounts, he gave his own cheque, instead of, as previously, the cheque of the club. This mode of dealing continued until the beginning of the present year, when Gordon failed to meet the market bills, and an action was brought against the club for the goods sold in January and February. The Magistrate who decided the case in the first instance seems to have held that the market master ought to have known that a change had been made in the position of Gordon, because cheques signed by the club before 1st May, 1903, were signed by Gordon from that date until the end of December. This, he remarked, was sufficient notification. I cannot myself attach the same weight to the circumstance that Gordon now signed cheques in his own name. The goods were still being bought by Gordon in the name of the club, and, in the absence of any notification that Gordon was no longer the agent of the club for the purchase of provisions, the Market Company might fairly believe that Gordon had received authority to deposit club moneys in his own name. The giving of Gordon's cheques in payment of the club's accounts was not so inconsistent with his continued agency as to throw on the Market Company the duty of inquiring whether the agency had been revoked. It was the plain duty of the defendants, who knew that credit had hitherto been given to them in the belief that Gordon had authority to pledge their credit, to give notice to the plaintiffs that Gordon's authority had ceased. Having failed in that duty, they cannot now be heard to say that by a private agreement with Gordon they had revoked his previous authority. The principles applicable to a case like the present were fully discussed in *Faure v. Louw* (1, Juta, 3), and do not need repetition. In that case the course of dealing which was held sufficient to establish the agency had been longer than in the present case, but the length of time does not affect the principles involved. The defendants' counsel has not seriously contended that his clients could have escaped liability for goods supplied to Gordon on their be-

half between March and May, 1903. That liability arose out of the previous course of dealing between the parties to this suit, quite independently of any private arrangements between the club and Gordon. But if the liability existed at the end of April, it is difficult to see on what consistent principle that liability ceased after May. The defendants having failed in their duty to inform the plaintiff that Gordon was no longer authorised to buy supplies for the club on credit, are as much bound by Gordon's purchases as if they had expressly authorised him to make them. The appeal must therefore be allowed, and judgment entered for the plaintiff, with costs in this Court and in the Court below.

[Appellant's attorneys: Syfret, God-lenton, and Low. Respondents': Fair-bridge, Arderne, and Lawton.]

REX V. JENKINSON. } 1904.
 } May 13th.

Criminal law—Evidence—Indecent assault—Particulars of complaint made by female.

Where, on a trial for indecent assault or other kindred offence on a female, it appears that she made a complaint as soon, after the assault, as she met a person to whom she would naturally make a complaint or give an explanation of her condition, the particulars of her statement, so far as they relate to the charge against the accused, are admissible as evidence in corroboration of her evidence upon the main issue.

This was an argument on a point reserved. The appellant, who had been convicted of indecent assault, applied for leave to raise the question as to whether or not statements made by the complainant to her mother immediately on reaching home were admissible in evidence in the examination-in-chief. Mr. Alexander was for the appellant and Mr. Nightingale was for the Crown.

Mr. Alexander said that the point reserved was whether or not there should be admission of evidence of the kind mentioned, and if their lordships decided it to be an illegality, whether the Court would interfere with the decision of the Court below. Counsel relied on section 34 of Ordinance 72 of 1830, which would rule as irrelevant any statement which the child might make to other persons. He submitted in cases of that kind where young children gave evidence it was very

necessary to interpret very strictly this evidence because evidence of that kind was very dangerous. In England there was some sort of safeguard where it was necessary there should be material corroboration of the complainant's story.

Without calling on Mr. Nightingale, the Court gave judgment.

De Villiers, C.J.: The question at issue in this case was whether or not the accused had committed an indecent assault on the little girl whose statement to her mother was objected to at the trial. The girl gave details at the trial of the assault alleged to have been committed on her in a railway carriage. Among other things she said that she screamed while the accused was assaulting her, and tried to prevent him from touching her indecently, and that she made a complaint to her mother as soon as she reached home, giving the particulars of the assault. The mother was called, and she confirmed the child's statement, that a complaint had been made to her, but the question as to the particulars of the complaint was objected to. The learned Judge, however, allowed the evidence to be given, and the question reserved for the Court is whether the evidence was properly admitted.

I take it to be a cardinal principle in the law of evidence that not only the facts in issue may be received in evidence, but also facts relevant to the facts in issue, provided that they are material, and may conduce to prove or disprove any fact in issue in the case. This principle is recognised by the 34th section of Ordinance 72 of 1830, but it is in the application of the principle that great difficulty constantly arises.

According to Stephen (Digest of Law of Evidence, article 3), "facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or subject matter, are relevant to the fact with which they are so connected." To illustrate this rule he says: "The question is whether A committed manslaughter, on B by carelessly driving over him. A statement made by B as to the cause of the accident as soon as he was picked up, is a relevant fact, though it may not be admissible as a dying declaration. The relevancy of such evidence arises, I presume, out of the facts that there has been no time for the person making the statement to concoct a false story, and out of the presumption that a statement made under circumstances which would necessarily call forth some explanation of his condition from the person making it would be a truthful statement. Now the view which, in practice, I have always taken of the admissibility or otherwise of statements made by a female upon whom an assault with intent to commit rape or other kin-

dred offence is alleged to have been committed is that if she makes a statement as soon after the assault, as she meets a person to whom she would naturally make a complaint, that statement is admissible to corroborate her evidence in support of the main fact in issue. This, I understand, has also been the practice of my brethren beside me. It is certainly difficult to appreciate the principle upon which some judges have held that the fact of a complaint having been made is admissible, but not the terms of the complaint. The reasons for admitting evidence of the fact of a complaint would seem *a fortiori* to favour the admissibility of the statements accompanying the complaint, so far as they relate to the charge against the accused. If while in a state of excitement, or in a condition showing traces of a recent assault on her, and before she has had time to invent a story, a complainant makes a statement to a person to whom she would naturally complain, or give an explanation of her condition, the whole statement appears to me to be as relevant as the fact that she made a complaint. This case has, however, been argued as if the evidence objected to fell within the definition of hearsay statements which, as a general rule, are not admissible as evidence. Counsel for the accused has contended that, as the evidence would in 1850 not have been admissible in a similar case pending at Westminster, it should, under the provisions of Ordinance 72 of that year, be excluded at the present time in the Courts of this Colony. Assuming then that the statements in question are in the nature of hearsay, I cannot accept the view that the judicial interpretation of the law of England after 1850 should be excluded from consideration. At that time the authorities conflicted with each other, and there has been no legislation since to put an end to the conflict. In 1896, however, the question was pointedly raised before a strong Court of Criminal Appeal whether the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may be given in evidence on the part of the prosecution, and the question was answered in the affirmative. The judgment of the Court was delivered by Hawkins, J., who after reviewing the previous cases on the point said: "After very careful consideration we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to

judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her." It would thus appear that the grounds upon which the evidence was admitted differed somewhat from the grounds upon which my colleagues and I have hitherto acted, but the result, so far as the present case is concerned, would be the same. The girl virtually denied that she consented to the indecent acts of the accused, and there was the same reason for admitting her evidence as existed in the English case referred to. Even, therefore, if the question were treated as one affecting the admissibility of hearsay evidence the statements were properly admitted by the learned judge under the provisions of the 44th section of the Ordinance. The question reserved must be decided in favour of the Crown.

Buchanan, J.: I have always admitted evidence of the terms of the complaints made immediately after assaults by women and children. I have not confined the admission of evidence to cases of children making statements to those *in loco parentis*. I held to this rule in consequence of the experience gained by me when at the bar of the practice usually followed in this Court. I think the admission of the evidence objected to was justified by sound sense as well as by long usage.

Hopley, J.: I did not allow any argument on this point at the trial as I considered that it had been decided. My experience at the Bar and on the Bench has been that such evidence is admissible. I do not confine such admissibility to complaints made to persons *in loco parentis*, as I think that the circumstances might frequently preclude the possibility of the report or complaint being made to persons in that relationship to the complainant; and in such cases, if the complaint is made to anyone who might naturally be appealed to for help or advice, I think it would be admissible. I concur that the point reserved should be decided against the accused.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

ADMISSIONS. { 1904.
{ May 14th.

Mr. P. Jones moved for the admission of Mr. Allen Frederick Corbett as an advocate.

Application granted, and oath administered.

Mr. Alexander moved for the admission of Edward Morris, as an attorney and notary.

Application granted.

Mr. Alexander moved for the admission of Johannes Visser, as an attorney and notary.

Application granted, oaths to be taken before the R.M., Kroonstad.

WIENER, SCHWAB AND CO. V. BERNARD JACKSON AND JOSEPH JACKSON.

Mr. Gardiner moved for provisional sentence for £80 8s. 11d., due on certain promissory notes, with interest at bank rates, less £37 10s. paid on account.

Order granted.

FOSTER V. DU PLESSIS.

Mr. Rainsford moved for provisional sentence for £432, due on a promissory note, with interest from 16th March, 1904, and costs.

Order granted.

ARGUS CO. V. MADDOCKS.

Mr. P. Jones moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court.

Order granted.

BEHR AND CO. V. COHEN.

Mr. W. P. Buchanan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £47 17s. 6d., with interest and costs.

The defendant appeared in person, and offered to pay £3 a month.

Order granted, decree to be suspended so long as defendant shall pay £3 a month, with interest and costs, until the debt is satisfied, the first monthly payment to be on the 1st June.

CAPE TOWN BUILDING SOCIETY V. MCKILLOP.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond

for £450 8s. 6d., which had become due by reason of non-payment of instalments, and that the property specially mortgaged be declared executable.

Order granted.

WARNER AND CO. V. GRAHAM AND ANOTHER.

Mr. Rainsford moved for provisional sentence against the defendants individually for £430 18s. 11d., due on certain promissory notes, with costs.

Order granted.

JAGGER AND CO. V. HAVENGA.

Mr. J. E. R. de Villiers moved for the final sequestration of the defendant's estate.

Order granted.

S.A. LIVE-STOCK CO. V. LOCHNER.

Mr. J. E. R. de Villiers moved for provisional sentence for £639 1s. 10d., due on a promissory note, with interest and costs.

Order granted.

COMBRINCK AND CO. V. LOCHNER.

Mr. J. E. R. de Villiers moved for provisional sentence for £115, due on a dishonoured cheque, with interest and costs.

Order granted.

SCHULTZE AND CO. V. JACKSON BROS.

Mr. Gardiner moved for provisional sentence on certain bills of exchange for £635 19s. 7d., with interest and costs.

Order granted.

ESTATE BAM V. TALANDA.

Mr. De Waal moved for provisional sentence for £84 and £56 on agreement of sale and rent due, less £20 6s. 6d. paid on account, with costs.

Order granted.

NOLTE BROS. V. RIACH.

Mr. W. P. Buchanan moved for the discharge of the provisional order of sequestration of the defendant's estate.

Order granted.

DE WIT V. PRINSLOO.

Mr. J. E. R. de Villiers moved for provisional sentence for £600, due on

a mortgage bond, and that the property specially hypothecated be declared executable, with costs.
Order granted.

STEYTLER V. AUCHMUT.

Mr. Close moved for provisional sentence for £700 on a mortgage bond, and that the property specially hypothecated be declared executable.
Order granted.

FOURIE V. DE VRIES.

Mr. Close moved for provisional sentence for £700 on a mortgage bond which had become due by reason of non-payment of interest, and that the property specially hypothecated be declared executable.
Order granted.

SACKHOFF AND SON V. MILLER.

Mr. J. E. R. de Villiers moved for provisional sentence on a bill of exchange for £33 18s. 10d., with interest and costs.
Order granted.

WILKINSON V. ABON.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate.
Order granted.

BUYSKES V. TRUIKE BROS.

Provisional sentence — Incorrect plan.

The Court refused provisional sentence for the purchase price of certain property where defendant alleged that the plan exhibited at the sale was incorrect.

Mr. Schreiner, K.C., moved for provisional sentence for £430, being the total amount of the purchase price of certain ground at Wynberg.

Mr. Burton (for the defendant) said that the sale was by public auction on the 10th December, 1903. The defendants' affidavit set out that the property was not according to the plan exhibited at the auction. The sureties in their affidavits stated that they were quite willing to carry out their duties if the property was transferred according to the plan.

De Villiers, C.J., said it was a pity that the defendants had not indicated the exact lines of the defence

which they intended to take. If the defence were really that they intended to repudiate the sale, he did not think the Court should grant provisional sentence, because he had not sufficient information before him to judge as to the extent to which the actual situation of the cottage operated on the minds of the defendants in purchasing it. On the whole, he thought plaintiff should go into the principal case. At the same time, he should certainly not recommend the defendants to defend this case unless they were prepared to produce clear evidence as to the extent to which the actual situation of the cottage operated on their minds at the time of the purchase. Costs would be costs in the cause.

ERASMUS V. VAN DER MERWE.

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,125, with interest and costs, and for property specially hypothecated to be declared executable.
Granted.

HEYDENRYCH V. FRAME. } 1904.
 } May 14th.

Provisional sentence—Promissory note—Proof of allegations in affidavit.

The Court granted postponement of a provisional case, in order to enable the defendant to produce proof of certain allegations contained in her affidavit, which, if proved, would be a good defence to plaintiff's claim.

Mr. Burton moved for provisional sentence for £146 9s., on a promissory note, dated the 5th February, 1896, with interest from that date.

Mr. Upington, who appeared for the defendant, read affidavits to the effect that in 1896 the defendant gave the promissory note in connection with an account running over several years, and that in a settlement made in March, 1896, this was included, all liabilities of the defendant and her husband to the plaintiff being then settled. The defendant applied for time in order to get certain documents from Scotland to prove the settlement.

In a replying affidavit the plaintiff denied the allegation that there had been a full settlement of all his claims. Plaintiff alleged that the money in respect of which the note now in question was given, was advanced by him to the defendant, and that in the account settled the wife's liability was omitted.

De Villiers, C.J.: The defendant's request for a postponement is a most reasonable one, and I am surprised that plaintiff should have instructed his counsel to oppose it. Statements were made on behalf of the defendant, which, if substantiated, would be a complete answer to the claim, and all the defendant asks for is that there should be some time allowed in order to enable her to get documents from England to substantiate these statements. The case will be ordered to stand over until the 1st August.

Postea (August 1).

The application was granted.

BOTHMA V. BOTES.

Mr. De Waal moved for provisional sentence on a promissory note for £371 7s.

Granted.

ESTATE OF MARSH V. JORDAAN AND ANOTHER.

Mr. Russell moved for provisional sentence on a mortgage bond for £300 against the first-named defendant as principal debtor, and against the second named as surety and joint principal debtor, for interest and costs, and for certain specially hypothecated property to be declared executable.

De Villiers, C. J., pointed out that the second named defendant had not been served.

Provisional sentence was granted against the first-named defendant.

PURCELL, YALLOP AND EVERETT V. MCLEOD.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate.

Granted

GRAAFF-REINET BOARD OF EXECUTORS V. GROUSE.

Dr. Greer moved for provisional sentence on a mortgage bond for £170.

Granted.

GOTZE V. BERGL.

Mr. Buchanan moved for provisional sentence against the defendant, with costs.

Mr. Upington appeared for the defendant, and said that while he opposed another of plaintiff's claims he did not object to the granting of provisional sentence in this case.

Provisional sentence granted.

LITHMAN, LANDEBERG AND CO. V. COHEN.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate.

Defendant appeared, and said he wished to surrender his estate for the benefit of the creditors.

Application granted.

G. AND T. HERBERT V. TWINE.

Mr. Russell moved for the final adjudication of the defendant's estate.

Granted.

JURGONS V. BAITELS.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £800, and for specially hypothecated property to be declared executable.

Granted.

SOUTHRON V. GABIER.

Mr. Close moved for provisional sentence on a mortgage bond for £600, and for specially hypothecated property to be declared executable.

Defendant appeared, and said he had no money to pay at present.

De Villiers, C. J., advised the defendant to see the plaintiff's attorney, and try to come to terms.

Provisional sentence granted, as prayed.

PIETERSEN V. MCLACHLAN.

Mr. Bisset moved for provisional sentence for £300 on a mortgage bond.

Granted, specially hypothecated property being declared executable.

ILLIQUID ROLL.

CITY TRAMWAY CO. V. SIEG. { 1904.
May 14th.

Mr. Rainsford moved, under Rule 329d, for £137 0s. 9d., for work and labour done, with interest and costs.

Order granted.

WITHINSHAW V. RIDDELL.

Mr. Close moved, under Rule 329d, for £8, for goods sold and delivered, with interest.

Order granted.

PURCELL AND CO. V. RIDDELL.

Mr. Close moved for judgment for £41 14s. 5d., for goods sold and delivered, with interest and costs.

Order granted.

FEDERAL SUPPLY CO. V. COETSER.

Mr. Gardiner moved for judgment in terms of a certain consent paper.
Order granted.

MENDELSONH AND CO. V. NEL.

Mr. N. de Villiers moved for judgment, under Rule 329d, for £83 4s. 4d., for goods sold and delivered.
Order granted.

MENDELSONH AND CO. V. BROUDE.

Mr. N. de Villiers moved for judgment, under Rule 329d, for £132 3s. 7d., the balance of an account for goods sold and delivered.
Order granted.

ZEEDEBERG AND DUNCAN V. ANDRUSIER.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £58 13s. 2d., balance of account for goods sold and delivered.
Order granted.

WALTON AND CO. V. PEACEY.

Mr. Sutton moved for judgment, under Rule 329d, for £37 0s. 9d., advertising charges.
Order granted.

"DIAMOND-FIELDS ADVERTISER" V. PEACEY.

Mr. Sutton moved for judgment, under Rule 329d, for £34 15s. 2d., advertising charges.
Order granted.

DU PREEZ V. REID.

Mr. Sutton moved for judgment, under Rule 329d, for £220 19s. 3d., moneys disbursed and interest.
Order granted.

EYRE V. MORIARTY.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £40 12s., fees for medical attendance, interest *a tempore morae*, and costs.
Order granted.

BOESEN V. DAY.

Mr. Van Zyl said that notice had been served on the defendant, as required by the Court, and he moved for judgment in terms already asked for.
Order granted.

COLONIAL GOVERNMENT V. RICH.

Mr. Howel Jones moved for judgment, under Rule 329d, for £109 15s. 4d.,
Order granted.

REHABILITATIONS.

Mr. D. Buchanan moved for the rehabilitation of Gideon Daniel Botha, whose estate disclosed a deficiency of £1,013.

Granted.

Mr. M. Bisset moved for the rehabilitation of George Stephanus de Beer, whose application had been ordered to stand over for production of a balance-sheet. It was stated that it had been impossible to frame a balance-sheet,
Granted.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROVISIONAL ROLL.

SERRURIER V. ISAAC. { 1904.
 { May 17th.

Mr. M. Bisset moved for provisional sentence for £6 on a judgment of the Resident Magistrate's Court at Wynberg, with costs, and also for property described in summons to be declared as executable.

Order granted.

STEYN AND SERRURIER V. ISAAC.

Mr. M. Bisset moved for a provisional sentence for £14 16s. 11d. on a judgment of the Resident Magistrate's Court at Wynberg, with costs.

Order granted.

ILLIQUID ROLL.

LONDON CARRIAGE WAGONWORKS V. HOFFMAN.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £63 7s. 6d., goods sold and delivered and work and labour done.

Order granted.

GENERAL MOTIONS.

NOMADINA V. SISSING. { 1904.
May 17th.

Mr. Percy Jones moved on behalf of Archibald Sissing, missionary, late of Eastern Pondoland, for the rule *nisi* to be made absolute for the restoration of certain nineteen head of cattle, which were alleged to have been forcibly removed.

Mr. Gardiner (for the respondent, Jane Nomadina, a native) read her affidavit, in which she claimed that the cattle were left to her and her brother, who was now dead, by her late father. She declared that the missionary Sissing had no interest whatever in the cattle. Sissing had never had legal possession of any of her property. Deponent added that she was lawfully married, and was a major. She absolutely denied that the cattle were forcibly seized. Counsel also read an affidavit sworn by the respondent's husband, who corroborated the statements made by his wife.

In reply to his lordship.

Mr. Gardiner said that he believed the cattle were still in the possession of the respondent, and that the rule *nisi* obtained by the applicant had not been executed requiring respondent to restore possession.

Mr. Jones submitted that, whatever were the rights of the parties in the cattle, the applicant had been dispossessed, and that the rule *nisi* should be made absolute. He submitted that the acts of the respondent or her agent amounted to spoliation.

[De Villiers, C.J.: The respondent does not claim more than a life interest.]

Mr. Gardiner: She says she intends contesting the applicant's claims, because he wrote the will himself.

Without calling upon Mr. Gardiner.

De Villiers, C.J.: The respondent stated in her affidavit that she was lawfully married to her husband Andrew, so that Andrew should be a party to this case to make it quite in order. But the applicant, in his affidavit, said that during his absence in Natal in February, 1902, the said Jane eloped with one Andrew, a native, with whom she was now living unmarried at another kraal, and that she refused to return to the petitioner. If Mr. Sissing knew, as he ought to have known, that the respondent was a married woman, he considered that it was an improper statement on his part to make that the respondent was an unmarried woman. Possibly he might not have known that she was a married woman, but he might have inquired into the matter and ascertained whether she was.

Mr. Jones said that the applicant filed his petition some time last year.

[De Villiers, C.J.: When was the respondent married?]

Mr. Gardiner: I think about June last. Mr. Jones: I believe the applicant filed his petition about twelve months ago.

De Villiers, C.J.: I am glad I made the remark, because the position of the applicant has now been explained. Proceeding, his Lordship said that the applicant now sought confirmation of the order under which the cattle now in the possession of the respondent should be handed back to him (Sissing). He the Chief Justice was quite satisfied that if the learned judge had been aware of all the facts of this case he would never have granted that rule at all. In the first instance, if the will were a valid one, then it was quite clear that the respondent was entitled to the cattle, and it would be a nugatory act now to order her to return the cattle if, immediately after returning them, she would be entitled to claim them back again. Still, that would be the order of the Court if the Court were satisfied that there had been anything in the nature of spoliation on the part of the respondent when she took possession. He thought that, reading the affidavits made by the respondent herself, and all the witnesses on her behalf, there really was nothing in the nature of spoliation. There must be something in the nature of illegality, or in the nature of force, to justify the Court in holding that there was spoliation. If Mrs. Sissing chose to yield to a demand, that was her own act, and, unless that demand were anything in the nature to suggest force, or violence, or fraud, he considered that it was not spoliation. He considered, therefore, that the order must now be discharged, with costs.

Mr. Gardiner asked if the costs would include costs of the application made by the respondent for an order against the applicant for security.

[De Villiers, C.J.: I think so.]

Mr. Jones said he would like to address the Court on that point. Sissing was at present in Natal, but he said that he had resided in Eastern Pondoland all the time. He submitted, seeing that there was no necessity for the application, Sissing should not be mulcted in the costs. The application was not for security for costs, but for security for the return of the cattle.

Mr. Gardiner having been heard,

De Villiers, C.J., said he would like to hear the affidavits read in regard to this point as to the nature of the application made by the respondent.

Counsel having addressed the Court further.

De Villiers, C.J., said he thought the application made by the respondent was quite a proper one. The costs, therefore, should follow. The order of the Court would be that the rule be dis-

charged, with costs, to include costs of the application made by the respondent for an order as to security.

Ex parte SIKENGAN.

Mr. Pyemont moved to make absolute a rule nisi under the Derelict Lands Act.

Granted.

VAN DER HOFF V. PADDON.

Mr. Sutton moved for leave to sue by edictal citation, the defendant being at present in London, and to attach certain property *ad fundandam jurisdictionem*.

Order granted, the citation being made returnable on the 1st August, personal service to be effected.

Ex parte SYFRET.

Mr. J. E. R. de Villiers moved for an amendment of a certain order of Court. The amendment sought to be made was the correction in the name of a certain firm, of whose insolvent estate the petitioner was sole trustee. It had been discovered that one person (Jasper Fink. Koeberg), who was declared insolvent, had no interest in the business of J. J. Fink and Co., and it was applied that the order against him should now be discharged.

Granted.

Ex parte MURPHY AND ANOTHER.

Mr. Schreiner, K.C., moved for the appointment of a provisional trustee.

Granted.

BARRY V. BARRY.

Mr. Alexander applied for an extension of the return day until the 1st June in order that service of a certain order of Court might be effected.

Granted.

PARKER V. PARKER.

Mr. Bisset moved for leave to make substituted service by edictal citation, and to extend the return day until the 1st June.

The Court ordered that in default of personal service the rule be published in the Johannesburg "Star." The return day was extended as prayed.

Ex parte THE EXECUTORS OF THE ESTATE OF THE LATE F. H. S. HUGO.

Mr. Uppington moved for an order authorising the transfer of certain property, to the heirs of the deceased, the surviving

spouse to whom the usufruct of the property was bequeathed, having renounced her interest.

De Villiers, C.J., said it was an unnecessary expense to come into court, as it was unnecessary to come to court for an order to do something to benefit a minor, as was the case here.

Mr. Uppington said that for some reason the Registrar of Deeds had refused to pass transfer.

Order granted.

LLOYD V. LLOYD.

Mr. Bisset moved for leave to sue by edictal citation.

Granted, the rule being made returnable on the 31st August, personal service to be effected.

Ex parte MORUM. { 1904.
May 17th.

Ante-nuptial contract—Registration—Free consent of wife.

On an application by husband and wife to have a contract registered as embodying an excluding community of property, ante-nuptial agreement made by them before their marriage in England, it appeared that the property was considerable, and the Court, before making any order, directed the Resident Magistrate of the district where the parties reside, to interview the wife and report to the Court whether she understands the nature of the application and consents to it of her free will.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), moved for leave to execute a certain ante-nuptial contract, which petitioner had omitted to have registered in England, where the marriage took place in 1888. Counsel said that although a number of years had passed, there seemed to be no reason in principle why the Court should not act as it had done in cases where application was made immediately after the marriage, provided, always, that the interests of creditors be protected. It seemed that the petitioner only discovered in 1907 that the marriage was in community and he was at that time advised that it was too late to then move the Court. The wife consented.

De Villiers, C.J.: The property involved is considerable, and as the effect of the registration of the contract would be to prevent Mrs. Morrison from having her share of the community

GENERAL MOTIONS.

NOMADINA V. SISSING. { 1904.
May 17th.

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Mr. Gardiner (for the respondent, Jane Nomadina, a native) read her affidavit, in which she claimed that the cattle were left to her and her brother, who was now dead, by her late father. She declared that the missionary Sissing had no interest whatever in the cattle. Sissing had never had legal possession of any of her property. Deponent added that she was lawfully married, and was a major. She absolutely denied that the cattle were forcibly seized. Counsel also read an affidavit sworn by the respondent's husband, who corroborated the statements made by his wife.

In reply to his lordship,

Mr. Gardiner said that he believed the cattle were still in the possession of the respondent, and that the rule *nisi* obtained by the applicant had not been executed requiring respondent to restore possession.

Mr. Jones submitted that, whatever were the rights of the parties in the cattle, the applicant had been dispossessed, and that the rule *nisi* should be made absolute. He submitted that the acts of the respondent or her agent amounted to spoliation.

[De Villiers, C.J.: The respondent does not claim more than a life interest.]

Mr. Gardiner: She says she intends contesting the applicant's claims, because he wrote the will himself.

Without calling upon Mr. Gardiner,

De Villiers, C.J.: The respondent stated in her affidavit that she was lawfully married to her husband Andrew, so that Andrew should be a party to this case to make it quite in order. But the applicant, in his affidavit, said that during his absence in Natal in February, 1902, the said Jane eloped with one Andrew, a native, with whom she was now living unmarried at another kraal, and that she refused to return to the petitioner. If Mr. Sissing knew, as he ought to have known, that the respondent was a married woman, he considered that it was an improper statement on his part to make that the respondent was an unmarried woman. Possibly he might not have known that she was a married woman, but he might have inquired into the matter and ascertained whether she was.

Mr. Jones said that the applicant filed his petition some time last year.

[De Villiers, C.J.: When was the respondent married?]

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Mr. Jones said he would like to address the Court on that point. Sissing was at present in Natal, but he said that he had resided in Eastern Pondoland all the time. He submitted, seeing that there was no necessity for the application, Sissing should not be mulcted in the costs. The application was not for security for costs, but for security for the return of the cattle.

Mr. Gardiner having been heard,

De Villiers, C.J., said he would like to hear the affidavits read in regard to this point as to the nature of the application made by the respondent.

Counsel having addressed the Court further,

De Villiers, C.J., said he thought the application made by the respondent was quite a proper one. The costs, therefore, should follow. The order of the Court would be that the rule be dia-

charged, with costs, to include costs of the application made by the respondent for an order as to security.

Ex parte SIKENGAN.

Mr. Pyemont moved to make absolute a rule nisi under the Derelict Lands Act.

Granted.

VAN DER HOFF V. PADDON.

Mr. Sutton moved for leave to sue by edictal citation, the defendant being at present in London, and to attach certain property *ad fundandum jurisdictionem*.

Order granted, the citation being made returnable on the 1st August, personal service to be effected.

Ex parte SYFRET.

Mr. J. E. R. de Villiers moved for an amendment of a certain order of Court. The amendment sought to be made was the correction in the name of a certain firm, of whose insolvent estate the petitioner was sole trustee. It had been discovered that one person (Jasper Fink Koeberg), who was declared insolvent, had no interest in the business of J. J. Fink and Co., and it was applied that the order against him should now be discharged.

Granted.

Ex parte MURPHY AND ANOTHER.

Mr. Schreiner, K.C., moved for the appointment of a provisional trustee.

Granted.

BARRY V. BARRY.

Mr. Alexander applied for an extension of the return day until the 1st June in order that service of a certain order of Court might be effected.

Granted.

PARKER V. PARKER.

Mr. Bisset moved for leave to make substituted service by edictal citation, and to extend the return day until the 1st June.

The Court ordered that in default of personal service the rule be published in the Johannesburg "Star." The return day was extended as prayed.

Ex parte THE EXECUTORS OF THE ESTATE OF THE LATE F. H. S. HUGO.

Mr. Upington moved for an order authorizing the transfer of certain property, to the heirs of the deceased, the surviving

spouse to whom the usufruct of the property was bequeathed, having renounced her interest.

De Villiers, C.J., said it was an unnecessary expense to come into court, as it was unnecessary to come to court for an order to do something to benefit a minor, as was the case here.

Mr. Upington said that for some reason the Registrar of Deeds had refused to pass transfer.

Order granted.

LLOYD V. LLOYD.

Mr. Bisset moved for leave to sue by edictal citation.

Granted, the rule being made returnable on the 31st August, personal service to be effected.

Ex parte MORUM.

{ 1904.
May 17th.

Ante-nuptial contract—Registration—Free consent of wife.

On an application by husband and wife to have a contract registered as embodying an excluding community of property, ante-nuptial agreement made by them before their marriage in England, it appeared that the property was considerable, and the Court, before making any order, directed the Resident Magistrate of the district where the parties reside, to interview the wife and report to the Court whether she understands the nature of the application and consents to it of her free will.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), moved for leave to execute a certain ante-nuptial contract, which petitioner had omitted to have registered in England, where the marriage took place in 1888. Counsel said that although a number of years had passed, there seemed to be no reason in principle why the Court should not act as it had done in cases where application was made immediately after the marriage, provided, always, that the interests of creditors be protected. It seemed that the petitioner only discovered in 1897 that the marriage was in community and he was at that time advised that it was too late to then move the Court. The wife consented.

De Villiers, C.J.: The property involved is considerable, and as the effect of the registration of the contract would be to prevent Mrs. Morrison from having her share of the community

which, without a contract, she would enjoy, it would be well for the Court to ascertain whether she has joined in this application of her freewill, and without any undue influence having been exercised on her by her husband. The Court will, therefore, refer the matter to the Resident Magistrate, who, after interviewing Mrs. Morrison apart from her husband, will report to the Court whether she understands the nature of the application, and consents to it of her own free will. The deed of settlement produced would seem to show that the parties did not intend to marry in community, and, if the report of the Magistrate is satisfactory, there will be no further objection to the proposed registration.

Ex parte WRIGHT AND OTHERS.

Mr. Van Zyl moved for leave to pass transfer of certain property to the Municipal Council of Durbanville for the purpose of making a public road.

Granted.

Ex parte THE EXECUTORS TESTAMENTARY OF THE ESTATE OF GEORGE FREDERICK RAUTENBACH.

Mr. Roux moved for leave to raise money on mortgage to pay the debts of the estate.

Granted

SMALL AND MORGAN V. TABLE BAY HARBOUR BOARD.

Mr. Close moved to have an award of arbitrators made a Rule of Court.

Granted.

REYNOLDS V. GOODMANSON.

Mr. J. E. R. de Villiers moved for an order declaring certain property executable in satisfaction of a judgment of the Court. Defendant had been sued by edictal citation.

A rule was granted calling on respondent to show cause on the 1st August why the applicant should not be authorised to sell the property and to apply the proceeds to satisfy the judgment and costs, on condition that any balance accruing from the sale be paid to defendant, the rule to be published in two Cape Town newspapers.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLBY.]

PRINCE V. MYBURGH. { 1904.
May 17th.
18th.

Lease — Cancellation for non-payment of rent—Waiver of rights under lease

This was an action brought by Mrs. Prince, widow of the late George Prince, farmer, of Stellenbosch, against Frank Myburgh, for cancellation of a lease of a certain farm, which had been let to the defendant for a period of three years.

The declaration set out that the plaintiff was the widow of the late George Prince, who died on the 25th January, 1904, and she was executrix of the estate of her late husband. The defendant was a farmer, residing at Stellenbosch. On the 24th April, and during the lifetime of George Prince, the plaintiff, acting for him, entered into a certain written agreement of lease with the defendant, by which the latter had a tenancy of the farm Retreat for a period of three years from the 1st May, 1903. It was also agreed that the rent should be payable half yearly, the first payment to be made on the 31st October, and that the defendant should account to the plaintiff for the rent of certain labourers' cottages on the farm. On the 31st October the half-yearly rent of £115 was not paid, nor had the £36 rent for labourers' cottages been accounted for. As the rent had not been paid within the thirty days' grace allowed in the lease, plaintiff claimed a cancellation of the lease. The defendant had also neglected the farm, and cut down fruit trees against the terms of the lease. In January, the defendant paid £100, and a receipt for that amount was given by the plaintiff's attorneys. The plaintiff accepted the amounts paid by the defendant, under the distinct understanding that it would not prejudice the plaintiff's right to cancellation of the lease. Plaintiff prayed for a cancellation of the lease, and that the defendant be ordered to account and debate the sums of £25 and £5 10s., with production of proper vouchers.

The defendant, in his plea, admitted that he was paid the £36 for the rent of the cottages, but said that this indebtedness was outside the terms of the lease, and that if the plaintiff did acquire any right to the cancellation of the lease it was annulled by her acceptance of payment of rent in January. Previous to the 6th January, when the rent was paid the plaintiff was indebted to the defendant in the sum of £25 for repairs to a dam, and £5 10s. for sundry other repairs. Defendant stated that he came to a settlement with Messrs. Silberbauer,

Wahl, and Fuller, who allowed him for the amount of the work to the dam, when he paid the rent. Defendant admitted that he owed plaintiff £9, and tendered that in full settlement.

The plaintiff, in her replication, denied that she was indebted to the defendant in the sum of £30 10s., as the defendant had not satisfied her that the sums were actually expended. The fruit trees cut down by the defendant were sound.

The rejoinder set out that the defendant had spent £50 on the reconstruction of the dam, and £5 10s. for other work. When he paid the rent in January it was duly accepted by the agent of the plaintiff.

Mr. M. de Villiers was for the plaintiff, and Mr. W. P. Buchanan (with him Mr. Gardiner), appeared for the defendant.

Susanna Prince said that in April last she entered into an agreement with the defendant as to the farm Retreat, and the cottages thereon. Everything was in good order when the defendant took possession in May last. A flower garden had disappeared, but as far as she knew, the cottages were in good repair. The drawing-room of the dwelling-house had been used as a dairy. Her late husband and herself were always prepared to keep the farm in good order, if notice was given to them. Myburgh was to put up a couple of new doors, but a fortnight ago she found them lying at the back of the house. The defendant did not deny that on the 30th July he received the rent of the cottages. Witness strongly objected to the defendant removing any fruit trees. She wrote to him several times for the rent, but he took no notice of her. During December she told the defendant that she wanted a new lease, by which she would have her rent in advance. On the 8th December she gave notice to her attorneys, who wrote to the defendant stating that if the rent was not paid by the 14th December, proceedings would be taken for the cancellation of the lease. Payment was not made on the 14th December, but later on she met the defendant, to whom she gave an extension. He was to pay £60 on the 24th December, and the balance a week later, on the conditions that a new lease should be entered into. She wrote to her attorneys again on the 29th December, on his failure again to pay, and meeting the defendant on the same day, she agreed to withdraw the summons on condition that he would cancel the lease, and pay on the 6th January. This the defendant agreed to. On the 7th January, she wrote to the defendant not to worry her any more about the farm, and setting forth the terms of the new lease. The defendant had no right to spend £60 on the dam without her authority, and the £5 10s. she knew nothing about.

Cross-examined by Mr. Buchanan: The farm was not totally neglected. Witness never told defendant with regard to the fruit trees that she was no farmer, and he could do what he liked with them. The farm was now being worked better than in her husband's time. She was quite willing to pay half the expense of the reconstruction of the dam, provided a good job was made. On several occasions she met Mr. Myburgh at the Grand Hotel, and on one occasion she agreed to an extension of time, and the lease, if he paid £60 on December 29, and the balance a week later.

John Rous, agricultural labourer, stated that he lived in one of the cottages of the farm, and the custom was that the materials should be supplied by Mrs. Prince, and that the tenants repaired the cottages themselves. The defendant had never repaired the cottages. The dam was working now, but the man who repaired it only went half as deep as he (witness) understood he was to go. He had chopped timber which had been sold in the village. The drawing-room had been used as a dairy.

Cross-examined by Mr. Buchanan: Myburgh had not stopped him getting material for the repair of the cottages. Witness had offered to do the repair to the dam for £50. Lourens had carried out the reconstruction according to Mr. Myburgh's instructions. The defendant did not send the trees into the village on Mrs. Prince's account.

William Minnis stated that formerly he worked on the farm as an agricultural labourer. When the defendant came on to the farm he instructed witness to plough the orchard. The defendant also told him to clear the vineyard out. Most of the trees dug out were good trees.

Cross-examined by Mr. Buchanan: He did not care what experts thought; he was under the opinion that the trees were good.

Thomas Cairncross, civil engineer, stated that on the 12th April last he went to Retreat to inspect the outside of the buildings and a dam. He found the drawing-room had been used as a rough store and a dairy. The material used for the dam was absolutely useless. He reckoned about £20 worth of work had been done.

Cross-examined by Mr. W. P. Buchanan: He had experience of all sorts of dams. He was not thinking of the Molteno Reservoir when he spoke of the dam at Stellenbosch.

William Scott, auctioneer and broker, stated that he inspected the dam, and estimated that it would cost about £20 or £25.

Alfred Beard stated that he never inspected the dam specially when he visited the farm. He got his authority to act as the plaintiff's agent about the 7th January. He never told the defendant that he approved of the dam. Witness had heard the arrangement that the de-

fendant should have time to pay the rent if the old lease was cancelled.

Cross-examined by Mr. Buchanan: He understood from Myburgh that the dam would cost £50 or £60. He saw a lot of small receipts for the dam. The defendant said that the rent of the cottages had better stand over, as he was spending money on the dam. The principal feature of the new lease that the defendant agreed to was that the rent should be paid every three months in advance.

Mr. De Villiers closed his case.

Percival Havers, farmer, stated that he had to pass through Retreat to get on to his own farm. The fruit trees were undoubtedly useless. The defendant had cultivated the land very well. In his opinion the value of the farm had been increased fully one-third in the hands of Mr. Myburgh.

By Hopley, J.: Had the orchard been his he would have cleared it out.

Thomas Micklem, fruit farmer, stated that he inspected the trees for the late Mr. Prince, and found them practically worthless. If there had been a good orchard close by it would have been in danger from infection.

Cross-examined by Mr. De Villiers: He advised Mr. Prince to remove the trees, and he was aware that he had not done so.

Albert Caslin, fruit farmer, stated that he had sold the trees to the late Mr. Prince in 1894. Subsequently he had seen the cattle nibbling at the young trees. Just before Myburgh came on to the farm there was not a piece of cultivation anywhere. If neglected for two years the trees would become absolutely useless. The trees should have been taken out five years ago.

Abraham de Villiers, owner of the farm adjoining Retreat, stated that he planted trees the same year as Mr. Prince. At present witness's trees were in full bearing. Mr. Myburgh had cultivated the farm, and improved the value of the farm beyond expectation.

Horatio Graham, farmer, of Stellenbosch, stated that the fences were much better looked after under the defendant's tenancy. He was not a fruit farmer, but he could see that the trees had not been looked after. The Hottentot boys that had worked on the dam received £10 before Myburgh took it over. He considered the work on the dam full value for £50.

Cross-examined by Mr. De Villiers: He could not say that the defendant had kept the farm well.

Peter Abrahams, contractor, said last year he did certain work on the farm Retreat, and gave Mr. Myburgh a receipt for £5 10s.

James Frederick Wilson, cab proprietor, stated that he drove Mrs. Prince and Mr. Beard out to the farm Retreat at the latter end of November or the

beginning of December, and twice during the beginning of the year.

Arend Lourens, contractor, stated that in July last he took a contract from the defendant to clean the dam for £40. The dam was full of rushes, and had been absolutely neglected. The work had been done as cheaply as possible. The dam would never be washed away by any rain. What Mr. Cairncross saw was what he had thrown over the substantial wall of the dam.

Cross-examined by Mr. De Villiers: He made the old wall a good deal broader. The dam did not leak as far as he knew.

William Mostert, attorney, stated at the time of the occurrences he was serving his articles in the office of Messrs. Silberbauer, Wahl and Fuller. On the 29th December he had the summons ready to issue against Myburgh, but Beard came in and stayed the summons.

Cross-examined by Mr. De Villiers: He had no definite instructions about a new lease, and he understood from the conversation that Myburgh refused to enter into a new lease. He thought it very reasonable to accept the balance of the money from the defendant on the day after he promised to pay the whole amount.

By Hopley, J.: He got no instructions that he was not to accept the rent until a new lease had been entered into. As far as he knew, the parties came to no definite arrangement about the terms of a new lease.

Francis William Myburgh, defendant in the case, stated that he had farmed the lands to the best of his ability. The fences were kept in good order, and new ones were constructed. When he took it only three morgen was under cultivation—he had cultivated about 100 morgen. The fruit trees he removed were really stumps; in fact, they were absolutely useless. When the plaintiff was on the farm with Beard she said

"You are a farmer, and you should know best." The first time a complaint was made about removing trees was at the end of the year. The plaintiff instructed him to have doors put in the coachhouse, and £5 10s. was a fair price for the work and material. The dam was made in the usual way for the reasonable cost of £50. There was a small leak, and he was going to have it made right. The plaintiff was aware that he was short of money, and she gave him an extension of time to pay the rent. The plaintiff did not make any new conditions on December 26, and it was untrue that Mostert had been instructed not to receive the rent unless a new lease had been entered into. The plaintiff wanted a new lease, stipulating that the rent should be paid quarterly in advance, but witness would not accept that condition.

Cross-examined by Mr. De Villiers: Messrs. Silberbauer, Wahl and Fuller

wrote to him about a new lease after he had paid his rent. He thought the matter was finished when he paid the rent. It was true that he had put milk in the drawing-room, but he could not see that it did any harm.

This concluded the evidence, and Mr. De Villiers having been heard in argument on the facts.

Hopley, J., without calling upon Mr. Buchanan for the defence, said that it was most regrettable that the parties had not been able to settle this case without incurring the serious expense of a lawsuit. He was under no doubt as to the way judgment should go, so had not called upon the defendant's counsel. He could sympathise with Mrs. Prince, as Myburgh was a bad payer, and would probably get on the nerves of people who expected money from him. This sort of tenant was a nuisance. The declaration set forth the terms of the lease. It was entered into on April 24, 1903, and the declaration went on to say that the defendant did various things in variance of the terms of the lease, neglected to maintain in good order and repair the existing fences, transgressed clauses 5 and 6, destroyed a number of fruit trees (against the express desire of the plaintiff), and did not and does not manage the farm in a husbandlike manner. At various times after October 31 the plaintiff notified the defendant that unless the rent was paid she would forthwith avail herself of the right to cancel. The defendant did not pay, and plaintiff said she was therefore entitled to cancel. What the Court had to do was to see whether the defendant had so behaved and the plaintiff in, her reply so behaved that the lease was cancelled and the defendant must be ordered to quit. The rent was £230 per annum, and the dates of payment October 31 and April 30. Clause 10 of the lease said that unless the lessee paid the rent within thirty days after it became due the lessor might cancel the lease and eject the lessee. When the first half-year's rent became due on October 31 defendant did not pay. He had, however, meanwhile under agreement with Mrs. Prince spent or was spending the sum of £50 upon a dam and the sum of £5 10s. on some repairs necessary to the building, which he said Mrs. Prince had agreed to. It appeared that this was the case. Mrs. Prince and Mr. Beard (who seemed to have become the adviser of Mrs. Prince) very frequently went to the farm, and must have seen the way the dam was being cleaned out, and they must have seen after a certain time that trees were taken up, but there was no strong protest set forth and no objection to anything defendant had done up to the time that Mrs. Prince began to be worried by the non-payment of the rent. Mrs. Prince was there apparently after her flower garden was pulled up.

Myburgh said there was this little bit of garden, but the rest of the farm had been neglected. The Court did not think that the taking away of the fence from round the flower garden was a breach of the lease, in spite of clause 7. With regard to the fruit trees, Myburgh said that Mrs. Prince and Mr. Beard were walking with him, and he pointed out the trees, and said that they had never thriven, that they were in a poor state, and not worth keeping. Upon this point they had also the evidence of farmers and experts in the district, who all said that it could hardly be called an orchard at all. The gates had been left open and the cattle had gone in and weeds had grown up, and the trees had become diseased, and were absolutely worthless. Myburgh swore that Mrs. Prince said: "Well, Mr. Myburgh, you are a practical farmer, you know best. You know more about these things than I do." This seemed likely upon the evidence given. It was not likely Myburgh would want to uproot the trees if they were good and likely to bring him in a return. The Court had no doubt that in uprooting these trees defendant acted wisely, and that he had the authority of Mrs. Prince. The next point was as to whether defendant had neglected the fences. The evidence abundantly proved that Myburgh farmed the farm in a decent, husbandlike manner, and that he had done nothing in the way of waste, but a good deal in the way of improvement. They therefore had to come to whether there was anything in the way he paid his rent that would justify Mrs. Prince in cancelling the lease. The defendant entered into an agreement to pay within thirty days after the due date, and if this was not done the lease could be cancelled, and he could be ejected. The Court would warn the defendant not to overlook this point in the future. Clause 10 said that the lessor might at her option cancel the lease and eject the tenant. The question was whether Mrs. Prince had exercised her option, and had told the lessee that he was to be ejected. If she had done so no Court would assist the defendant, because he would be bound by the terms of the agreement, but the lessee must know that the option was to be exercised. The lessor must know her own mind, and not blow hot and cold, and must not lead the lessee to believe that she was not going to exercise her option. The Court would not allow the lessor to take up a position like that and eject a lessee whom she had led into the idea of the security of his tenure. The plaintiff's declaration said that at various times after December 14 she notified the lessee of her intention to cancel the lease, and more specifically on December 29 she would cancel if not paid that day. She appeared to admit that up to December 29 she had

only notified him that she would cancel if certain things did not happen, but she had not up to that date cancelled. Now, on December 29, the parties appeared to have met at the Grand Hotel. There was a summons out that day against Myburgh for the payment of the amount, and perhaps for the cancellation of the lease, and plaintiff said she notified him that unless the rent was paid that day she would cancel. But why did he not pay that day? Myburgh saw her, and told her about a sum he expected to receive on January 6, and the result was that Mrs. Prince sent Beard and defendant down to the office of her attorneys to explain to the attorneys, primarily, that they were to withdraw the summons, and that this new arrangement was come to. When they got to the attorneys all that was said was: "Withdraw the summons; we have given Myburgh up to January 6 to pay." They did not say, "We have cancelled the lease, so you can withdraw the summons." Nothing of that sort appeared to have happened. It appeared to be arranged that Myburgh could go on with the lease if he paid on January 6. There was no doubt something was said about a new lease. No doubt, Myburgh got on Mrs. Prince's nerves, as he was a bad payer, and she might have intended that there should be a new lease and payment in advance, but nothing appears to have been written by Mrs. Prince or agreed to by Myburgh. Mrs. Prince appeared to rely a good deal upon her letter of December 8, but on December 16 the parties met, and entered into an agreement for Myburgh to plant 10,000 grafted vine trees. It was clear at that time they were contemplating carrying on under the old lease; not a word was said about a new lease or any new terms of payment. Even if they had told Myburgh they would only allow him to stop upon condition of his accepting a new lease, then the action should have been to call upon Myburgh to accept a new lease. This course was not taken, and it was said that the payment on January 6 had nothing to do with the right of the plaintiff to eject the defendant from the farm. There was nothing to show that Mrs. Prince ever put it to Myburgh clearly that the lease must be cancelled; so Myburgh went to plaintiff's attorneys and paid them the rent, after going into accounts, the matter of the dam and doors, and then the attorneys gave him the receipts produced. Not on the receipts or anywhere was there anything about a new lease having been agreed upon, or that the payment was taken, except unconditionally. Myburgh said it was taken unconditionally, and Mostert supported him. There was then no absolute, specific cancellation. Even if there had been a cancellation, and it had been properly exercised by the lessor, if afterwards she

led her tenant to believe that everything was to go on as before she could not come to the Court for an order to cancel the lease and eject the tenant. No Court would listen to such a plea. The defendant's plea appeared to be the right one, that plaintiff did not exercise the right, but waived it and accepted the rent. For those reasons there must be judgment for the plaintiffs for the £89 tendered, with costs up to the time of the tender; costs hereafter to be paid by the plaintiff. In other words, upon the first prayer there would be judgment for the defendant, and upon the second prayer of the declaration judgment for the plaintiff, with costs up to the date of defendant's tender.

[Plaintiff's Attorney: D. Tennant, jun.; Defendant's Attorneys: Findlay and Tait.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte J. I. DE VILLIERS, { 1904.
May 18th.

Lunatic—Curator—Judicial declaration of lunacy.

The Magistrate's order for detention of an alleged lunatic, although confirmed by a judge, is not such a declaration of lunacy as would justify the Court in appointing a permanent curator of the alleged lunatic's property. For the purpose of such an appointment it is necessary that a summons should be issued and served in the usual way.

Mr. Close moved, on behalf of the petitioner, who is secretary of the Paarl Board of Executors, for the appointment of a curator bonis in the estate of Magdalena Elizabeth Louw, a lunatic, who was entitled to usufruct under a certain will. The respondent was under treatment at the Valkenberg Asylum, and was detained under a Magistrate's order,

given at Worcester. She had been in the asylum some 18 years.

Mr. Close: She comes in under the old Act of 1879. Section 4 of Act 35 of 1891 makes many important changes.

[De Villiers, C.J.: Do any other previous Acts provide for the appointment of a permanent curator to anybody who has not been declared a lunatic by order of Court?]

I am not aware of any such Act.

[De Villiers, C. J.: I can grant an order for the appointment of a temporary curator, but if you want a permanent curator to be appointed, why not apply to have the woman declared a lunatic in the ordinary way? Does not section 4 of Act 35 of 1891 apply only to those who have been declared lunatics by the Court?]

My contention is that all persons detained under Act 20 of 1879 may have a permanent curator appointed. Part 3 of Act 35 of 1891, and not part 1, applies to those detained under Act 20 of 1879.

[De Villiers, C.J.: Has she been declared a lunatic under section 34 of Act 35 of 1891? A judge's certificate given on the strength of the respective certificates of two medical practitioners is not a declaration of lunacy.]

If a man has been confined for some time, the Court may declare him not to be a lunatic. See section 12 and 14 of Act.

[De Villiers, C.J.: There you have it that the Magistrate can order only detention and the appointment of a temporary curator.]

Then I would ask for the appointment of a curator *ad litem*, and would suggest the appointment of Advocate Russell.

De Villiers, C.J.: There never has been a formal judicial order in which the respondent has been declared a lunatic. There has been a process under the Lunacy Act by which her detention in a lunatic asylum has been ordered, but such an order does not involve such a judicial declaration of lunacy as, in my opinion, is required in a case where the Court is asked to appoint a permanent *curator bonis*. The 15th section of Act No. 1 of 1897 clearly shows that where a *curator bonis* is appointed to a person who has been ordered to be detained under the Act, he is a curator for the temporary care or custody; but if there is to be a permanent curator, then the sub-section (2) of section 15 must be followed, and a summons must be served upon the lunatic and the curator to appear in Court, and show cause why the alleged lunatic should not be declared a lunatic. The order of the Court will be that a summons be issued, calling upon the respondent to show cause why she should not be declared of unsound mind, Mr. Advocate Russell to be appointed *curator ad litem*, summons to be served upon

the respondent and the *curator ad litem*, and to be returnable on the 2nd June, with leave to the applicant to prove the alleged lunacy by means of affidavits.

[Applicant's Attorneys: Walker and Jacobsohn.]

Ex parte CRONJE.

Mr. Russell moved for an order authorising the passing of a certain mortgage bond upon an estate in the division of Riversdale, subject to certain payments. Some nine beneficiaries were interested in the estate, five of these being minors. It would be a great advantage to the minors if they could retain the property, their share of the payments being £16 odd each.

The Master's report was favourable. Order granted in terms of Master's report.

Ex parte SCOTT.

Mr. Percy Jones moved on behalf of the petitioner, an executor in the estate of the late Wm. Scott, of Cape Town, of the firm of W. and G. Scott, for an order confirming the sale of half share in certain property to the petitioner. All the heirs consented, except that in the case of one who was married in community to a Mr. Donald, who was an engineer at sea, her husband's signature had not been obtained.

Order granted as prayed.

Ex parte PHILLIPS.

Mr. Gutsche moved on behalf of the petitioner, who is the executrix under the joint will of her late husband and herself, for leave to mortgage certain cottages at Mowbray, in order to carry out improvements and alterations required by the Municipality of Mowbray. The estimated outlay was over £130. There were already certain bonds on the property, and other charges were due.

De Villiers, C.J., explained that the Registrar had not been provided with a copy of the Master's report, while the attorneys had a copy. It was very strange, he said, because the report was really made to the Court.

Order granted as prayed.

Ex parte CROSBIE.

Mr. Schreiner, K.C., moved for the appointment of a *curator ad litem* to represent the minor children of the petitioner and Wm. Crosbie in a special case concerning the construction of the will of the late Robert Crosbie.

Order granted, appointing Mr. Advocate Gardiner to be *curator ad litem* of the minors in the action proposed to be instituted.

BOTHA V. DE BRUIN.

Mr. De Waal moved for the appointment of a *curator bonis* to manage the affairs of the respondent, who was certified by a doctor to be unable to manage his own affairs. The applicant was respondent's mother.

De Villiers, C.J., pointed out that there should be more than mere certificates from medical men. One of the two certificates produced was four years old.

Mr. De Waal said that notice had been served on the respondent.

De Villiers, C. J., said the case was wholly incomplete. The Court could not upon two certificates, not upon oath, make the order asked for. If the opinion of doctors had to be stated it should be by means of affidavits. On the whole, he (the Chief Justice) considered that, having regard to the value of the property, there should be a curator appointed, and the Court would grant leave to issue a summons against Jacobus Albertus de Bruin, returnable on the 2nd June, calling on him to show cause why he should not be declared of unsound mind, and incapable of managing his own affairs. The Court would appoint the Assistant Magistrate at Maraisburg as *curator ad litem*, with instructions to report to the Court as to the state of mind of the respondent. Leave would be granted to prove respondent's state of mind by means of the affidavits of medical men—not certificates, but affidavits as to his present state of mind.

FOSTER AND OTHERS V. ROESTOFF AND OTHERS.

Mr. D. Buchanan moved for an order for ejectment, and for an interdict. Granted.

Ex parte MARAIS.

Mr. P. S. T. Jones moved for an order authorising petitioner to take over liability under a certain bond. The Master reported that this course would be for the benefit of the minor interested. Granted.

CONTATS' COLLIERIES V. CONTAT.

Mr. Schreiner, K.C. (with him Mr. W. P. Buchanan), moved on behalf of the liquidators of Contats' Collieries for an order allowing the payment of certain witnesses' expenses, or referring the matter back to the taxing officer. The taxing officer refused to allow the expenses of certain witnesses, who were subpoenaed but not called at the trial. Plaintiff contended that the witnesses were, on the pleadings, material witnesses. The taxing officer reported that when the bill of costs came before him, defendant's attorneys objected to the expenses of these

witnesses being allowed. Plaintiff's attorneys did not press for the expenses, and he (the taxing officer) thereupon disallowed them. Subsequently, the applicants wished to press the claims, but he (the taxing master) held he could not go into the matter again without the consent of the parties.

De Villiers, C.J., said it was clear that the witnesses in question were necessary witnesses, and the matter would be referred back to the taxing officer for re-consideration. The taxing officer, however, was quite right in holding that when once the taxation had been decided upon he should not reconsider it without either the consent of the parties or an order of Court. As to the costs of the present application, he considered there should be no order as to costs, because these costs might have been avoided if the matter had been pressed upon the taxing officer at the time when the first taxation was made.

OSBORNE V. OSBORNE.

Mr. D. Buchanan moved for leave to the wife to sue the respondent *in forma pauperis* for divorce on the ground of misconduct and cruelty.

A rule was granted calling on respondent to show cause on the first day of next term why applicant should not be allowed to sue *in forma pauperis*.

Postea (June 1st.) The rule was made absolute.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

WEINTROB V. DE VILLIERS } 1904.
AND SCHAVEREIN. { May 18th.

This was an action brought by Louis Weintrob, of the Paarl, against the first-named defendant, for transfer of certain property, and to declare the subsequent sale to the second defendant null and void. The plaintiff appeared in person, Mr. W. Buchanan appeared for the first defendant, and Mr. Gardiner for the second defendant.

The plaintiff stated that he had paid his advocate £40 10s., and had had no notice of the trial.

[Hopley, J.: You mean you have paid your attorneys that amount; you don't pay advocates that amount of money.]

Mr. Buchanan: His attorneys have withdrawn from the case.

[Hopley, J.: What is your position?]

Plaintiff: I am quite willing to go on with the case and take transfer immediately.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

DAVIS V. STEVENS. { 1904.
May 19th.

Mr. Roux moved for an order, authorising the liquidation of a certain partnership business. The petitioner stated that he desired to dissolve partnership, and had endeavoured to discontinue the business, but the respondent refused to agree to a liquidation. Petitioner suggested the appointment of Mr. W. H. Gray, as liquidator.

The respondent said that the application was unnecessary, as he had always been ready and willing to terminate the business. This action was principally brought as a matter of spite in order to saddle him with costs. The total value of the goods in the partnership business was small; there was very little left now but fixtures.

Order granted for the liquidation of the business, Mr. Gray being appointed liquidator, costs to be divided between the parties.

Ex parte BECKER.

Mr. M. Bisset moved for the rule *nisi* to be made absolute for an order authorising the transfer of certain property.

Rule made absolute.

ESTATE DE SWARDT AND { 1904.
OTHERS V. SURVEYOR—{ May 19th.
GENERAL AND OTHERS. { " 20th.

Land beacons—Amended title—
Act 9 of 1879.

Notice was duly given to the applicants in terms of the first proviso to the 4th section of Act 9 of 1879, that unless within thirty days after service thereof an objection were lodged with the Divisional Council to the boundaries adopted on survey, they would be deemed to have consented thereto, but the applicants failed, not inadvertently but deliberately, to raise any objection within the time specified.

Mr. Buchanan said that his client contended there was a cancellation of the sale by reason of the plaintiff's non-fulfilment of the conditions of the contract.

[Hopley, J.: I don't see how he can have any claim against the second defendant, except he alleges collusion between the defendants.]

He does not plead that, my lord. Counsel then proceeded to read the pleadings.

[Hopley, J.: I expect all the money was spent in the previous litigation pleadings.]

Plaintiff: They never said anything about money.

[Hopley, J.: Why don't you see your attorneys?]

I have no time, my lord; they said when I saw them that it was too late.

[Hopley, J.: It can't have been that; the attorneys would only be too glad to interfere.]

Mr. Buchanan: I have been told, my lord, that his attorneys have refused to act for him because he can't make further payments.

[Hopley, J.: According to what you say, it is probable that his attorneys have not given him notice.]

Mr. Buchanan: His attorneys have taken action against him for civil imprisonment for a debt of £80.

Plaintiff: Nothing of the sort, I have managed all that.

[Hopley, J.: When did you hear of these proceedings?]

Plaintiff: I heard on Saturday.

Mr. Gardiner: The case was originally set down for the 6th.

[Hopley, J.: Where are your witnesses?]

Plaintiff: I have got a lot of witnesses at the Paarl.

[Hopley, J.: When will you be ready to have your witnesses here?]

I think by the 15th June.

[Hopley, J.: You will swear you had no notice?]

Yes.

Mr. Gardiner: I think he is often in the Supreme Court.

Plaintiff: I have paid my debts.

Hopley, J., said he did not like to be harsh in the case, and to take advantage of the plaintiff's position.

Mr. Buchanan produced Mr. Faure, who stated that he had sent notice to the plaintiff's attorneys at the Paarl.

The plaintiff then gave evidence, and stated that he only knew of the case on Saturday, 7th inst.

Hopley, J., remarked to the plaintiff that he had given a lot of trouble. The case would be specially set down for 15th June, and there could be no excuses then, costs to be reserved.

Held, that the applicants were not entitled to an order restraining the Surveyor-General from giving an amended title according to the said boundaries to the owners of the land on whose behalf such notice had been given.

This was an application brought by A. H. Stander, J. C. Botha, Jan Hendricus Barnard, Anna M. de Swardt (executrix testamentary in the estate of her late husband), and others against the Surveyor-General of the Cape Colony, Dirk M. Lamprecht, J. S. Gericke, and others. The petitioners are co-owners, with certain others, in undivided shares of the quitrent farm Gwayang, in extent 2,492 morgen, in the division of George, and the respondents are the Surveyor-General and the owners of the adjacent farm Brakfontein, also known as Schimmelkans, the said owners having applied to the Surveyor-General for the issue to them of amended title and diagram of the said farm Brakfontein. The application was for an interdict restraining the first-named respondent from preparing for issue and issuing amended title of Brakfontein, and the other respondents from proceeding with their application for such amended title pending the institution by petitioners of an action for a declaration of rights on the question of the disputed boundary line between Gwayang and Brakfontein.

It appeared that the respondents had had a survey carried out of their property, and had applied to the Surveyor-General for the issue of an amended title. Mr. W. H. Ballot, the Surveyor, employed by the respondents, informed petitioners that he had re-surveyed the farm Brakfontein for the purpose of obtaining an amended title under Act 9 of 1879, and that unless petitioners lodged an objection to the boundary line within 30 days with the Divisional Council of George in terms of section 93 Act 7, of 1865, they would be deemed to have consented. This the petitioners failed to do. They now said that the survey prejudiced their interests. Mr. Searle, K.C., was for the petitioners; Mr. M. Bisset was for the respondents.

[De Villiers, C. J.: Why have the petitioners allowed more than 30 years to elapse before making their claim?]

Mr. Searle, K.C.: They had not obtained their diagram.

[De Villiers, C. J.: That was no reason for not objecting to the boundary line.]

Mr. Searle, K.C.: The question is whether the applicants can now be debarred from objecting to the boundary line under the circumstances of this case. See sec. 4 of Act 9 of 1879. In June the Surveyor-General told them to state their objections to the Divisional Council.

Sec. 93 of the Land Beacon's Act is very obscure, but it is not against us.

[De Villiers, C. J.: The six months had not expired?]

No, but neither the Divisional Council nor the Surveyor-General did anything.

[De Villiers, C. J.: Under what Act was the amended title granted?]

Under Act 9 of 1879. None of the applicants let alone three-fourths have agreed. Sec. 4 of the Act requires a formal notice of agreement, but no such notice has been given. I suggest that this section applies only when the parties agree; but here there was no agreement, and the applicants protested to the surveyor against the boundary. It would be very hard on these people were they to lose their land.

[De Villiers, C. J.: They had plenty of time wherein to come to the Court.]

They could not get their diagrams. The Surveyor-General evidently did not consider that the matter was settled, as he advised them to apply to the Divisional Council.

[De Villiers, C. J.: These people received notice to lodge their objection within 30 days, and they did not do so?]

The clause as to the 30 days is directory, and not imperative. Had it been imperative there would have been an enacting clause. Here no less than 32 morgen is proposed to be taken away, and it is said that because one man had had his farm re-surveyed the whole boundary line is to be changed, and all co-proprietors are to suffer. Under sec. 93 we are entitled to six months' notice.

[De Villiers, C. J.: From what time do these six months' date?]

Obviously not from the same time as the 30 days referred to in the Act of 1879.

[De Villiers, C. J.: You have not given the 30 days' notice after you were warned to do so. Are you not now estopped?]

The Act does not say so.

[De Villiers, C. J.: Suppose the legislature had said that if the owner did not give notice within 30 days' he should be barred from doing so?]

The section is only for the purpose of fixing the time and the mode of procedure.

[De Villiers, C. J.: You can only ask the Court to grant relief. See *Steydman v. Oudtshoorn Divisional Council*.]

Mr. Bisset: I submit that sec. 4 of Act 9 of 1879 is not intended to bring the procedure prescribed by Act 7 of 1865 under that of Act 9 of 1879. As to the six months' referred to in Act 9 of 1879, the applicant has failed to raise his objection within 30 days, and therefore he cannot do so now.

[De Villiers, C. J.: Suppose that an objection had been raised, what would have been the procedure?]

The Divisional Council would have appointed a surveyor under sec. 9 of Act 4 of 1865.

[De Villiers, C. J.: But the parties do not intend to proceed in that way, and wish their rights to be decided by the Court. It may be that they cannot now proceed under the Land Beacon's Act; but may they not come to Court to have their rights decided?]

I submit not.

[De Villiers, C. J.: Do not the provisions of sec. 4 of Act 9 of 1879 refer only to procedure under the Land Beacons' Act? It is quite a different question as to whether a person forfeits his right under the common law by not giving notice.]

I submit he does if he is taken to have consented. The petitioners have been most dilatory. They have allowed in all nearly two years to elapse, after they got notice, before taking action. If they were likely to suffer irreparable injury why were they so negligent?

Mr. Searle (in reply): This act was not intended to apply to cases in which there was a *bona fide* dispute as to boundaries. In any case there is nothing in the Act to show any intention to oust the jurisdiction of this Court.

Cur. Adr. Vult.

Postea (May 20th).

De Villiers, C.J.: This is an application by the owners of the farm Gwayang, in the district of George, for an order restraining the respondents, the Surveyor-General, and the owners of the farm Brakfontein, from proceeding for an amended title in terms of Act 9 of 1879. The ordinary proceedings were taken by the respondents for the purpose of having an amended title. A surveyor was appointed, Surveyor Ballot, and he took all the steps required by the Act for the purpose of obtaining the consent of the owners of the adjoining farm Brakfontein. The preamble of the Act 9 of 1879 is relied upon on behalf of the applicants, and it has been urged on their behalf that inasmuch as the Surveyor was told by the applicants that they did not agree to the boundaries, the Act did not apply. It appears to me that the object of the 4th section of the Act was to define cases in which owners of the adjoining land should be considered not to have disputed the boundaries. The surveyor seems to have used every consideration towards the owner of the adjoining land. All the required notices were given, and, not only that, but the proprietors were informed that the surveyor was quite willing to meet them in an amicable manner. The surveyor, in his affidavit, states that he arranged with them to meet the owners of Brakfontein on the 10th March on the ground in dispute, when he would point out the beacons and so on. At the appointed time and place only four or five of the owners of Gwayang appeared without powers to act for the rest. He (the surveyor) after they had been over the boundaries, claimed by the Brakfontein owners, offered to

show to the applicants a true copy of the diagram of their ground, which he had in his possession, but this they declined to look at. Subsequently, a further appointment was made with the applicants, but they put in an appearance so late that the owners of Brakfontein had gone away again. The surveyor then gave them notice under Act 9 of 1879, and told them they would have 30 days within which to lodge their objection. The notice was delayed until the 14th April, 1902, and even then no objection was lodged within the specified period. The notice was served in due form in terms of the Act, 30 days were allowed to expire, and no steps were taken by the owners of Gwayang in terms of the Act. The applicants had full notice in terms of the 4th section of the Act that unless within 30 days after service of the notice an objection were lodged they would be taken to have consented, they elected not to object and they must now be deemed to have consented. In the present case it appears to me that it was not a mere oversight, not a mere inadvertence—if it had been a case of mere inadvertence possibly the Court would have power under its general jurisdiction to have given relief to the applicants—but the applicants refused to look at the diagram, they had ample time to raise the objection, and they failed to raise the objection. In my opinion they must be deemed to have consented to the diagram as proposed. It is true that the 4th section of the Act of 1879 refers to the 83rd section of the Act of 1865, but not for the purpose of altering the time within which the notice must be given. The later Act should prevail if there is a conflict as to the time in which objection should be made, i.e., 30 days after service of notice. In my opinion, therefore, the applicants are not entitled to the relief. It is their own fault that they are too late now, and the Act would be made to fail in its objects if the Court were, in the case of a deliberate refusal to comply with the terms of the Act, to give the applicants relief. The application will, therefore, be refused with costs.

[Applicants' Attorneys: Michau and De Villiers; Respondents' Attorneys: Tredgold, McIntyre and Bisset.]

MAW V. FOX.

Mr. Schreiner, K.C., appeared for the applicant, to move for an order abating certain proceedings on the ground of defective service of notice.

There being no affidavit of service, the matter was ordered to stand over.

ESTATE KROESE V. KROESE { 1904.
AND OTHERS. { May 19th.

Mutual will—Executors of the same estate appointed under two wills.

A. and B., married in community, made a joint will, by which they appointed each other as heirs "of our estate until our death, and as executor we appoint the survivor of us and as executors of our joint estate after our death we appoint our sons," the applicants. B., the wife, died, upon which A. adiated and remained in possession of the joint estate. He married a second wife and made a second will, jointly, with her, by which they revoked all previous wills except the one just mentioned, and they appointed the respondent as executor. A. died, and the Master issued letters of administration in favour of the respondent, and the applicants as executors of A.'s estate. There was no application to set aside this appointment, but the applicants asked for an order, declaring that the respondent was not entitled to interfere with the assets of A. acquired before the death of his first wife.

Held, that in the absence of any proof that the respondent did not intend to abide loyally by both wills, the order should not be made.

The applicants were the executors of the estate of the late Maria Margarita Kroese, and respondents were executors of the late Christiaan Hendrik Nicolaas Kroese. It was stated on affidavit that the deceased persons named were married in community of property. The parties made a joint will, under which first the survivor, and after his or her death, Johannes Godfrey Kroese, Jan Kroese, and Christiaan Hendrik Nicholas Kroese (one of the respondents) were appointed as executors. The wife died in February, 1900, and the survivor remarried. He died in 1903, leaving a will making certain dispositions to his second wife and others, and appointing Johannes Godfrey Kroese, one of the applicants (Jan Godfrey Kroese), and the

secretary of the Malmesbury Board of Executors as executors. After his first wife's death, the survivor adiated under the will, and remained in possession of the estate. The Master, after the death of the survivor, granted letters of administration of his estate to the respondents, who, with Johannes Godfrey Kroese, were appointed executors of the estate under the first will. Applicants contended that there was a specific appointment in the will of the survivor and his second wife of executors, who did not include Christian Hendrik N. Kroese, jun., and they now applied for an order setting aside the appointment of the last named as executor, on the ground that the appointment was wrong, and appointing applicant and the secretary of the Malmesbury Board of Executors as executors under the second will to deal with property acquired by the testator after the death of his first wife.

Mr. Schreiner, K.C. (for applicant): This case is very similar to that of *Rudolph v. Rudolph* (12 S.C.R., 361), though the two cases are not quite on all fours. There the will did not provide for an executor after the death of the survivor. Here the will does make such provision (see the judgment in *Rudolph's* case at page 364, where several cases are brought up.) In the present case we have an executor appointed under a joint will, who is to administer after the death of the survivor. The executors under the first will are excluded. The Master has included as a co-executor testamentary a person whose name is not mentioned in the will. He has no such power. I submit that Mr. Kotze's attitude in insisting on administering the estate by himself is most unreasonable. Christian should never have been appointed as executor of the last will, because even though he was executor testamentary under the first joint will, he was not an executor under the last will. Christian should never have been appointed as an executor of the last will. He had been appointed an executor testamentary under the first mutual will, but he was not so appointed under the last will.

[De Villiers, C. J.: It is an anomaly that there should be two sets of executors for the same estate.]

See *Brand's* case (4 Juta. 320). This is a leading case on the point, and there an executor was appointed to administer the whole estate under a second will.

[De Villiers, C. J.: How many executors has the Master appointed?]

Three under the second will. The father confirms the appointments of the first will, are also executors under the first will save as to Christian; thus he is an executor of his mother's estate, but not of his father's.

[De Villiers, C. J.: Should not the executors under the first will be joined with those under the second?]

That would be so if it were clear what would happen. Suppose that one party wishes to distribute in one way and the other in another.

[De Villiers, C. J.: They could always come to the Court. The whole question seems to be one of distribution and administration.]

Yes, but the Board of Executors are in possession. We offered to share the commission with them, but they insisted on having the Master's opinion.

[De Villiers, C. J.: Why should not all join in the administration. When you come to the distribution possibly there might be a difficulty.]

The persons who should do that are those who are appointed under both wills. Kotze, however, insists on administering the whole joint estate.

Mr. Searle (for respondents): The applicants are the executors of the first dying, but they take up the position that they are executors of the whole joint estate. It would be very inconvenient to have two sets of executors. It is said that the applicants are prepared to share the commission, but Christian's letter to Kotze goes much further than that, and claims the right to administer both estates. The application means that the executors of the survivor should administer the whole joint estate. We object to that, and I submit that this application is necessary.

Mr. Schreiner (in reply): We could not ask to have the appointment of Kotze set aside because he has a right to administer the property acquired after the death of the first dying which would not be included in the bequest.

[De Villiers, C. J.: I cannot understand how you can have two sets of executors to administer the same estate?]

That was done in Brand's case.

[De Villiers, C. J.: All the executors must join in all formal acts. If there are three, two of them cannot pass transfer.]

But Kotze wants to administer the whole estate.

[De Villiers, C. J.: According to law.]

He does not say what his interpretation of the law is.

[De Villiers, C. J.: Why should he? If he should attempt to do anything illegal you can always come to the Court.]

De Villiers, C.J.: I think it is to be regretted that Mr. Kotze, in his answer to the applicants, was not more specific. It is a very curt letter, and possibly there may be a misunderstanding as to what he really meant, but the letter is quite capable of the meaning that he intends to administer the estate jointly with the other co-executors in accordance with the wishes expressed by the testator in both wills. The Master has appointed three executors of the estate of the survivor. There has been no attempt to set aside that

appointment of the three executors. It will be the duty of the three executors who have been appointed to administer the estate, in terms of both wills, but until it is clear, from some overt act or from something specifically said by Kotze that he does not intend to abide loyally by the terms of the first will, I do not think this Court should interfere. There will consequently be no order, but the costs may well come out of the estate, because there seems to have been a misunderstanding, and that misunderstanding partly arose out of the terms in which Mr. Kotze wrote his letter. If he had explained himself more fully, as he did in the subsequent affidavit, possibly this question might not have arisen. In regard to the costs, the question is: What estate was interested in having this question decided? Was it the second estate or the first estate, or both? If both estates were concerned in having this point decided, that would be a reason for letting costs come equally out of both estates, but, as far as I can judge at present, it is the first estate that is mainly interested in having this question decided.

[Applicant's Attorney: T. P. Peters; Respondent's Attorneys: Berrange and Son.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION. § 1904.
{ May 19th.

Mr. W. P. Buchanan moved for the admission of Miss Vlotter, as a sworn translator in the Dutch and German languages.

Application granted and oath administered.

TRIAL CAUSE.

HOLLAND V. SHERWOOD.

Quantity surveyor — Partnership
— Division of profits.

This was an action brought by James Holland, architect and quantity surveyor, of Cape Town, against Edmund Sherwood, to recover £144 2s. 9d., being an proportionate share of certain work, which the parties had done in partnership.

The declaration set out that in October, 1902, the Corporation of the City of Cape Town, resolved to build certain

electric sheds on the Dock-road. Plaintiff was engaged to take out the quantities, and it was agreed between plaintiff and defendant that the work should be done in the name of Sherwood and Co., one third to go to the plaintiff and two-thirds to the defendant. There was also the same understanding with regard to certain plans and specifications, which secured the second prize of £100, in the competition in connection with the baths. The successful tenderer for the Electric Sheds, Messrs. Hopkins and Co., were indebted to the plaintiff in the sum of £605, and the company admitted their liability to the defendant, who had drawn £400. The defendant was still owing the plaintiff £144 2s. 9d.

The plea denied that the plaintiff was a quantity surveyor. The defendant was approached by the plaintiff, who represented that he had taken out quantities, and would give them to defendant. It was thereupon agreed that the plaintiff should receive one-third of the proceeds. Plaintiff wholly failed to supply the said quantities, and defendant took them out himself, the plaintiff neither contributing work or expense towards them. The plaintiff had retained the £100 prize money. Defendant claimed in reconvention £54 17s. 3d., which added to the disbursements, would be two-thirds of the £100.

Mr. W. P. Buchanan appeared for the plaintiff, and Mr. McGregor (with him Dr. Greer), was for the defendant.

James Holland, plaintiff, stated that he was an architect and quantity surveyor.

[Hopley, J.: Are you a quantity surveyor?]

Yes, my lord.

[Hopley, J.: How long have you been a quantity surveyor?]

Witness: I may say I was born one. My father was one.

Continuing, witness said that up to the end of October, 1902, he was employed as an architectural draughtsman at the Town House. Witness drew up the plans for the electric light sheds. The specifications were necessary in taking out quantities. In October the defendant came to see him about the baths competition. The defendant said he had got all particulars, and asked witness if he would join him in taking out the quantities of the electric power works. Witness was to get one-third, and then he promised to consider the matter. On October 22 the defendant wrote offering again to give witness one-third on all the works, and this was duly accepted. In the arrangement witness was to supply the plans in pencil for the baths competition, and the defendant and his partner were to finish them. For the electric light-sheds he was to give defendant all information about the plans, and to give him assistance in getting out the quantities. Certain explanations were usually necessary from the architect before the quantities could be taken out. The de-

fendant practically did nothing in connection with the baths competition. The Town Council issued the plans for the electric light sheds about the first week in November. When the plans were public property, the defendant made an appointment with witness to go down to his house to do the quantities. On the 9th November witness took out the measurements with his rule, and the defendant put them down in his book. When he left, the work had been practically done by him. On the 13th November defendant wrote that he was ready for the printers, and asking witness to guarantee the quantities. Witness guaranteed them as being correct. In connection with the plans for the new baths the defendant had done very little work. Several people he had engaged to complete the work kept worrying him for money. On February 27 the defendant wrote asking him to settle the matter amicably. If he had had any assistance from Mr. Sherwood he would have won the first prize of £1,000. On the 7th May the defendant wrote saying that there was something wrong with the quantities for the City Hall, but witness went down the following day, and said that there was nothing wrong.

Cross-examined by Mr. McGregor: If Sherwood owed him money on the electric power sheds he owed the defendant money on the baths. He was quite sure that Mr. Pitts did not ink in the elevations. He did not send a letter contradicting Pitts, when he wrote that he had done so. When he got the cheque for £100 over the baths, he endorsed it himself, and spent the amount, as the defendant had drawn over £200 in connection with the electric power sheds. He did not state to the defendant when he called at the Town House that he had the quantities ready. It was not understood that if witness produced his quantities that the defendant would allow him something for them. He wrote to Mr. Grace that he was only a couple of hours with the defendant in making out the quantities.

Re-examined by Mr. Buchanan: He had a testimonial from the Town Council which mentioned his capability for taking out quantities. When one was acquainted with the specifications the quantities could be got out in quarter of the usual time. The work left to Sherwood was detailed work that could have been done by a clerk.

Einar Aune, Government land surveyor, stated that in November, 1902, the plaintiff got him to do some work on pencilled plans. Part of the ink-work had to be touched up. The plaintiff was in and out of the office several times, and he also helped on the plans.

Cross-examined by Mr. McGregor: As far as he remembered, the elevations were not inked.

Frederick Grace, architectural draughtsman, said that in October and

November, 1902, he was working with the plaintiff at the Town-house. The plans and specifications of the electric sheds had been in plaintiff's hands for a long time before witness took them over. He understood that plaintiff and defendant were in a partnership over the quantities. By knowing specifications, it would take a man about half the usual time to get out quantities.

Cross-examined by Mr. McGregor: The final plans and specifications were different from what the plaintiff had.

Mr. Buchanan closed his case.

Edmund Sherwood (defendant) said that he told the plaintiff not to sign the cheque. Both the jobs were separate partnerships, as one was a certainty and the other was an uncertainty. Witness never approached the plaintiff, as he never knew he was a quantity surveyor. He was perfectly certain that the plaintiff came to him at the Town-house. The plaintiff said he had a full bill of quantities taken out, and said to witness, "What's the good of two people taking out quantities?" and then witness agreed to accept it. The reason he wanted to join the plaintiff was that he was afraid the builders would not accept the quantities. The plaintiff never rendered him an hour's assistance in the matter; in fact, he never produced a single sheet of paper. Day after day witness asked the plaintiff for his quantities. The plaintiff came to his house principally to induce witness to take him as a partner. On that day the plaintiff never rendered any assistance whatever in regard to the quantities. On the 4th November witness asked plaintiff for his quantities, and he promised to let witness have them. When plaintiff came to the house on the 9th November, he said that he was very sorry for overlooking the quantities. When he saw that the plaintiff was not forthcoming with quantities, witness went on with his own, and issued them in his own name. The plaintiff never saw the quantities drawn up by witness. It took his son and himself a week to draw up the quantities. He made the sketch plan of the ground floor and the baths while he was at Caledon.

Cross-examined by Mr. Buchanan: He could get to know when the plans would be ready; he knew the running of the Town-house.

He did not know that the plaintiff drew up the plans and specifications. If the plaintiff's quantities were anything near his, it would have saved him a lot of time. Witness sent in his quantities about the 16th or 17th. He never wrote to say that as the plaintiff had not completed his part of the contract, that the agreement was off. When there was a dispute about the work, witness called for plaintiff's quantities, although he denied that the contract was open then.

Mrs. Sherwood (wife of the defendant) stated that on the 9th November, when

the plaintiff came to the house, she remembered that there were no papers produced or any work done. The chief conversation was about a partnership with the defendant, which the plaintiff was anxious to bring about. She only saw him come once to the house.

Henry David Pitts, architect, stated that the defendant sent a plan for the baths competition, which witness handed over to the plaintiff, who had eight plans made out of it. Witness inked the major portion of the plans, but after some unpleasantness, witness said that he would have nothing more to do with the plans, and that was the cause of the work being sent out. His firm did fully two-thirds of the work.

Cross-examined by Mr. Buchanan: The plaintiff agreed to bear his share of the outside cost.

This closed the evidence, and counsel having been heard in argument on the facts,

Hopley, J.: In this matter plaintiff sued defendant on contracts entered into for taking out bills of quantities for an electric power station and for designs for some Municipal baths. Plaintiff had been employed in the Town-house up till 1902, working mainly on the power-station plans, and it is clear that at about the time that tenders were about to be called for for the power-station the plaintiff and defendant came to an agreement to work with each other as to the taking out the quantities for that building. Each alleges that he was approached by the other. Now the defendant was a well-known quantity surveyor. If the plaintiff had been a recognised surveyor with a clientele, he would have had no need to ask the defendant to go in with him if he had the quantities already taken out. Defendant had a large connection in Cape Town amongst contractors. Therefore the plaintiff had every reason for approaching the defendant, while defendant had not equally potent reasons for approaching plaintiff. The baths transaction took place about the same time, and the terms of both agreements were stated in the same letter. The plaintiff said these two contracts were indivisible and inseparable, but there was no reason to disbelieve the defendant when he said that they were separate agreements, and were only put in the same letter because they happened about the same time. Sherwood had done a very substantial portion of the work for the baths design, David Pitts had also done some work, and would have done more but for the quarrel with plaintiff. Clearly, therefore, as to this, the parties worked together and must share the proceeds after deducting expenses. On this head defendant was entitled to £54 17s. 3d. As to the other contract, I cannot help thinking that defendant's version was the correct one. Plaintiff had induced the defendant to enter into the agreement with him by

holding out that he had the bills of quantities all made out, which would have saved the defendant much labour and trouble, but as a fact the plaintiff never had any bills of quantities, and when one looked at the bulk of the bills of quantities and the specifications produced, it was impossible to think that anyone could carry all the details in his head, which is what the plaintiff said was all that he had alleged, and that he had only agreed to help when defendant took out quantities by the explanation he was able to give. Plaintiff had been engaged for two years on these plans, and he must have forgotten a great many of the details, and, moreover, the plans had been altered after he had left the Town Office. He never was really in a position to afford the substantial help which he had led the defendant to believe he could give him, and in the end the defendant had to take out the quantities himself unaided by the plaintiff, who had thus entirely failed to perform his part of the contract. Judgment must therefore be given to the defendant in convention, and also for the defendant (now plaintiff) in reconvention, for £54 17s. 3d. with costs.

(Plaintiff's Attorneys: Mostert and Son; Defendant's Attorneys: A. W. Steer.)

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

GENERAL MOTIONS.

TABORISKI V. HOFFENBERG. { 1904.
May 20th.

Release from civil imprisonment.

The Court granted an order for the release of a debtor from civil imprisonment on its appearing that he had no means of paying his debt.

This was an application by the respondent, Solomon Hoffenberg, for his release from civil imprisonment.

The applicant's affidavit said that he bought the goods which formed the subject of the action from Taboriski, and supplied them to customers who had run off and would not pay. He

was willing to pay when he had means, but he was unable to earn anything at present.

The answering affidavit of Jacob Taboriski, stated that judgment was originally obtained in the Court of the R.M. at Wynberg for £8. Defendant had repeatedly moved about to evade service. If now released he would never pay the debt.

Mr. Gardiner appeared for the plaintiff in the original case, Jacob Taboriski; the applicant appeared in person.

De Villiers, C. J., said that the debt was a very paltry one, and it was clear that the defendant had not the means. He would be granted his discharge from imprisonment.

Mr. Gardiner said he supposed that the applicant (Hoffenberg) would have to pay the costs.

His Lordship: No. I suppose they are co-religionists, and I think the plaintiff might have shown some consideration of Hoffenberg.

Ex parte VOGTS.

Mr. Alexander moved, on behalf of the petitioner, as representing certain beneficiaries, for leave to execute a mortgage bond on the Victoria Hotel, Victoria West, in order to provide for certain alterations and extensions. A minor was concerned.

The Master reported favourably. Order granted in terms of the Master's report.

PEISER V. BOOTSEN.

Mr. W. Buchanan appeared for the applicant, and asked for leave to sue the respondent by edictal citation for the recovery of £52 on a promissory note. Respondent had been resident in Griqua Town, but was now believed to be in German South-west Africa. Applicant asked that £313 7s. 8d., now in the hands of the sheriff, should be attached to satisfy the debt, and also asked for directions as to the mode of service. The country was now in a state of turmoil, and counsel suggested that leave might be given to effect service by means of registered letter.

The Court granted the order prayed for £75 in the hands of the sheriff to be attached *ad fundandam jurisdictionem*, rule returnable on the last day of next term, publication to be made once in "Ons Land" and notice to be sent by registered letter to respondent.

Ex parte COLEMAN AND OTHERS.

Mr. Close moved for an order for the compulsory winding up of the business of Coleman and Co., and the appointment of a liquidator.

Mr. Schreiner, K.C. (for the Robinson Bank) urged that the matter should be postponed, as no notice had been served on the voluntary liquidators at present acting in the estate.

The case was ordered to stand over until the 9th June, with leave to the applicants to serve affidavits on the 30th May, and notice to be given to the liquidators.

REX V. STANDEN.

1904.
May 20th.

Receipt—Payment of money—
Cheque—Stamp.

The appellant wrote to V. and B., who owed him money, asking them to send a cheque for the amount. They sent their cheque, whereupon the appellant gave them a receipt, as follows: "Received cheque." V. and B. had funds in the bank which was solvent, and honoured the cheque when presented.

Held, that the receipt was equivalent to a receipt for the payment of money and required a penny stamp.

This was an appeal from the decision of the A.R.M. of Cape Town, convicting the appellant under section 16, Act 20, of 1884. The appellant had received from Messrs. Van Zyl and Buissinne a cheque for £42 8s. 6d., and had marked the account "cheque received," and refused to give a stamped receipt as required by the Act.

Mr. Burton appeared for the appellant in this matter and Mr. Nightingale for the Crown.

Mr. Burton said that the question was whether the words "received cheque" were a receipt for money. The word used in the Act was "money." What was money? It meant specie or coin of the realm. There was nothing in the Act to show that the Act extended to paper which might have a monetary value. The Act did not say money or money's worth.

[De Villiers, C. J.: What about bank-notes?]

Mr. Burton said that strictly speaking a receipt was not necessary for bank-notes.

[De Villiers, C. J.: Sometimes bank-notes are not legal tender.]

Mr. Burton said that this strengthened his case. Bank-notes as well as cheques were sometimes dishonoured. Government notice 372 of 1885 extended the provisions of the Act to all notes, paper, etc. Up till the passing of 54

and 55 Vjct., 1870, which defined money as including promissory notes, cheques, etc., the law in England was the same as ours. In the absence of express legislation of the same kind, he contended that money must be taken to mean coin of the realm.

Mr. Nightingale said that the appellant had really no case for appeal. Under the old state of the English law cases had been decided in a contrary direction. In (4 Espinasse's Reports, 1802), a case was reported which supported his contention.

[De Villiers, C. J.: Have you got the statute?]

Mr. Nightingale said that it was 43 George III., chapter 126, Section 1. A similar decision was given in the case of *Spaworth v. Alexander* (2 Espinasse's Reports, p. 620), under 35 George III., chap. 57. Any receipt given in full receipt for a debt must be held to require a stamp. Counsel quoted the case of *Regina v. Boardman* (2 Moodie and Robinson Reports, p. 143), and the case of *Overton* (6 Cox's Reports). The test to be applied was whether the document would be accepted as evidence in a court of law. The contention of the appellant was a mere quibble. A person was not compelled to give a receipt though he might be obliged to do so by action, but if he did give a receipt, he must comply with the revenue laws of the Colony.

Mr. Burton said, in reply, that all the cases quoted were cases in which there was an acknowledgement of a complete settlement of the debt. They all dealt with the discharge of the debt. The acknowledgement by one firm that the cheque of another firm had been received was surely not a receipt for payment of the debt.

De Villiers, C. J.: On the 26th of November, 1903, the appellant wrote to Messrs. Van Zyl and Buissinné as follows: "Please let us have your cheque for the above amount," which was owing to him. It is clear, therefore, that at that time he was prepared to accept a cheque in payment of the debt. A cheque in his favour, or order, was sent, and he then wrote on the account, "received cheque, Standen and Sauer," but he omitted to affix a penny stamp. The question to be determined is whether the receipt was "a receipt for the payment of money," in terms of Act 20, of 1884. In my opinion the receipt read by the light of the previous letter amounts to an acknowledgement by the appellant that his claim had been settled by cheque. His counsel admitted that if the words "settled by cheque" had been used, they would, on the authority of the English cases cited, have amounted to a receipt for the payment of money. The drawers of the cheque had credit with the bank which was solvent, and honoured the cheque when it was pre-

sent, and the words actually used were equivalent under the circumstances, to a receipt for the payment of money.

It is unnecessary for the purposes of this case to decide whether the receipt would have been equivalent to a receipt for the payment of money if the letter requesting the debtors to send a cheque had not been written, but I do not wish to say anything from which it might be inferred that the sending of the letter makes any difference. In view of the facts that the drawers of the cheque had funds in the bank, that the bank was perfectly solvent, and that the bank did pay the cheque when presented, it would require clear authority to justify the view that without the letter the receipt would not have been a receipt for the payment of money. The appeal must be dismissed.

[Appellant's Attorneys: Sauer and Standen.]

REX V. DE STADLER. { 1904.
May 20th.

Review—Admission and rejection of illegal evidence.

The defendant was charged in a Magistrate's Court with the offence of obstructing a public road, and the only evidence given by the prosecution was the record of a conviction against another person of having obstructed the same road. The defendant tendered evidence to prove that the road was not a public road, but the evidence was rejected, on the ground that after the previous conviction the road must be held to be a public road.

Held on review, that the evidence tendered ought to have been admitted, as it was material to the issue, the proceedings were set aside.

This was an appeal from the decision of the R.M. of Simon's Town, by which the appellant was fined in £5, or one month's imprisonment, for wrongfully and unlawfully obstructing a public road.

From the record in the Court below it appeared that the appellant was charged with contravening section 163 of Act 40 of 1899, in that he obstructed a public road, which leads across his farm at Elsie's River, by placing a wire fencing across it. The road had been held to be a public road in the previous case of *Rez v. Lancaster*. Mr. Du Toit, who appeared for the accused,

proceeded to lead evidence that the road was not a public road, and the Magistrate refused to allow it, holding that it had been fully established in the *Lancaster* case that the road was a public road. Mr. Du Toit objected to the records of the previous case being put in, but his objection was overruled.

Mr. Schreiner, K.C. (for the appellant) argued that the proceedings in the Court below were grossly irregular (1) inasmuch as the Magistrate had refused to admit evidence as to the road being a private one; (2) by admitting the record in *Rez v. Lancaster* as evidence in this case. That was merely a judgment *in personam*, and could not in any way affect the appellant.

Mr. Nightingale (for the Crown) argued that the Magistrate was bound by the judgment in the said case to hold that the road was public.

De Villiers, C.J.: Assuming for the purpose of my decision that the obstruction of a public road is a punishable offence, I am clearly of opinion that the proceedings should be set aside on the ground that illegal evidence was admitted on behalf of the prosecution. The only proof given that the road in question was a public road was the production of a record in the same Court of a conviction against Lancaster of having obstructed the same road. That was not in strictness evidence against the appellant, who was not a party to the previous proceedings, but a further illegality was committed by the Magistrate in refusing to allow the appellant to give any evidence in support of his defence that the road was not a public road at all. The accused was informed that the only evidence he could be allowed to give was the question whether he did or did not obstruct the road. As he could not deny such obstruction he was convicted, but it is clear that the conviction cannot be sustained. The evidence which he proposed to give was not only admissible but it was most material to the issue.

[Appellant's Attorneys: Friedlander and Du Toit.]

REX V. JOHNS. { 1904.
May 20th.

Exposing for sale — Municipal market.

A market agent, who had authority to sell goods out of hand, placed damaged vegetables, which he had for sale, in public view in the Municipal market.

Held, that the vegetables were "exposed for sale."

This was an appeal from a decision of the A.R.M. of Port Elizabeth, by which

the appellant, Henry Johns, was fined in £1 for contravening section 217 of Act 27 of 1897, in that he exposed for sale a certain quantity of unsound tomatoes in the market place.

The evidence for the prosecution showed that on the 15th March the accused exposed for sale some 27 boxes of tomatoes in the market place. The inspector had them sent to Dr. Galloway, who pronounced 90 per cent. of them to be unsound. For the defence, it was stated that before articles were put up for sale, the clerk came round and entered everything that was to be given over to the auctioneer. The tomatoes in question were not entered on the list, and the accused would not have sold them until they were entered. The Magistrate, in his reasons for judgment, said it was unnecessary to prove that the accused offered the fruit for sale. They were exposed with an object of sale, which the accused could have done out of hand, and he had every opportunity of examining them between Saturday and Tuesday, as they were over for sale on the first day named.

Mr. Gardiner (for the appellant) contended that the evidence showed that they were not kept or exposed for sale.

The Chief Justice: Supposing a customer came up, would he have sold them?

Mr. Gardiner: I take it not, my lord. The appellant had no intention of selling the tomatoes until they were examined and found to be sound. The evidence of the market-master was that the fruit was not offered for sale, but only placed there for examination as to whether it was sound or not. A fruit seller could only examine the fruit at the market where presumably it was delivered. The prosecution had not proved guilty knowledge on the part of the appellant (*Hearn v. Garton and Stone*, 28 Law Journal, p. 216).

Mr. Schreiner (for the Town Council of Port Elizabeth) said that the knowledge of the accused was the knowledge of his agent, who was there representing him. All the witnesses proved that the fruit was offered for sale. Accused's agent was requested by the inspector to remove the fruit and refused to do so. The appellant might have sold and would have sold the goods out of hand if he had had an offer. The goods were exposed for sale on the principle laid down in the case of *Crane v. Lawrence* (13 L.T.R. p. 197).

De Villiers, C. J.: If this were a case in which the fruit could only be sold by the market master, after an inspection by the sanitary inspector, I should have hesitated to support the present conviction, but it appears that the appellant, besides being able to sell goods through the market master, also had authority to sell out of hand, and he had exercised that authority. He says that he only

sold out of hand after the goods had been declared not sold on the market. Well, the tomatoes in question had been declared not sold on the Saturday previous to the day on which the goods were found to be in this rotten state. The defendant, therefore, would in the ordinary course sell the goods out of hand, and I am satisfied from the evidence that if a customer had passed on the day in question and offered to buy these tomatoes the defendant would have sold them, because they had already been declared not sold. It is admitted by the defendant that the goods were on the floor, with the object of being sold, and that admission by the defendant seems to me to dispose of his defence that the goods were not exposed for sale. Clearly then he exposed the tomatoes for sale, and was liable to prosecution. I am of opinion that the appeal should be dismissed. On the question of costs, it seems to me to be a very fair case to bring before a Court of Appeal, and the decision of this Court will be a precedent for both parties. It is for the benefit of the Town Council, and I do not feel inclined to depart from the usual practice in cases of this kind, and there will be no order as to costs.

[Appellant's Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D).]

GENERAL MOTIONS.

MAW V. FOX.

{ 1904.
{ May 25th.

Mr. Schreiner, K.C., moved on notice of application for an order calling upon the respondent, Sydney Fox, to show cause why he should not be ordered to pay costs of proceedings which he had initiated for £5,000 damages for breach of contract by alleged wrongful dismissal from the service of Maw and Co., as their agent, and why the proceedings should not be declared to be abated. It appeared from correspondence and affidavits read by counsel that the respondent (Fox) had instituted an action for wrongful dismissal, and that it had been shown that the applicant, A. John Maw, had no office in this country and that the case was outside the jurisdiction of this

Court. A letter from the respondent's attorneys intimated that he withdrew the action and accepted an assurance that the applicant, A. John Maw, was proceeding to England and that he would bring the matter before his directors, Maw and Co. The present motion had previously been adjourned for proof of service. The action had been brought against A. John Maw, who, however, did not represent the company.

De Villiers, C.J., said that an order would be granted in terms of prayers (a) and (c), requiring the respondent to pay costs of the proceedings and the present application. There would be no order under prayer (b) as to abating proceedings against Maw and Co.

COGILL V. QUEEN'S TOWN { 1904.
LICENSING BOARD. { May 25th.

Liquor Licensing Act, 1883 —
Renewal of bottle licence —
Objections.

It is a valid objection to the renewal of a licence in terms of the 3rd sub-section of section 52 of Act 28 of 1883, that the business is conducted in an improper manner, although it is not alleged that drunkenness was permitted upon the licensed premises.

This was an application for review of a certain decision of the respondent Board, in refusing applicant a renewal licence for his bottle store.

Mr. M. de Villiers was for the applicant, and Mr. Upington was for the respondent.

Mr. De Villiers said that in the first place the Chief Constable of Queen's Town brought in certain objections, and the Licensing Court did not adopt the procedure required by the Licensing Act, the applicant having no opportunity to rebut the evidence, and, in the second place the objections raised were not such as it was competent for the objector to make. The record of the Board showed that two voted for the renewal, and three against it. The objections raised by the Chief Constable showed that there had been fifteen prosecutions in the Magistrate's Court for illicit traffic, and in most of the cases the convictions had been traced to Cogill's and Holmes's bottle stores. Registered native voters had been seen on several occasions to go to the applicant's bottle store and obtain sacks containing bottles of brandy, which were retailed out to natives in the location. The applicant was strictly within the letter of the law in selling

liquor to registered voters, but only in reasonable quantities. Three petitions were put in by inhabitants praying for a refusal of the licence. The affidavit of the applicant set out that he had never before been convicted under the provisions of the Liquor Laws Act, and that he always understood that he could not refuse to supply liquor to natives who were registered. No notice was given to him of the objections, and he had no opportunity to rebut the evidence.

Mr. Upington read the affidavit of the Resident Magistrate and Chairman of the Licensing Board of Queen's Town, which set out that the applicant had sold large quantities of liquor to a low class of natives, and that he must have known that he was not faithfully carrying out the terms of his licence. He had no hesitation in saying, had the applicant been allowed to carry on his business as heretofore the beneficial results in regard to the restriction of the sale of liquor to natives would be nullified. The Chief Constable offered to substantiate his statements on oath, and it must have been apparent to the applicant that he was assisting in illicit traffic. The Court offered to adjourn if necessary, to give the applicant an opportunity of replying to the objections, but the offer was not accepted by the applicant or his attorney. The further affidavits, including those of the Chief Constable and Mr. Chalmers, who presided at the Court, were read, the former adhering to the terms of his report, and the latter confirming the offer to adjourn the Court.

Mr. De Villiers said that the procedure prescribed by the Act was not followed in this case. It would seem, by the wording of the section, that there was a certain amount of discretion left to the Licensing Court with regard to postponement, but in several previous decisions of the Courts it would appear that it is absolutely imperative to adjourn in order to give the applicant an opportunity of rebutting the statements made, and of appearing on another day. It was clear that a Court of that kind was of the nature of an inferior Court, and there ought to be proper records kept by a duly appointed officer. The Chief Constable said that Cogill was strictly within the letter of the law in selling liquor to the native registered voters, and Mr. Cogill thought it was imperative upon him to supply such voters. It was either legal for Mr. Cogill to sell liquor or it was illegal, in which case he should have been prosecuted and convicted. As regarded the objections of the residents, there was no petition at all against the licence; the petition was merely to reimpose certain restrictions. As to the objection of the Magistrates he (Mr. De Villiers) contended that there ought to appear on the record that the Magistrates had certain objections. He submitted

that there was nothing on the record to show that any such objections were made, and that even if there were, the proper procedure was not followed, applicant not having been given an opportunity of meeting those objections, as provided in the Act.

De Villiers, C. J., intimated that he only desired to hear Mr. Upington on the point as to whether any of the objections mentioned in the 52nd section existed here.

Mr. Upington said that the Licensing Court purported to take two of these objections, first, that the premises had been conducted in an improper manner, and the conditions of the licence had not been fulfilled; and, secondly, that the licence was not required. Counsel contended that to sell liquor in the manner in which the appellant did, so as to evade the law, was to conduct the business in an improper manner. It was intended by the Legislature that a man should not facilitate, by the improper conduct of his business, the illicit sale of liquor to natives. He submitted that the appellant had full opportunity of meeting the objections.

De Villiers, C. J.: The statement appears on the record, and is confirmed by affidavits now before the Court, that the Magistrate, before putting the question to the vote, informed the applicant's attorney that if he so desired the Court would adjourn the consideration of the application in order to afford applicant an opportunity of replying to the objection in terms of section 49 of Act 28 of 1883, and that the suggestion was not accepted. The applicant has had an opportunity of denying this on affidavit, and I think that statement must, in the absence of any denial, be taken as stating the correct facts. The question to be determined is whether after refusing to accept the suggestion made by the Licensing Court, the applicant has any ground of complaint. It appears to me that he has no ground of complaint whatever, whether the case be considered under the 53rd or the 48th section of the Act. I think that the objections raised by the Chief Constable that the business was not conducted in a proper manner, and that drunkenness was permitted on the licensed premises, would each be a sufficient objection. These allegations of the Chief Constable were not refuted, and I am bound to conclude that opportunity having been offered to the applicant to refute them, and he not having done so, they could not be refuted. The appeal will be dismissed, with costs.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller; Respondents' Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

MOWBRAY MUNICIPALITY } 1904.
V. MULLEE. } May 26th.

Municipal regulations — Sanitation—Engineer.

On an application by the Municipal Council of M. to compel the respondent to remove certain earth closets to another part of a building which was being constructed, on the ground that they interfered with the width of a passage on the respondent's land, which, under the Municipal regulations, ought to be of a certain width, it appeared that the Municipal Engineer, entrusted by the Council with the duty of seeing to the carrying out of the regulations, had pointed out the spot as proper for building the closets, and had visited the place while the erection was proceeding.

Held, that the applicants were not entitled to succeed.

This was an application on notice of motion for an order compelling the respondent to remove certain earth closets or to effect certain alterations in his property in Trill-road, Mowbray.

The affidavit of Francis Drake, engineer to the Mowbray Municipality, set out that the respondent had erected within the boundaries of the Municipality two dwelling-houses. Subsequent to the approval by the Municipality, the respondent erected on the premises two earth closets without submitting the plans to the Council. The closets were not built according to the regulations, and the respondent refused to remove them or make the necessary alterations. The passage would not admit of proper ventilation, and one of the closets was exposed to public view. The original idea was to let the two houses as two tenements, and for that purpose the two earth closets would have been sufficient, but the houses had been divided up into four tenements, and four different people occupied them.

The replying affidavit of the respondent stated that on the 10th

March, 1903, the Municipal attorney wrote to him calling on him to erect additional closets, and his attorney replied thereto, pointing out there was sufficient sanitary accommodation. There was no further reply to this letter, nor did the defendant Council take any action. In June last year, when one of the gables of the wall came down the Municipal Engineer was on the property, and pointed out the spot where these closets were to be erected. The engineer was several times on the property, saw the work go on, and deponent took it for granted that no further order from the Council was necessary. Subsequently he was summoned for contravening the building regulations, and the Magistrate at Wynberg found that the closets were put in their position by the direction of the Municipal Engineer, and that that was the only suitable position. According to the engineer's present plans, a balcony would have to be built at the rear of the house, and walls would have to be brought up to the height of the balcony, which would exclude air and light from the back windows.

The affidavits of Abraham Bloom and Jacob Golding corroborated the respondent with regard to the engineer having pointed out the position for the closets and his having been on the work several times in the course of their construction.

The affidavit of Francis Drake set out that the information given to the applicant's attorney that the shops were tenanted by two people was absolutely incorrect, and that the respondent knowingly gave his attorney such wrong information. He did not point out the position to the respondent.

Mr. W. P. Buchanan for applicant; Mr. Upington for respondent.

Counsel having been heard in argument on the facts.

De Villiers, C.J.: The Court is asked for an order compelling the respondent to remove certain earth closets, and to place additional closets on the first floor of the building, which has been erected by him. Such an order constitutes a very serious interference with the rights of an individual, and should not be made except on clear legal grounds. The responsible person employed by the Municipality for the purpose of seeing that buildings are constructed in compliance with the Municipal regulations is the Municipal engineer; and if the statements made by the respondent and by two of his witnesses are correct it seems to me that the Town Council is not entitled to claim what they are claiming. The statement of the respondent is as follows: "In June last year one of the gables of my property collapsed. The Municipal Engineer met me, and during the course of conversation spoke to me in regard to the erection of additional closets. I agreed to fall in with his view, and to erect the

same. The engineer pointed out the spots where the same were to be erected, and told me to have the work proceeded with at once. This was done, and the closets erected. The said Municipal Engineer several times thereafter saw the closets in the course of erection, and seeing that, I carried out his instructions. I thought that no further plans were necessary." Well, a most reasonable conclusion if the engineer saw the work being done. If these statements are correct, clearly the Court should not assist the applicants, whatever right they might have by action, which I do not wish to encourage. The statements I have just read are supported by two other independent witnesses, who were present and heard the conversation, and saw the spot pointed out where these closets were to be erected. It is true that the engineer now denies that, but, the applicants must prove their case, and as far as I can gather from these affidavits, they are entirely in favour of the statement made by the respondent and his witnesses. It does not appear to me that the respondent set himself against complying with the instructions of the engineer, but was anxious to meet the engineer, and this view is further strengthened by the fact that there has been a prosecution of the respondent by the Municipality for a contravention of the Municipal regulations. The case was tried before the Magistrate, and the charges were dismissed. The Court found that the closets were placed in their present position by the direction of the Municipal Engineer, and that that position was the only satisfactory one. If that statement is correct, it would be an injustice to the respondent to order him to remove these buildings, and go to the expense of erecting closets upstairs, in what appears to me to be a more inconvenient position than the position proposed by the respondent. The application will be dismissed, with costs.

[Attorneys for Municipality: G. Trolip; Attorneys for Respondent: W. Sonnenberg.]

DE WET V. BLOOM.

{ 1904.
May 26th.

Amendment of plea—Commission *de bene esse*.

This was an application by the defendant in the above case for leave to amend his plea and for the appointment of a commission to take the evidence of a material witness in Edinburgh.

The application of Louis Bloom set out that the applicant had found out that the amount of water on a farm which he purchased from the plaintiff, and which he had subsequently sold to one Livingstone, had been misrepresented to him. The plaintiff had agreed to give an ex-

tension of time until Livingstone took transfer. Applicant was desirous of putting in a counter-claim for damages.

The answering affidavit of the respondent, Peter de Wet, set out that the farm was sold to the defendant with the same water and other rights that he had himself. No other conditions were made, except those contained in the deed of sale, except that transfer by the defendant was extended to the 15th December, 1903.

Mr. Alexander (for the applicant): When the plea was filed the defendant did not know that the farm had no right to the water which the vendor promised. The deed of sale says nothing about water rights, though the deed of transfer does, hence we must go outside the deed of sale. The plaintiff clearly did so, because transfer was to have been taken long before it really was taken.

[De Villiers, C.J.: He gave transfer of what he had, and of all such rights as went with the land.]

That is exactly our case. (

[De Villiers, C.J.: No, your case is that there was an agreement between the parties independently of the deed of sale.]

We say that we were promised a certain quantity of water, and now find that we are not entitled to it, and wish to amend our plea so as to show what is the real issue between the parties. The Court will always grant leave to amend under such circumstances. See Rules 27 and 334 (a).

Mr. Buchanan (for the respondent). In a case in which a defendant wishes to amend his plea by alleging fraud, he should come into Court with the amended plea.

[De Villiers, C.J.: I quite agree with you that their not doing so may affect the question of costs.]

Our case is that the defendant bought the farm in accordance with the terms of the deed of sale, and he admits that in his plea.

[De Villiers, C.J.: That is the plea which he wishes to amend.]

The Court will not grant leave to amend a plea by introducing a chance of fraud save under very exceptional circumstances.

[De Villiers, C.J.: We do not know that he means to suggest fraud.]

Mr. Alexander (in reply): There is nothing on the pleadings to suggest fraud. The plaintiffs may only have made an innocent misrepresentation.

De Villiers, C.J.: The case cannot be heard until some time next term. No injustice can be done to the plaintiff by allowing the defendant to amend his plea, but the defendant ought to have indicated more clearly than he has done the nature of the defence which he intends to raise. The application for a commission must be refused; leave to

amend the plea will be granted, but the defendant must pay the costs of this application.

[Applicant's Attorney: T. P. Peters; Respondent's Attorney: J. Buiraki.]

YOUNG V. MULVIHAL.

Tender—Costs.

This was an application on notice of motion calling on the respondent to show cause why an order should not be granted as to costs in the case of Mulvihl v. Young and Young.

The application arose out of a case that came before the Court on the 18th December last. The present respondent obtained a rule nisi calling on the defendants to show cause why they should not be compelled to give up certain premises known as the City Hall Hotel. Notice had been given to the defendants on the 30th November, but it appeared that the applicant had accepted rent up to December 15, and as they were entitled to a month's notice, that motion was not pursued.

The answering affidavit of the respondent, Thomas Mulvihl, stated that the then respondents were indebted to him in the amount of £123 for rent and stock. Of the defendants, Ethel Young had been declared insolvent, and Edward Young had left the country.

Mr. Gardiner (for applicant): The respondent applied for a bill of costs, but has never acknowledged his liability. He has had plenty of time to bring his action, but his affidavit does not even say that he means to do so.

Mr. Buchanan (for respondent): We admit that we owe the costs, but say that we have a set-off. They owe us £123, and the costs amount only to £13.

De Villiers, C.J.: If there had been a clear admission by the present respondent of the liability, and a tender on his part to set it off against the claim for his rent, the present application would have been wholly unnecessary, but there is no such clear admission on his part. The fact that he asked for the bill of costs does not amount to such an admission. The applicant is entitled to an order from the Court with costs. The respondent originally instituted proceedings for ejectment, but finding that no notice to quit had been given to the applicant, he practically withdrew the proceedings. He is clearly therefore liable to pay the costs of these proceedings. But the respondent does not become a creditor for the amount of the costs until the Court has awarded the costs to him, and the object of the present application is to obtain such an award. An order will be granted as prayed, with costs, execution to be stayed until the respondent has instituted his action for the debt alleged to be owing to him,

the stay of execution not to extend beyond six months.

UYS V. UYS.

This was an application by Johanna Uys, to make absolute a rule nisi restraining her husband, who was squandering the property, from dealing with any of the joint estate pending a decision of the Court in an action for judicial separation.

Rule made absolute.

FLAUM V. GERHARD AND HEY.

This was an application for leave to sue the respondents *in forma pauperis*.

Matter referred to counsel for certificate *probabilis causa*, or otherwise.

Ex parte CLOETE.

Mr. W. P. Buchanan said that this matter was ordered to stand over by Mr. Justice Buchanan for a report of the Registrar of Deeds, with regard to the cancellation of a mortgage bond. The Registrar's report was favourable.

Order granted as prayed.

EXSHAW AND CO. V. VAN RYN { 1904.
WINE AND SPIRIT CO. { May 26th.
" 30th.

Trade-mark — Rectification of register—Deception.

The respondents' trade-mark having been registered for nine years, an application was made to the Registrar by the applicants to have their trade-mark registered, but he refused, on the ground of what he conceived to be the similarity of the marks. The applicants thereupon applied to the Court for the rectification of the respondents' registered mark, on the ground that the applicants had used their mark and registered it in France before the respondents registered theirs in this Colony. On a comparison of the marks, however, the Court found there was no identity and not such a resemblance as would be calculated to deceive.

Held, that as both marks had been in use for several years, as no case of actual deception had been proved, and as there

was no proof whatever of fraud on behalf of the defendants, who were not aware of the applicants' mark when they designed theirs, there was no ground for the rectification of the register.

This was an application for an order authorising the rectification of a certain trade-mark, and for the registration of the applicants' trade-mark instead of that of the respondents.

The affidavit of John Henry Exshaw, member of the applicant firm, set out that they had used the coronet label, which was registered in France on their brandy since 1877. About December, 1902, the firm took the necessary steps to secure the registration of their trade-mark in Cape Town, but the application was refused on the ground that a coronet device had already been registered by the respondents.

The answering affidavit of the manager of the respondent company, set out that their labels were quite distinct, and their label had always been used. Their device was registered in 1895, and there was no question of it until April, 1903. The affidavit of the designer, Mr. Van Heerden, set forth that the label was in use twelve years, and previous to designing it he had never seen the other label.

Mr. Buchanan (for the applicant): The respondents do not disclaim the use of the coronet on their trade mark. We had to come to Court to get our trade mark registered, as the Registrar refused to register it on the ground that the respondents were already on the register with a similar design. Our trade mark was in use long before Act 22 of 1877 was passed. Under Acts 27 of 1891 and 12 of 1895 we are entitled to use this trade mark, and the respondent admits our right to it, but asks that we should disclaim the coronet.

[De Villiers, C.J.: Suppose the respondents knew nothing about your trade mark, and invented one for themselves which happens to resemble yours?]

That might be hard upon them, but I submit they could not register it. The leading feature of the respondents' trade mark is the coronet. If we could show that this was fraudulently copied, we should no doubt have a stronger case, but it does look as if the horse-shoe had been introduced into their trade mark merely to differentiate it from ours. As to rectification, see *Kerley on Trade Marks* (p. 311). Even after five years one may claim rectification of the register if he can show that the trade-mark should not have been registered; for instance, if it was not attached to the good-will of any business. *Edwards v. Dennis* (54 L.T. 112). A trade-mark

must be used for the particular goods for which it is granted. As to the object of the English Act of 1875, see *Kerley* (p. 8 and 275). As to what is special and distinctive in a trade mark, see *Kerley* p. 131 to 134) and the cases there cited.

Mr. Shreiner (for respondents): I do not know on what grounds application is made to have our trade-mark struck off the register. It is not said that there was any fraud on our part, nor is it said that it is calculated to deceive. We say that these trade-marks are so distinct that nobody can be deceived; and then, again, they are applied to different articles. Exshaw's brandy is an article known only to connoisseurs, the Van Ryn Company make ordinary Colonial spirits. Instead of calling upon the Registrar to show cause why he should not be ordered to register the trade-mark of the applicant, he turns upon us and insists on our mark being struck off.

[De Villiers, C.J.: Could not the applicant have objected to your crown when you first began to use it?]

Exshaw's brandy only began to be used in this Colony in 1877. All he can now ask for is that we should disclaim the exclusive use of the crown. Our law as to trade-marks is not the same as the English law. For our law, see Act 13 of 1895, sec. 2, and compare sec. 76 of the English Act.

[De Villiers, C.J.: *Dennis v. Edwards* was decided under the old Act.

Yes, our law is much wider, and here it has never been held that the Court will interfere after five years, apart from cases of fraud, of *mala fides*. The English cases cited are, therefore, not binding on our Courts, and are not *ad rem*.

Mr. Buchanan, in reply

De Villiers, C.J.: The applicants ask for an order for the rectification of the registration of the respondents' trade mark, by expunging therefrom so much of such mark as consists of the coronet representation, and further for an order directing the Registrar to proceed with the registration in the name of the applicants of a mark, a description of which is appended, in the form of a label. The notice of motion is supported by the affidavit of John Henry Exshaw, who states that his firm are brandy shippers, carrying on business in France, that the registered trade-mark of his firm in France in connection with the business is of the representation of a coronet, and he affixes a coronet. He says, from the period dated the 28th March, 1877, until the present time, the applicants have been exporting brandy to the Cape with the trade-mark, but there has been no registration in this colony of the trade-mark. The applicants applied for registration in 1902, and the Registrar then refused to register the applicants' trade-mark, on the

ground that the respondents had already registered a similar trade-mark. Now, that decision of the Registrar is clearly not binding upon the Court at present. It is competent for the Court still to decide whether the one or the other mark would be calculated to deceive unwary purchasers. The defence raised on behalf of the respondents is that they have been using their trade-mark for over a period of twelve years, that the trade-mark was registered in the year 1895, and that the design was invented by the respondent without any knowledge as to the existence of the previous trade-mark of the applicants. Mr. Van Heerden, who designed it, says that he has carefully examined the coronet of the applicants' label, and that the coronets are not similar to one another, and he adds that he had never seen the other design previous to designing the one for the respondent firm, and he annexes a number of labels showing the different designs for the different qualities of liquors sold. The question has been raised in this case as to whether the respondents' trade-mark can at all be questioned after it has been in existence for a period of five years and registered for a period of five years. The third section of the Act of 1877 is certainly very strong in its language. It is as follows: "The registration of a person as first proprietor of a trade-mark shall be *prima facie* evidence of his right to the exclusive use of such trade-mark, and shall, after the expiration of five years from the date of such registration be conclusive evidence of his right to the exclusive use of such trade-mark, subject to the provisions of this Act as to its connection with the goodwill of a business. It is unnecessary, however, to decide whether the applicants are barred by this section from questioning the respondents' mark, because in my opinion there is no evidence that that mark has been improperly registered. It is a perfectly distinctive trade mark, and it does not appear to me to be calculated to deceive. The only point of similarity is that there is a coronet, but the coronet is very different from the coronet of the applicants. The coronet of the applicants has an arm, which obscures part of the coronet, and it has nothing underneath it corresponding in any way with the design which the respondents have underneath their coronet, namely, the horse-shoe and the figure inside. The least that could have been expected from the applicants, who seek now to rectify the registration in existence since 1895, was that they would have produced some evidence that some purchasers or intending purchasers had been deceived, but no evidence to that effect has been produced. No doubt such evidence is not necessary where the similarity is so great that the Court might without the assistance of such

evidence find that the respondents' mark is calculated to deceive. Both marks have been in use for several years, no case of actual deception has been proved, and it is not even suggested that there has been any fraud on the part of the respondents. Under these circumstances, it would not be in accordance with the practice of this Court to interfere. If the applicants would disclaim any right to the exclusive use of the coronet as a trade-mark, the Registrar will, no doubt, after this intimation of opinion from the Court, reconsider his decision, but the present application must be refused with costs. [Applicants' Attorney: G. Trollip; Respondents' Attorneys: Berrangé and Son.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Ex parte FRASER. { 1904.
{ May 30th.

Mr. W. P. Buchanan moved for an order authorising the substitution of Messrs. Van Zyl and Buissinne for that of Casper Henry van Zyl, on the petitioner's articles of apprenticeship, and for an allowance of 138 days in the period of apprenticeship, during which the applicant was ill.

Order of substitution granted as prayed, 90 days allowed as a reasonable holiday, the applicant to serve 48 days additional.

BYRNE V. BYRNE.

This was application by Ellen Byrne for leave to sue her husband, James Byrne, by edictal citation for restitution of conjugal rights, failing which, a decree of divorce, custody of the children, forfeiture of the benefits accruing out of the marriage in community of property, and for an order authorising the Master to pay sufficient money out of £1,000 that had been left to the applicant by her mother to prosecute the action, and for maintenance of the children. Mr. W. P. Buchanan was for the applicant.

The declaration set out that the parties were married in Cape Town, and the respondent had deserted the applicant in Galway, Ireland.

De Villiers, C. J., said that the affidavits should be amplified, there was no information as to domicile in Ireland.

GIDDINGS V. GIDDINGS.

This was an application by Maria Giddings for leave to sue her husband for restitution of conjugal rights, failing which a decree of divorce. Mr. W. P. Buchanan was for the applicant.

The parties were married at Malmesbury in March, 1887, and the respondent deserted her in August, 1902. He was last heard of in Graaff-Reinet.

Order granted, personal service to be effected if possible, failing which one publication in a Cape Town paper and one in a Graaff-Reinet paper, the citation to be returnable on the 12th July, with leave to serve the intendit with notice of trial.

VAN BOOM V. VISSER.

This was an application for removal of bar.

The affidavit of Daniel Johannes Visser stated that, on receipt of the summons, he took it to be simply a demand for payment of £100 for alleged trespass, not a summons. Applicant stated that he had a complete defence on the merits.

The answering affidavit of the attorney, formerly acting for Visser, stated that when Visser brought the summons to him (deponent) Visser understood the same to be a summons. Deponent had advised Visser to compromise the matter out of Court, and Visser first accepted that advice, but subsequently declined to consider a compromise, and wished the matter to be determined by the Court. Deponent thereupon withdrew from the case.

Mr. Williams for applicant; Mr. M. De Villiers for respondent.

Mr. De Villiers pointed out that no affidavit of merits had been filed on behalf of the applicant, as required by the Rules of Court.

De Villiers, C. J., said there must be an affidavit as to the merits. He had pointed out that when the matter was last before the Court that such an affidavit was required. No *prima facie* ground was shown for believing that the applicant had a defence on the merits.

After hearing Mr. Williams in argument,

De Villiers, C. J.: On the last occasion when the matter was mentioned an affidavit was produced on behalf of the defendant in which he stated that he had been served with a summons, but that he was not aware of the contents, and that all the subsequent proceedings against him were taken entirely without his knowledge. These statements of his are now entirely denied by the attorney whom he employed in the country, and, so far as they can deny them, by the attorneys in Cape Town. But it is said that this man is an ignorant man living in the country,

that he has a good defence to this action, and that some consideration should be shown to him. That is just what the Court is anxious to do; to show him every consideration, and for the purpose of showing him that consideration, counsel was informed on the last occasion that when he applied again he should produce an affidavit from which it may be fairly inferred that the man has a good, honest defence to the action. If such an affidavit had been produced to-day, there would have been no difficulty whatever in granting the order which is asked for. The applicant, however, has not taken advantage of this opportunity. He has not filed any affidavit of merits as indicated by the 26th Rule of Court. He has had ample time to do so, and under these circumstances it is impossible for the Court to grant him any relief. The application must be refused, with costs.

Ex parte DE JAGER.

Mr. Gardiner moved for the appointment of a *curator ad litem* for the purpose of instituting an action to have the applicant's husband declared to be of unsound mind, and incapable of managing his own affairs.

Application granted, the summons being returnable on the 16th June. Mr. Roux was appointed *curator ad litem*.

Ex parte HUGO.

Mr. W. P. Buchanan moved for an order releasing the applicant from acting as *curator bonis* in the estate of her husband, who had been declared incapable of managing his own affairs, the property in the estate having been sold, and the estate assigned. The affidavit of the petitioner set forth that on assuming the management of the estate, she found that the estate was deeply involved in debt. Creditors threatened immediate action, and applicant assigned the estate.

[De Villiers, C. J.: The applicant ought to have applied to Court for leave to assign the estate.]

Mr. Buchanan said that under the Insolvent Ordinance any person having control of an estate had power to surrender it, and probably the petitioner and her advisers thought this implied the power also of entering into a deed of assignment.

De Villiers, C. J.: I would like to have independent evidence, as to whether this was for the benefit of the estate. The matter will accordingly be ordered to stand over.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

APPEALS.

VERMEULEN V. SWART. { 1904.
{ May 31st.

Service of stallion.

The plaintiff, having let his donkey stallion to the defendant, for the purpose of serving the defendant's mares, brought an action in the Magistrate's Court for money alleged to be owing to him for such service, and proved that the stallion had run with the mares, but gave no evidence that he had actually served the mares or that any of them were in foal. Held on appeal, that the Magistrate had properly granted absolution from the instance.

This was an appeal from a judgment of the R.M. of Ceres in an action brought by the appellant for £6, being for the hire of certain two donkeys, a stallion, and gelding. The judgment of the Court below was absolution from the instance, with costs.

The Magistrate, in his reasons for judgment, said that the plaintiff sued for £6, hire of certain two donkeys, a stallion, and gelding. It would appear from the evidence that the stallion was required for covering donkey mares. There was no agreement made for the cost of the hire of the donkeys, and there was no evidence that the mares were served. It was only when the plaintiff was made to pay £1 10s. for trespass that a charge was proposed to be made. He (the Magistrate) was of opinion that the summons was very badly drawn, and that it should have been stated that the stallion was hired for a specific purpose, viz., to serve mares.

Mr. Upington was for the appellant; Mr. Gardiner was for the respondent.

Mr. Uppington said there could be no question that the defendant had had the benefit of the use of the plaintiff's donkeys. It was true no specific price was agreed upon, but under the circumstances he submitted that the Magistrate, if he was satisfied there was an agreement for the hire of the donkeys, should have awarded a reasonable sum to the plaintiff.

Defendant admitted that he drove the mares to the stallion. John Swart (father of the defendant), in his evidence, said, "I am willing to pay if the plaintiff will pay damages for his donkey biting mine."

Without calling upon Mr. Gardiner,

De Villiers, C. J.: The object of the letting by the plaintiff of his donkeys to the defendant was to cover the mares of the defendant. In order, therefore, to succeed in his action, the plaintiff ought to prove that the mares of the defendant were served. Neither the plaintiff nor any of his witnesses proved that there was any such service. The defendant does not admit that there was service. I quite agree that the plaintiff at any rate was premature in his action. The Magistrate very properly gave absolution from the instance, and the appeal will be dismissed, with costs.

MTEMBU V. WEBSTER. { 1904.
May 31st.
June 21st.

Consideration — Promise — Contract—Right of pre-emption—*Nudum pactum*—*Donatio*—Remuneratory donations.

The defendant, who owned a farm adjoining that of the plaintiff, on being pressed by the plaintiff to sell the farm, promised, that in the event of his wishing to sell the farm, he would give the plaintiff the first refusal. Thereafter the defendant sold the farm to E. without giving the plaintiff the first refusal, and E. resold the farm at a profit.

Held, that as the plaintiff had given or done nothing in return for the right of pre-emption, and had not even promised to buy at the price for which the defendant could sell to another purchaser, there was no valuable consideration for the promise, and that consequently the plaintiff was not entitled to damages for breach of contract.

This was an appeal from a judgment of the Resident Magistrate of Mount Curry, in an action brought by the respondent, Rowland Webster, against the appellant, John Mtembu, for £500 damages for breach of contract.

The summons set out:

1. That plaintiff is a farmer residing on Lot No. 8, known as "Kempdale," in Kokstad district.

2. That defendant is also a farmer, lately the owner of, and residing on, Lot No. 9, Kokstad district.

3. That Lot No. 8, Kempdale, and the said Lot No. 9 adjoin.

4. That during the year 1894, and subsequently, defendant agreed with plaintiff, for due consideration, that in the event of the defendant wishing to sell the said Lot No. 9, he, the plaintiff, should have the right of pre-emption thereof, for a sum to be then fixed, being the market value thereof at the time of sale.

5. That in breach of the said agreement, he, the defendant, without consulting the plaintiff, or offering the said Lot No. 9 to him, he, the plaintiff, being anxious and willing to purchase the same, sold the said lot to one J. F. D. Elliot, of Kokstad, and has given him transfer.

6. That by reason of the said breach of contract the plaintiff has suffered loss and damage to the extent of £500 sterling.

The defendant excepted to the summons on the grounds that:

1. The same is vague and bad in law, inasmuch as it fails to state the date when the alleged right of pre-emption, referred to in par 4 thereof, was given by defendant to plaintiff; and

2. That it fails to state what the consideration alleged in par 4 thereof to have been given by the plaintiff to the defendant consisted of, and the date when the same passed.

And for a plea to the summons, should the above exceptions be overruled, the defendant pleads:

(a) That he admits paragraphs 1, 2 and 3 thereof.

(b) That he denies paragraphs 4, 5 and 6 thereof.

(c) That he admits that he sold Lot 9, Kokstad, to the firm of Elliot and Walker.

The Magistrate overruled the first exception on the ground that "the time stated, viz., the year 1894 was sufficiently definite, taking into consideration the fact that the defendant is a native who, in 99 cases out of 100 have no idea of time or dates."

He overruled the second exception, as he was of opinion that "it is not necessary to prove any consideration as contracts of this nature are entered into by mutuality of agreement, the promise of the one party to sell being the consideration for the promise of the other to buy."

From the evidence of the respondent it appeared that he had never charged the appellant for articles he had supplied to him, and that in January, 1903, he promised to give the appellant a life residence on Lot No. 9, in the event of his selling it to the respondent.

The Magistrate gave judgment for the plaintiff for £400, with costs.

In his reasons for judgment, after setting out the facts, the Magistrate proceeds:

"It is admitted by both sides that the defendant did promise that in the event of his wishing to sell the farm, he would give the plaintiff the first refusal. Now the point to be decided is 'was the promise sufficient to compel the defendant to first of all offer the farm to plaintiff before he could sell to another?' The defendant maintains that as no consideration passed he was at liberty to break the promise whenever he chose. Several cases have been quoted by defendant's attorney, but none, I think bear exactly on the question raised. As already stated in my reasons for overruling the exceptions, I am of opinion that a contract of this nature is entered into by the mutual agreement of the parties, the promise of the one party to buy being the consideration for the promise of the other to sell. Moreover, should any consideration be necessary to the agreement, then, in my opinion, the promise of a life residence was sufficient consideration to make the agreement binding. The only question now remaining is that of the amount of damages or loss the plaintiff has sustained. The declarations of purchaser and seller show that the farm was bought for £500, and sold for £1,000 very soon afterwards, a clear profit of £500. The plaintiff, however, states he was quite prepared to pay £600, so that, in my opinion, he is entitled to the difference between that sum and £1,000. I would like to add that the defendant gave his evidence in a most unsatisfactory way, and appears all through, since the sale, to have tried to mislead the plaintiff.

Mr. Gardiner for the appellant; Mr. Upington for the respondent.

Mr. Gardiner: This is an action on a contract, but it is clear that no contract was ever made. At most there was a bare promise made as long ago as 1894 to give respondent the first offer should appellant wish to sell his property. This was quite a different thing from an offer to sell for a certain price. Here no price was fixed or indicated in any way, and no time was fixed during which the promise was to hold good. Then, again, the respondent gave no consideration for this promise. He says that he promised to allow the appellant to remain on the farm for his life in the event of his selling it to him. Even if he did make that promise, he did not actually give anything. He did not even promise to allow the appellant to remain rent free. If the promise as to remaining on the farm was worth anything at all it can be regarded only as a part of the purchase price to be paid for the farm. See *Goss and Michau v. Van der Hoff* (13 C.T.R. 397). That was a

much stronger case than the present, for there there was a definite offer to sell at a fixed price.

Mr. Upington: Apparently the Magistrate relies on *Voet* (18, 1, 2). But in view of decisions of this Court, this passage can hardly be relied upon. This transaction was no mere *nudum pactum*: there was a sufficient *causa* to support the contract. English law would certainly hold that the consideration was good. It was a detriment or inconvenience to the plaintiff to have a man on his ground for life.

[De Villiers, C.J.: That is no part of the consideration.]

I submit it is.

[De Villiers, C.J.: Ought it not rather to be considered a part of the price?]

I submit not, though no doubt this undertaking was intended to act as an inducement to the appellant to sell.

[De Villiers, C.J.: Nothing has been purchased.]

The respondent purchased a right to the first refusal of the property, or, perhaps I should say, that there was an agreement to give him first refusal in consideration of his granting certain advantages in return. If this promise of a life tenancy was worth anything at all there was valuable consideration, consideration need not be adequate.

Mr. Gardiner, in reply.

Cur. Adr. Vult.

Postea (June 21st.)

De Villiers, C. J.: This is an appeal against a judgment of the Resident Magistrate of Mount Currie in an action for damages for breach of contract. The alleged contract consisted in a promise made by the defendant that in the event of his wishing to sell a certain farm, then owned and occupied by him, he would give the plaintiff the first refusal. It appears that the plaintiff, who is a European owning a farm adjoining that of the defendant, who is a native, made repeated applications to the defendant to sell the farm to him, but could not exact more than the promise which I have mentioned. The defendant afterwards sold the farm to one Elliott for £500 without giving the plaintiff the refusal, and an action was brought for damages for breach of contract, with the result that judgment was given for the plaintiff for the sum of £400. Against that judgment the defendant now appeals.

The appeal raises the question, not for the first time, whether an action can be maintained in this colony on a promise not supported by valuable consideration. The Magistrate did not dispute the law as laid down by this Court that consideration was necessary, but he found that there was a twofold consideration for the promise, namely, a promise by the plaintiff to buy, and a further promise made by him that if he should buy he would allow the defendant a residence on the farm for his life. There was not, how-

ever, any promise on the plaintiff's part to buy the farm in case the defendant should wish to sell, for it was quite competent for the plaintiff, in case he considered the price too much, to have nothing further to do with the matter. As to the plaintiff's offer to allow the defendant to live on the farm, that would only take effect in case a sale should be completed, and could not in any way constitute a consideration for the defendant's promise to give him a right of pre-emption. The only reason or motive that I can discover for the promise was the defendant's wish to escape the plaintiff's importunity without giving him any offence, but the promise was definite and serious enough, and if valuable consideration had been given, the Court below would have been quite justified in enforcing it. In this respect no doubt our law differs from the old Roman law, which would have considered such a promise as a *nudum pactum*, inasmuch as it did not fall within the class of recognised agreements which were enforceable by action. The Roman law would have recognised such an agreement if annexed to or forming part of a recognised contract, such as that of purchase and sale, but standing by itself and not confirmed by a solemn *stipulatio*, it would have been regarded as a *nudum pactum*, and therefore not enforceable by action. The Dutch law swept away the subtleties of the Roman law relating to *nuda pacta*, and would have enforced a promise like the one in question, even although not annexed to a contract, provided that it was founded upon a reasonable cause. The payment by the defendant of a substantial sum for the right of pre-emption, or a reciprocal promise to buy at the price offered by another intending purchaser, would certainly have been considered a reasonable cause for the promise; but in the actual practice of the Courts, I cannot find any case from which it might be inferred that they would have enforced a contract like the one now in question.

There can be no doubt that some Dutch lawyers understood and employed the expression *nudum pactum* in a different sense from that in which I have just used it. The mistake was probably occasioned by the following passage in the Digest (2-14-7-4): *Cum nulla subest causa practer (others read propter) conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit sed parit exceptionem*. Vinnius, in his book on Facts (5, 15) writes with scorn of those who employ the terms *nudum pactum* in the sense of an agreement not founded on a *causa*, but in Holland the error was a very common one, and in England it was universal. Another difficulty arose out of the different senses in which the word *causa* was employed in the Roman

law. In one of those senses it approached as nearly as possible to the "consideration" of the English law, and indeed, according to some eminent writers, it meant exactly the same thing. Now, in the Roman law, the *stipulatio*, as a solemn form, afforded a ground of action, but in practice, if it was not founded on a *causa*, judgment could still, according to Ulpian (Dig. 44, 4, 2, sec. 3), be averted by the *exceptio doli*. The Dutch law, while doing away with the subtleties of the Roman law in regard to *pacta*, continued to insist upon a *causa* as an essential ingredient of every actionable agreement, and the Dutch Courts, in actual practice, only admitted as a valid *causa* for contracts other than donation, such a *quid pro quo* as we should now call valuable consideration." Damhouder, in his Practice in Civil Cases (c 175), says: "Writings containing an obligation without a cause (*oorzaak*) are in law of no, or at all events, of little effect, and consequently have no binding force. And obligations are understood to have no cause if the wherefore (*waaromme*) of the obligation is not therein expressed." To illustrate what he means by the "*waaromme*," he adds: "That is to say, whether it arises out of a loan or a purchase or other similar causes." Groenewegen approves of this general statement, but he adds that the *causa* need not be expressed in those cases in which, from the relationship between the parties, the existence of a *causa* may be presumed, "as, for instance, if a merchant has given a bond without a *causa* expressed to a merchant, a scholar to his teacher, a patient to his physician, and a wounded man to his surgeon." In those cases the presumption may, of course, be rebutted, but the illustrations are valuable, as showing what the nature of the *causa* is which would have been required. Van Leeuwen, in his *Censura Forensis* (P. 1. B. 4, C. 2, sec. 2), says that a *nudum pactum*, however seriously and deliberately entered into, does not give rise to an action. "Hence," he proceeds, "comes the maxim *ex nudo pacto non datur actio*, and this has also been received in our practice, according to which, even a bond which contains no *causa debiti* is of no effect, nor can an action be brought thereon unless the *causa* is proved *aliunde*." If by *nudum pactum*, Van Leeuwen meant, as he probably did, a pact not founded on a reasonable cause, his statement fell into an error in confounding *nuda pacta* with conventions which have no of the rule is perfectly correct. Voet, however (2, 14, 9), correctly points out that Van Leeuwen express *causa debiti*. It would, no doubt, have been more correct for Van Leeuwen to say, as he did in his Commentaries, that an action does not arise out

of a convention, which is not supported by a reasonable cause, but his meaning is reasonably clear from the context. Voet (2,14,9 and 42,1,15) admits that the *causa debiti* must be expressed, or, at least, proved, and this admission shows that the existence of the *causa* is essential to the validity of the debt. There are undoubtedly other passages in his Commentaries from which it might be inferred that, in his opinion, all promises, even though not made in return for something given, done, or promised, should be enforced, but he does not cite any decided cases. His opinion upon a question of practice cannot carry the same weight as that of Van Leeuwen, whose *Censura Forensis* was justly described by the Privy Council (L.R., 4, P.C., 255), as a work of high authority. Van Leeuwen's position as Registrar of the Supreme Court of Holland gave him better opportunities of observing the actual practice of the Court than was enjoyed by Voet, who, as professor, at Leyden, dealt with the more theoretical aspects of the law. In remarking that Voet does not cite any decided case, I was, perhaps, not strictly accurate, for he does refer to Coren's Observaties (13; num. 8, 9, and 10) as his chief authority for the statement that every agreement seriously and deliberately entered into is enforceable by action (2, 14, 9). The case reported by Coren is that of the *Deacons of the Walloon Church at Amsterdam v. De Willem*, and as that case is cited by so many other Dutch writers to show the complete emancipation of *pacta* from the trammels in which they had been held by the Roman law, it would be well that I should explain what the case really was. Two Amsterdam merchants referred certain disputes, which had arisen between them to arbitration, and by the deed of submission each of them promised that he would not apply to the Court to reduce or set aside any award which might be made by the arbitrators, and that if he should so apply he would pay a penalty of 100 Flemish pounds to the poor of the Walloon Church. After the award had been made, one of them did apply to the Court to set it aside, but before the application was heard the other party consented to the award being set aside, and this was accordingly done by the Court. The deacons of the Church thereupon sued the party who had made the application, and obtained judgment for the amount of the penalty. On appeal the Provincial Court of Holland reversed this decision, and it was on appeal to the Supreme Court of Holland, Zealand, and Vriesland that the proceedings were reported by Coren, who was an assessor of that Court. On behalf of the appellants, it was contended that good faith required that the promise should be enforced, and that although under the Roman law an agreement like the one in question could not be enforced, the Dutch

law, following the Canon law, allowed an action on a *nudum pactum*. The respondent contended that inasmuch as the award had been set aside by the Court, the appellants were not entitled to the benefit of the promise stipulated for on their behalf by the parties to the deed of submission. The Supreme Court of appeal supported the respondent's contention, and dismissed the appeal. The only way in which the decision can be held to bear upon the present question is by the inference that might be drawn from the judgment that if the award had not been set aside, the plaintiffs would have recovered the amount of the penalty. This inference, I may incidentally remark, would support the decision of this Court in *Tradesmen's Society v. Du Preez* (5, Juta, 169), that a promise made by one person to another in favour of a third party, if supported by valuable consideration, and accepted by such third party, is enforceable by action. But the case cannot possibly be accepted as an authority for the view that even without valuable consideration such a promise would have been enforced by the Dutch Supreme Court. The promises were mutual, and consequently the only reasonable cause for the defendants' promise was the promise made by the other party to the submission that he, on his part, would pay the penalty to the plaintiffs in case he should depart from his undertaking not to make any application to the Court. Under the Roman law such mutual promises being *nuda pacta* may not have been enforceable, but if Voet and other Dutch writers held the opinion that the Dutch Courts would have enforced the defendant's promises, even if there had been no mutual promises given to him, the case cited by them affords no support whatever to that opinion. It is clear from what is said by U. Huber (*Hedendaagsche Regtsgeleerdheid*) (B, 3, c. 21, 6 and 7) that the practice mentioned by Van Leeuwen was not confined to bonds, and other written obligations, but was extended to other contracts. "All promises," says Huber, who was himself a Judge of high repute, "must have an 'oorzaak,' and without it they can have no effect; and it must be observed that in a written promise the 'oorzaak' must be expressed, although, if not so expressed, it may be proved *aliunde*; otherwise a writing by which a person acknowledges that he owes something and promises to pay it without the 'oorzaak' for the debt appearing, has no force; and so it was held in the case of *Sybrandt v. Poppe*, in 1680, where the Court refused judgment on a written acknowledgment of debt for 415 guildens without any more appearing." Whatever Voet might say to the contrary, I cannot find that, in practice, the Courts were satisfied with any lawful reason as a sufficient "oorzaak" unless it was clear that the promisor either received a *quid pro quo*, or made the promise by way of gift. In other words, I

cannot find that in practice any gratuitous promises, except donations, were ever enforced by law. Even in regard to donations, it is by no means clear that the Courts would have enforced a promise to make a gift unless the donation was to take effect at once. Even Vinnius, who is generally cited as the strongest authority against the doctrine of consideration, says that a promise to make a gift at a future date would not, in his time have been enforced in Holland. The writers thus far quoted speak only of "oorzaak" as being necessary. Other writers again, observing perhaps that the term *causa*, in the variety of meanings, which it had in the Roman law, did not clearly express what they meant by "oorzaak," used the expression "redelyke oorzaak," as was done by Grotius and Van Leeuwen, or *justa causa debendi*, as was done by Van der Keesel. This Court has repeatedly decided that, except in the case of donation—which, if it be a contract at all, stands on its own peculiar footing—this "redelyke oorzaak" really means valuable consideration, and, therefore, but for the reasoning of the Judges of the Transvaal Supreme Court in a recent case, which has been brought to my notice, there would have been no doubt as to what our decision in the present case should be.

The case to which I refer is that of *Rood v. Wallach* (21, S.A.L.J., p. 137). The action was grounded on two documents executed on the same day. The first was a notarial agreement by which the plaintiff ceded to the defendant, for the sum of £300, one-half share of the plaintiff's interest in certain prospecting rights which he had acquired. After this agreement had been executed, but on the same day, further negotiations took place between the parties, which resulted in a letter being addressed by the defendant to the plaintiff in the following terms: "Re contract, 'Normandien.' With reference to the contract this day entered into between us regarding above farm, I hereby guarantee and undertake that in the event of sale or otherwise, as mentioned in paragraph 4 thereof, your share of the profits will be not less than £7,500, which sum, at least, I undertake to pay you should I be successful in dealing with the property. You will in any case be entitled to a full half of all profits that may accrue, but not less than the above sum." The learned Judge (Bristowe, J.), who tried the case, found as facts that the notarial agreement did not correctly represent the intention of the parties, and that the defendant gave the guarantee for the express purpose of rectifying the mistake. Upon this finding on the facts, he could come to only one conclusion, whether under Roman or Dutch or English law, and that is, that, as the whole matter was one transaction, the consideration which supported the original contract supported also the guarantee. The Court of Appeal, however, did not believe the

evidence of the plaintiff that the guarantee had been mentioned before the contract was executed, and therefore treated the guarantee as an agreement standing by itself. If the finding of Bristowe, J., on the facts was wrong, there was no consideration for the guarantee, and the Court of Appeal accordingly proceeded to consider the question whether, in the absence of such consideration, the agreement could be legally enforced.

It does not appear from the terms of the judgment whether the point was raised that the promise should be supported as a donation. According to the well-known definition given by Grotius, a donation is "a promise whereby a person who is not bound to another binds himself out of liberality (*weldadigheid*) to give that other something belonging to himself, without receiving anything from him in return or stipulating for anything for his own advantage." I quote from Chief Justice Maasdorp's translation, which, if I may venture to say so, correctly reproduces the original. If, therefore, the defendant (Rood), without being under any obligation to pay the plaintiff anything, out of liberality promised to pay the £7,500 without receiving any valuable consideration, such a promise would be tantamount to a donation, and would be binding as such. In such a case, however, the transaction would have been hedged in by all those rules and restrictions, such as the necessity for registration, where the amount exceeds £500, and the liability to revocation for certain specified causes, to which the law has subjected this class of contracts. In the case of the so-called "remuneratory donations," that is, gifts promised as reward for past services which the donor was not bound to reward, these restrictions were greatly modified. The fact that "remuneratory donations" founded as they are upon bygone consideration, were not classed among ordinary contracts, goes far to show how deeply the notion of what English lawyers call "valuable consideration" had entered into the constitution of all other binding contracts. The truth is that it was an anomaly to admit *donation* into the circle of contracts at all. Once it was so admitted, an "oorzaak" had to be found, and as donation for a valuable consideration was a contradiction in terms, some lawyers found the "oorzaak" in the liberality which the donor intended to exercise towards the donee. Van Leeuwen (Comm. B 4. C 30. Sec. 1), perceiving, I presume, the inconsistency of treating the donor's bounty as a *causa*, boldly affirms that a donation is "a voluntary delivery of a certain thing without any oorzaak to another." Clearly, by the expression "without any cause," the learned author meant the same thing as Grotius did by the expression, "without receiving anything

in return, or stipulating for anything for the donor's advantage," which, again, means the same thing as "without valuable consideration." I have already referred to Huber's remarks upon this question, and I need here only add that if the Dutch law would have enforced ordinary promises, made without any consideration, it is difficult to conceive why donations should have been hedged in by so many restrictions. The Transvaal Court, however, did not base its judgment upholding the defendant's promise on the ground that it was a donation, and, consequently, it was unnecessary to decide whether it belonged to that class of donations which are subject to the restrictions already mentioned, or whether Vinnius was right in holding that a promise to make a gift at a future time cannot be enforced. The plaintiff succeeded in obtaining all the advantages of a donation, without being subject to any of its disadvantages.

If the facts had not been correctly found by the Court of the first instance, and the promise did not hold good as a donation, then it clearly was a case in which, according to the decisions of this Court, there was no reasonable cause for the contract. The Chief Justice, in his able and lucid judgment, proceeds to criticise these cases, and to give his reasons for not agreeing with them. The first of them, *Alexander v. Perry* (Buch., 1874, p. 59), was very briefly reported, but the substantial point decided was that a promise by one person to serve another as bookkeeper for a definite period was not binding, unless there were a corresponding engagement on the other side to employ him and remunerate him for his services. If the Transvaal Court in theory disagrees with this view, it is difficult to imagine a case in which it would give practical effect to its theory. The two other cases, *Malan v. Secretan* (Foord. 94) and *Tradesmen's Society v. Du Preez* (5 Juta, 269), are more fully reported, and it is therefore unnecessary to repeat all the observations there made. In the former case, I ventured to point out that the expression *nudum pactum* did not, in the Roman law, properly signify an agreement without consideration, and the learned Chief Justice concurs in this view. He very correctly adds that with the Romans it was entirely a question of recognition, and that an agreement, not falling within the privileged class, even though founded on valuable consideration, gave no right of action. He proceeds, however, to point out that the Germans attached great importance to the observance of good faith, and refused to recognise distinctions which allowed a man to break an agreement deliberately entered into. In support of this statement, he quotes Grotius as stating that the subtleties of the Roman law on the distinction between pacts and contracts

were no longer observed in his time, and that the Germans from time of old esteemed no virtue higher than good faith. It is clear, however, that he did not include among the subtleties of the Roman law, which had been abolished, the requirement of a *causa* to support an agreement, whether in the form of pact, or contract. On the contrary, he goes even further than Roman lawyers had gone, and demands a *reasonable cause*. What he means by this expression he explains in the following passage, as follows: "Redelijke oorzaak wordt verstaan zoo wanneer de toezegging of belofte geschiedt *ter schenk*; of dient tot *eenige andere handeling*, 'tzij zulks geschiedt ter tijde van de handeling of daarna." The italics are those of Grotius himself. The literal translation of the passage is as follows: "Reasonable cause is understood as well when the promise is made by way of donation as when it serves for (is auxiliary to) some other contract, whether the promise be made at the time of the contract or thereafter." Owing to its extreme conciseness, it is exceedingly difficult to grasp the real meaning of this passage. The author's intention seems to be to emphasise the distinction between donations, where the liberality of the donor is the cause, and other contracts, which require that the promisor should receive something in return, or stipulate for something for his own benefit. This intention comes out more clearly from the following chapter on donations, the first paragraph of which I have already quoted. In another passage (3, 30, 14), the learned author says that "in the case of purchase and sale, letting and hiring, and the like, all promises falling below or exceeding the real value might appear, to the extent of such difference, to be without reasonable cause (redelijke oorzaak)," yet, he adds, that, as such a transaction is founded on a legal cause (rechtelijke oorzaak), that is to say, a cause implied by law from the very nature of the transaction, the value should not be narrowly scrutinised except where the consideration is purely nominal or is grossly in excess of the value, in which case other principles of law would come into operation. It is clear from this passage that the author could not possibly mean by "redelijke oorzaak" the simple reason or ground for the contract, but must have meant something equivalent to valuable consideration. The Chief Justice (Innes), however, makes the following remarks: "With the edition of Grotius published in 1667 is printed a list of the Dutch meanings of Latin words used throughout the book. The definition of *causa* in that list is *een raaron*, the ground or reason, the why and wherefore of any matter." As the book was written in the Dutch language, and as Grotius himself used the ex-

pression "redelijke oorzaak," it is not quite clear why the publisher of the list, whoever he was, should have translated *causa* into Dutch. The fact, moreover, that he defined it as "een waarom," does not carry the matter much further, seeing that *Damhoudou*, as I have shown, also uses the term "waaromme," but gives as his only illustrations instances of valuable consideration. Van Leeuwen treats of the same subject in the chapter on Obligations, in his Commentaries (B 4, c 1, secs. 4, 5, and 6): "A promise," says he, "upon request is where a person for some reasonable cause, that is (as we have said), in return for what has been given or done to him, promises and acknowledges himself bound to another in something upon the latter's request. For otherwise a bare promise, which has no definite cause, confers no right upon another whereby he may acquire an action against the promiser. I say a reasonable cause, which in its nature is good and legitimate, as, for instance, in the case of loan, sale, hire, and the like, not that the same must necessarily be strictly and proportionately measured, for the smallest circumstance will render a thing larger or smaller, and of greater or less value." In a note to the following chapter, Decker treats the expression "reasonable cause" as equivalent to "physical and moral possibility," but this is surely a very serious departure from the author's reasoning in the text. Decker was probably influenced by the writings of the philosophical French jurists, whom he cites, and forgot that Van Leeuwen was dealing with the Dutch law as administered in actual practice in his immediate presence. If by "reasonable cause," Van Leeuwen meant "physical and moral possibility," it is difficult even to conjecture why he immediately added: "That is in return for what has been given or done to" the promiser. His meaning clearly was that there can only be a "reasonable cause" for a promise where the promise is made in return for what has been promised or given to the promiser. This view of his meaning is supported by the illustrations which he further on gives of reasonable cause. Whatever theorists like Decker might say, the testimony of writers conversant with the actual practice in Holland and Vriesland has led me to the conclusion that the more commercially-minded tribunals of these provinces, differing in this respect, perhaps from the tribunals of France and other Continental States, would not have accepted anything short of valuable consideration as a sufficient cause for any promise not intended as a donation. Certainly, if in a suit to enforce a promise, whether oral or in writing, counsel, on being asked what the "redelijke oorzaak" was, had answered, "the physical and moral possibility of performance," it is not difficult to imagine what

reply he would have received from the Bench. The only other Dutch writer to whom I need refer is Van der Keessel, who (Thes., 484) adds the following explanatory note to the passage in Grotius defining reasonable cause: "*Promissio cui justa debendi causa non subest, non producit actionem in foro effracem, quacvis aliquin ex nudo pacto actio nascatur.*" The author's object is to make it clear that although the subtleties of the Roman law in regard to *nuda pacta* had been abolished, the Dutch law still in his time required a *justa causa debendi*, and this expression the learned translator, who was an advocate practising at the Ceylon bar, interpreted to mean "consideration." Reference is made in the Transvaal judgment to Goudsmit's statement that *causa*, or *oorzaak*, is the ground or reason for the contract, and may be the desire to do another a favour, or to discharge a legal obligation, or to secure any other lawful object or purpose." Goudsmit is, or lately was, a Professor at Leyden, and the work to which reference is made relates to the system of the *Pandects* in the Roman law, and has no direct bearing on the Dutch law as it existed before the introduction of the present code. In a note, however, to the passage quoted, the author candidly admits that the term *causa* had several other meanings in the Roman law, and points out that in the case of the innominate contracts, the giving or doing by one of the parties is the *causa* for the giving or doing by the other party. In a later passage he states that the old Dutch law required proof to be given of the *causa debiti* where none was expressed in a bond, and he cites the passage I have already quoted from Groenewegen in support; but he adds that the practice was founded upon an unauthentic quotation in the Digest. It is quite possible that the Courts of Holland may have been misled by a spurious reading in the Digest; but the relevant question is not whether the Dutch Courts had departed from the pure and unadulterated principles of the Roman law, but what the actual practice in reality was. The Chief Justice also quotes with apparent approval Decker's statement that "reasonable cause is equivalent to physical and moral possibility," and Toullier's statement that cause means the motive for making the promise. I have before had occasion to point out that other French writers do not agree with this definition, but the dispute is not of much practical importance, as the Court is dealing with the Dutch, and not the French law. The difficulty in connection with the different definitions of "reasonable cause," which the Transvaal Court approves of, is that besides being somewhat inconsistent with each other, they afford so little practical assistance for the decision of concrete cases as they arise. Take the present

case as an illustration. It is admitted that there must be a reasonable cause to support the defendant's promise to make the first offer of his farm to the defendant, in case he should wish to sell. What, then, is the *causa*, or *oorzaak*, for his promise? If the test is the physical and moral possibility of his fulfilling his promise, there can be no doubt that there was a *causa*; but what becomes of the requisite that the *causa* must be reasonable? The Dutch writers must have attached some meaning to the word "reasonable," apart from the possibility, physical or moral, of performance, of the obligation. But by what test is any judge or jury to decide whether it was not only physically and morally possible for the defendant, to offer the farm to the plaintiff, but also reasonable that he should have made the promise at all? From the strictly moral point of view, it was reasonable for the defendant to make the promise, although the plaintiff was not to give or do anything in return, but the ordinary jurymen would consider that there ought to have been a *quid pro quo*. Assuming, on the other hand, that the term *causa* means either motive or reason for the contract, I can find no motive or reason in the present case, except the defendant's wish to escape the plaintiff's importunity without any apparent rudeness to him. Like a true native, he was so intent upon getting rid of a present inconvenience, that he quite forgot that he might afterwards be called upon to make good his deliberate promise. But the motive which influenced him was not a reasonable one, and the strange result would follow that because his motive was not reasonable he escapes liability. It is admitted, however, that if the plaintiff, on his part, had paid a substantial sum for the right of pre-emption, or had promised to buy the farm for the price at which another purchaser should be willing to buy, or had given a right of pre-emption on his own farm to the defendant, there would have been a reasonableness of the defendant's motive and the want of any further consideration would not have prevented the Court from holding him bound by his undertaking. It always, therefore, comes round to this, that, in the case of all contracts except donation, the only practical test of the existence of a reasonable cause is the giving of a *quid pro quo*. This is a test which the simplest mind can understand and appreciate, and which in practice is found to solve every difficulty. The learned Chief Justice, however, is apparently of a different opinion, for near the end of his judgment he says: "To pluck the English doctrine from its surroundings and from a system of which it forms a well-understood part, and to graft it upon our legal system, to which it is, in my opinion, foreign, to curtail its scope by excluding from its operation all contracts

of donation; and to recognise in connection with it the inconsistent doctrine that contracts without consideration, are valid for all purposes of defence—to adopt such a course would not, I think, be expedient if it were possible." Surely this criticism does less than justice to the part actually taken by this Court in the development of the law relating to contracts in this colony. It found the doctrine of "redelyke oorzaak" well established, and, as its proceedings were in the English language, it had to find an English equivalent for the Dutch expression. The literal translation would have been "reasonable cause," but that expression, associated as it is with the law relating to injuries, would not have adequately conveyed the real meaning of the original. What then was more natural than for the Court to adopt the expression, "valuable consideration," approaching as it does more nearly than any other words in the English language to the true meaning of "redelyke oorzaak?" Without transplanting the whole of the English doctrine of consideration into our law, the Court has availed itself in this, as in so many other departments of law, of the practical aid afforded by the wisdom and good sense of great English judges in the elucidation of matters which are common to both systems of law. As to "donations," the anomaly of including them among contracts has repeatedly been pointed out by great writers on the Dutch law, but the Court, finding that it was so included, accepted the law as it stood without attempting to curtail the general doctrine of consideration. In regard to the inconsistency of that doctrine with the rule that contracts without consideration may be valid for purposes of defence, it is an inconsistency which, at all events, would in this Court prevent a decision such as that of the House of Lords in *Fonkes v. Beer* (9, Ap. Ca., 605), upon which the Chief Justice is so severe. The practice of allowing a defendant under certain circumstances to avail himself of certain facts as a defence, which, if he were plaintiff, he would not be allowed to rely on or prove, is known in the Dutch as well as English and American jurisprudence. It is quite consistent, at all events, with the Dutch practice for the Court to refuse its aid equally to the one party, who, as plaintiff, claims the benefit of an agreement for which he has given no *quid pro quo*, and to the other party should he, as plaintiff, seek to enforce a right which he has promised to forego. In other respects also the doctrine has always been so applied as to do no violence to any recognised principles of our own law. For instance, a contract by formal deed requires to be supported by a consideration as much as any simple contract. No inconvenience has ever resulted from the non-adoption of the English rule, which dispenses with the necessity of consideration in the case of contracts under seal, and I do not.

therefore, share in the fear expressed by the Transvaal Court that we might be driven to have recourse to the so-called "peppercorn considerations." A purely nominal consideration would certainly not be regarded in our courts as a reasonable cause.

It is not quite to the point to say, as was said by the Chief Justice, that the tribunals of Scotland, where the doctrine of consideration forms no part of the law, have coped successfully with the task of deciding whether parties intend to bind themselves to the performance of gratuitous promises. Those tribunals have not, so far as I can judge, been hampered by a rule of practice that no contracts should be enforced unless they are supported by a reasonable cause. "The Romans," says Lord Stair, "that they might have clear proof of pactions and agreements, would second none with their civil authority, but such as had a solemnity of words by way of stipulation, whereby the one party going before, by an interrogation, the other party closed by an answer conform, which was both clear to the parties and witnesses; or otherwise, unless there were the intervention of some deed, or thing, beside the consent, or that it were a contract allowed of the law, or such other paction as it specially confirmeth; without all which, it was called *nudum pactum inefficax ad agendum*. We shall not insist in these, because the common custom of nations has resiled therefrom, following rather the canon law, by which every paction produceth action *et omne verbum de ore fidei cadit in delictum*. And so observeth Gudelinus de Jure (Nov., L. 3. C. 5. sec., ult.) and Corvinus de Pactis. We have a special Statute of session, November 27, 1592, acknowledging all pactions and promises as effectual, and so it hath been ever decided (January 14, 1631, Sharp *contra* Sharp.)" On reference to the work of Gudelinus, who was a professor at Louvain University, I do not find that he quite supports Lord Stair, whose statement as to Scotch law is emphatic enough. Compare that statement with the qualified statements of the different Dutch writers I have quoted, and the difference between the two systems of law becomes apparent at once. The Dutch Courts, while rejecting the Roman law rule *ex nudo pacto non datur actio* in its proper sense, still retained that "intervention of something beside the consent," which the Scotch law seems to have swept away along with the subtleties of the Roman law, and they developed it into something more akin to the "valuable consideration" of the English law than even the *causa præter conventionem* ever was under the Roman law. As was to be expected, there is a corresponding difference in the manner in which donations are treated. The Dutch Courts, while on the one hand refusing to enforce or-

inary contracts not supported by valuable consideration, and, on the other hand, having to recognise donations, although not supported by valuable consideration, continued to enforce the restrictions to which donations were subjected even when there was no question of defrauding creditors. In the Scotch law, so far as I can judge, donations are not revocable by the donor, nor do they require registration, the only restriction being that they shall not be used as a means for defrauding creditors.

It is more to the point, in a colony where the Dutch law prevails, to inquire what has been the course of judicial decision in other colonies where the same system is in force. In his Institutes of the Laws of Ceylon, Thomson, J., a judge of the Supreme Court of that colony, cites with approval cases decided in the local courts as far back as 1837, in which the doctrine was fully recognised. In another passage (Vol. 2, p. 322), he says: "By the laws of Ceylon, all contracts whatsoever made in Ceylon (except perhaps recognisances) must have an adequate consideration, otherwise no obligation can be said to exist." In support of this statement of the law, he cites, not only a passage in Van der Linden, but also the collection of judgments by Chief Justice Sir Charles Marshall, of which I have, unfortunately, not been able to procure a copy. "This rule," adds Thomson, J., "applies even to deeds; but deeds have this advantage, that the consideration is in the first instance presumed, i.e., the deed itself is *prima facie* evidence that it was given for an adequate consideration, only to be rebutted by satisfactory evidence to the contrary." In support of this statement, he cites cases decided in the local courts in 1851 and 1859. Turning next to the practice in the neighbouring colony of Natal, where the Dutch law also prevails, I find that the Supreme Court, in *Boshoff v. Lotter* (Broome's Dig., 74), decided that "valuable consideration" is necessary to support an action on a contract. The facts of the case are somewhat peculiar. Differences between the plaintiff and defendant having been brought before a Church Council of the denomination to which both parties belonged, the Council suggested a compromise, under which the defendant was adjudged, under pain of ecclesiastical censure, to pay a sum of money, for which he gave his promissory note. The note being dishonoured, was sued upon, and the defence of want of consideration was set up. It was held by a majority of the Court that, there being a want of reciprocity or material benefit accruing to the defendant as consideration, no right of action surrendered by the plaintiff, and no legal obligation on the defendant to pay the amount adjudged, the payment should not be enforced. Chief

Justice Harding dissented, and the report of the case is too brief to enable one to judge whether upon the facts he may not have been justified in holding that there was sufficient consideration, but the decision is important, as showing what strict proof of "valuable consideration" was required by a majority of the Court. Strangely enough, in Mr. Nathan's recently-published work on the "Common Law of South Africa" (vol. 2, p. 541), the learned author, while citing the judgment of Harding, C.J., as supporting the view that consideration is not required, omits to mention the more relevant fact that the Chief Justice was in a minority, and that the opposite view was adjudged to be the law of Natal. The decision was given as far back as 1858, and appears never since to have been questioned by the Court, although during the interval it was for a considerable time presided over by a Chief Justice (Connor), who was admitted by every lawyer, who has had the privilege, like myself, of practising before him, to have been one of the keenest students and clearest exponents of the Dutch law that have ever occupied a seat on the judicial bench of South Africa. Indeed, in the subsequent case of *Waller v. Wo'der* (9, Natal, S.C., c. 55), that learned Judge took for granted that consideration is required to support a contract. He correctly pointed out the difference between *nudum pactum* as understood in the Roman and in the English law, but held that in that particular case there was sufficient consideration to support an agreement to accept a composition. In support of this view he cited an English case, which he would certainly not have done if, in his opinion, the English doctrine of consideration were so foreign to the legal system of a colony where the Dutch law prevails, as it is held by the Transvaal Court to be. Until its recent decision the question had never been fully argued, and decided in the Transvaal, although the tendency seems to have been to assume that consideration was not required. On inquiry as to the course of judicial decision in the former Orange Free State, I have been informed that the question never arose for decision in the Supreme Court, but that in a case before the Circuit Court for Winburg, it was held that, giving an option for the purchase price of a farm was not binding without valuable consideration having been given for the right. I have not been able to ascertain what the decision on the point has been in the courts of British Guiana, the only other British colony where the Roman-Dutch law prevails, but it is significant that in his translation of Van der Linden's Institutes of the Law of Holland, Henry, who had made the law of that colony a subject of special study, and had himself held high judicial office there, translated "oorzaak" into "consideration" in the passage (B, 1, c. 14, sec. 2),

where the learned author states that a contract without an "oorzaak" is not valid. In this colony, as I before had occasion to observe, the practice has not been uniform. In 1830, the Supreme Court held, in *Louisa v. Van den Berg* (1, Menzies, 471), that a gratuitous promise made to A for the benefit of B, accepted by A and B, is binding on the promisor, and that performance thereof, if refused, may be enforced by legal proceedings, if not in its nature illegal. The question does not seem to have been raised in that case whether the promise should be supported as a donation subject to the rules relating to that class of contracts. In the subsequent case of *Jacobson v. Norton* (2, Mez., 218), the declaration certainly discloses valuable consideration for the defendant's promise to pay, but the Court held that as no consideration was necessary to support that promise, it was unnecessary to decide, on exceptions to the declaration, whether the consideration was sufficiently set out. It has been stated in this court that Mr. Justice Menzies subsequently modified the strong views which he originally held under the influence of his Scotch training, but I have not been able to find any reported case to that effect. From 1841 to 1868 cases were not regularly reported, and it would therefore be difficult to verify the statement. Among the cases that were reported is that of *Carwood v. Lane* (5 Searle, 264), in which the plaintiff claimed damages for the defendant's breach of contract in opening a butcher's shop at Uitenhage in violation of his undertaking to refrain from carrying on such a business. To the summons there were three exceptions, the first of which was that the summons did not allege any contract containing consideration for refraining from carrying on the business of a butcher at Uitenhage. The brief judgment delivered by Hodges, C.J., was as follows: "The first exception must fail, because the stipulated rental of £65 must be regarded as consideration." This judgment treats it as an accepted doctrine, as, to my knowledge, it was in 1867, when the case was decided, that a contract requires a consideration to support it. In 1874 the point was definitely decided, and since that time the doctrine has been affirmed and reaffirmed, not only in this court, but also in the Eastern Districts Court and in the High Court of Griqualand. (See *Midgley v. Tarrant* (5 E.D.C., 35), and the recent case of *Gous v. Van der Hoff* (13, C.T.R., 397).)

But, assuming for a moment that this Court and other Colonial Courts administering the Dutch law have erred in their interpretation of the Dutch law, the question would still remain whether it would be right or proper for the Court to reverse its practice of so many years. Surely, if ever there were a matter in which the saying *Communis error facit*

jus should apply, it is here. The error, if error it be, has not, to use the language of Lord *Ellenborough* (*Islewood v. Oldknow*, 3 M. and S., 386), consisted in "an opinion merely speculative and theoretical, floating in the minds of persons, but it has been made the groundwork and substratum of practice." So far from its being impossible to apply the doctrine of consideration, in the modified form in which it is here accepted, I do not see how it would be possible, in this Court at all events, to apply any other doctrine. Take the case of promissory notes, in regard to which it has been the invariable practice to refuse provisional sentence to the payee upon proof that the maker had not received valuable consideration for the note. Where the payee can prove in the principal case that the note was given to him with the undoubted intention of making an immediate gift, the Court would enforce it, but the donation would be subject to the fetters binding this class of contract. In the absence of proof of such an intention, no payee has, within my knowledge, ever succeeded in obtaining judgment on a note for which he has given no value. Since 1893 the law of England relating to promissory notes has been practically incorporated with the law of this Colony not by means of an Imperial Act applying to England and this Colony alike, but by our own local Act (19 of 1893). In that local Act, wherever a difference in practice or nomenclature previously existed, the provisions of the English Act have been so amended as to make it clear whether the local practice or nomenclature was to be superseded. For instance, the 12th section of the local Act declares that there are no days of grace in this colony, and the 20th section expressly provides that, to the validity of a bill accepted or endorsed by a woman, the renunciation of the benefits *senatus consulti Velleiani* and *authentica si qua mulier* shall not be requisite. As to consideration the English Act reads as follows: "Valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time." The local Act has adopted the section verbatim, except that for sub-section (a) it substitutes the following: "(a) Any cause sufficient to support any action founded on contract or agreement." By our law, therefore, valuable consideration for a bill may be constituted by any cause sufficient to support an action founded on contract or agreement. The Transvaal Court, however, has held that any ground or reason which is not immoral or forbidden would be sufficient even if there was no *quid pro quo* for the promise, and no antecedent debt or liability. If this

Court were now to accept that decision the strange result would follow that there might, in law, be valuable consideration for a promissory note for which, in fact, no valuable consideration whatever had been given by the payee. Rather than allow such a result to follow, the local legislature would, I should think, have adopted the section of the English Act without any alteration, for then the term "consideration" in sub-section (a) would have to be construed by the light of the English, and not the Dutch, law. Other illustrations of the inexpediency of following the Transvaal decision might be given, but my remarks are already longer than at the outset I intended them to be. Greatly as I desire to abide by the decisions of other South African Courts, and to assist in checking the tendency of the laws of the different South African colonies to drift apart by reason of contradictory decisions, I could not accept the views expressed by the Transvaal Court in *Rood v. Wallack* without running counter to the actual practice of the Dutch Courts, as I conceive it to have been, and, what is more important still, without completely, unsettling the law of this and most other colonies in which the Roman-Dutch law prevails.

In the present case donation is out of the question, and as no valuable consideration was given for the defendant's promise, the plaintiff is not entitled to the damages claimed by him. The appeal must, therefore, be allowed, with costs in this court and in the court below, and judgment entered for the defendant.

Hopley, J., concurred.

[Appellant's Attorneys: Syfret, God-lonton and Low; Respondent's Attorneys: Faure and Zietsman.]

TYAM V. KOTA. } 1901.
 } May 31st.

Mandate — Agent — Payment of damages.

The plaintiff, a native, who owned some cattle, left them during his absence from home in charge of his uncle M. During the plaintiff's absence, his brother seduced the defendant's daughter, whereupon M. gave one of the plaintiff's cows to the defendant as compensation for the seduction of his daughter.

Held in an action by the plaintiff to recover the cow or its value, that under the ordinary law M. had no mandate to give any of the plaintiff's cattle to others for the protection of his brother's

honour, and that in the absence of any statement that by native custom in the Native Territory he had such authority, the Magistrate erred in giving judgment for the defendant.

This was an appeal from a decision of the A.R.M. of Middledrift. The plaintiff had sued to recover a certain cow, or its value, £18.

In the first instance action had been taken against Gololo Kota, and the Magistrate held that the wrong party had been sued. Action was then taken against Maclean Kota, and the parties agreed that the proceedings in the previous case should form part of the record. The evidence in the case showed that the plaintiff's younger brother had seduced the defendant's daughter, and that while the plaintiff was away his uncle, Mbela, gave the defendant a cow as damages for the seduction. The Magistrate dismissed the case, holding that the plaintiff's uncle was justified in paying damages out of the estate, in which all the children had property, and that if the plaintiff's father had been alive he would have paid damages for the misconduct of his son. Mr. Van Zyl (for appellant), contended that Mbela was merely the agent of the plaintiff, and that he had no authority to dispose of the property. The Magistrate did not decide the case on native custom, but on the law of mandate.

Respondent in default.

De Villiers, C. J.: The Magistrate has not decided this case, under native law, but under the ordinary law of the Colony. It appears that the plaintiff is to all intents and purposes the owner of the cow in question. He alone has control over it, and although he holds the cattle subject to certain conditions, yet he is the person in whom the property is vested, and he is entitled to sue for the value of the cow, of the possession of which he has improperly been deprived. He left his place, and left his cattle in the charge of his uncle, Mbela. During his absence a brother of the plaintiff seduced defendant's daughter, and upon a demand being made for damages, according to native custom, damages were given by way of a cow, and with the consent of Mbela a cow belonging to the plaintiff was taken for the purpose of paying damages to the defendant for the seduction of his daughter. The Magistrate held that Mbela had authority to do so, because he says there was a mandate. He proceeded upon the ground that there was no prohibition, and that inasmuch as there was no prohibition, Mbela was justified in giving one of the plaintiff's cattle to pay for the seduction of the defendant's daughter. I am of opinion if the

doctrine of mandate is to be applied here, that the question is not was there prohibition, but was there permission. Mbela had no right to part with the plaintiff's cattle without his authority, and leaving Mbela in charge of the cattle did not give him authority to deal with the cattle just as he chose. In my opinion Mbela, as agent, had no right to deprive the plaintiff of the possession of the cow, for which no consideration whatever is given, but merely to pay damages for the misconduct of a brother for whom the plaintiff was not in any way responsible. Under these circumstances, I am of opinion that the Magistrate erred in finding that the plaintiff had no right to recover the cow or its value. The appeal will be allowed, with costs in this Court, and the Court below, and judgment entered for the plaintiff for the restitution of the cow, or its value, namely, £13.

TAYLOR AND GIBSON V. { 1904.
BEHR AND CO. { May 31st.

Conditions of sale—Auction sale
—Auctioneer's commission.

One of the conditions read at an auction sale of lots of land was that "the purchaser shall pay the auctioneer's commission." Certain lots were knocked down to the defendant, who afterwards refused to sign the conditions, on the ground that he had never bought the lots. It having been proved that the defendant had bid for the lots after hearing the conditions read.

Held on appeal, that the Magistrate was right in giving judgment for the plaintiff in an action brought by the auctioneer to recover his commission.

This was an appeal from a decision of the Assistant Resident Magistrate of Wynberg in a case in which judgment was given against the appellants for £9 11s. 6d. for auctioneer's fees.

The action arose out of a sale of certain plots of land at Croydon. Twenty-two lots were sold to the appellants, but they denied the transaction, or that they ever saw any conditions of sale. The Magistrate, in his reasons for judgment, said the case resolved itself largely into one of credibility, and he had no hesitation in believing the evidence of the defendants' clerks, who entered the transaction on the roll. It was possible that the defendant might

raised entirely to pay debts contracted after the death of deponent's wife.

The replying affidavit of Thomas Henry Matthews, of Willowmore, a law and general agent, stated that he acted as the defendant's agent in the administration of his wife's estate, but he denied any collusion. He added that when the bond was raised, only £26 was in favour of deponent on account of disbursements he had made and commission. The affidavit of George Wm. Mugliston, auctioneer and general agent, Willowmore, stated, he considered £3,000 a reasonable value for the ground in question. The defendant had made considerable improvements to the land since his wife's death. Deponent had made advances to the defendant to enable him to carry out the improvements.

A further affidavit was put in (by consent), of the defendant, who repeated that he asked the deponent Matthews whether he could legally pass a bond on the property, and that Matthews told him that he had a perfect right to do so. As regarded the alleged improvements, he denied that he had spent any considerable sum upon the bore hole, dam, and furrow. The increase in the value of the farm was not due to any improvements described by Matthews and Mugliston, but owing to the general increase in the value of property in the district of Willowmore.

Mr. McGregor for defendant; Mr. Alexander for plaintiff.

Mr. McGregor said that the defendant primarily objected to the property being declared executable. The case was practically governed, save for the matter of knowledge, by that of *Haupt v. van den Heever* (6, Juta, 49). Under the will the right of alienating was taken out of the hands of the survivor. There was no power to mortgage the land in the survivor. Counsel quoted at some length from the judgment in the case of *Williams v. Williams* (Supreme Court Reports, p. 392). On the question of knowledge, he said that the agent Matthews must have had full knowledge of the position of things by reason of having been concerned in the administration of the defendant's wife's affairs at her death. If Matthews (the agent) had knowledge, then that knowledge must be imputed to his principal.

Mr. Alexander said that the mortgage had been publicly registered, and no objection had been taken before to the property being mortgaged in this way. He submitted that the debts for which the bond was raised, were such as would be bound to fall on the estate, and that the money was really laid out for the benefit of the joint estate.

Hopley, J.: The plaintiffs must have provisional sentence, but the serious point raised in the case is whether or no they can have the property specially mortgaged declared executable for the

purpose of satisfying the judgment. On the cases quoted, and on the facts raised in the present affidavits, the Court would be wrong to declare the property executable. I cannot conceive how Matthews could have forgotten that there were special circumstances applicable to this property. I think that all the children having a vested interest in the estate have a right to be heard and to show cause why the property should not be sold to satisfy the debts contracted by their father. For these reasons I shall give provisional sentence for the amount claimed, with costs, but the property will not be declared executable until further action is taken by the creditors.

[Plaintiffs' Attorneys: Reid and Nephew; Defendants Attorneys: Fairbridge, Arderne and Lawton.]

INSOLVENT ESTATE LITTON V. BOAS.

Mr. W. P. Buchanan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £35, and £24 6s. 11d. costs.

The defendant appeared in person, and denied that he owed the money. Now that the judgment was obtained against him, he offered to pay £2 a month.

Order granted, with execution stayed if the defendant pays £5 a month, first payment to be paid on July 1.

W. AND G. SCOTT, LTD. V. MANSCHESTER.

Mr. P. Jones moved for provisional sentence on two promissory notes for £97 16s. 9d. and £50, with interest and costs.

Order granted.

DE VILLIERS V. DOW.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £75, with interest at the rate of 8 per cent. The bond had become due by reason of non-payment of interest. Counsel also applied that the property be declared executable, with costs.

Order granted.

MERRINGTON V. LA GRANGE.

Mr. M. Biset moved for provisional sentence for £40 on a promissory note with costs.

Order granted.

ROCHESTER BRICK CO. V. STEENSMAN.

Mr. P. Jones moved for judgment for £27 15s., on a promissory note, with interest and costs.

Order granted.

HOFMEYER AND SON V. LATEGAN.

Mr. P. Jones moved for judgment on a promissory note for £354 4s., less £25 paid on account, with interest at the rate of 8 per cent.

Order granted.

SCHUR AND SCHEINFELD V. LOUBSCHER.

Mr. Rainsford moved for provisional sentence on a promissory note for £65, with interest and costs.

Order granted.

MARAIS V. VAN ZYL.

Mr. Sutton moved for provisional sentence on a mortgage bond for £275, with interest at the rate of 6 per cent., and that the property specially hypothecated be declared executable.

Order granted.

HERMANN V. VIVIERS.

Mr. Pittman moved for provisional sentence on two promissory notes for £100 each, with interest and costs.

The defendant appeared in person, and denied that he owed the money, as he never had the goods delivered to him.

Mr. Pittman applied to have the matter postponed until to-morrow week.

Ordered to stand over accordingly.

BOSMAN V. LEWIN.

Mr. Roux moved for provisional sentence on two promissory notes for £25 and £25, less £5 paid on account, with interest and costs.

Order granted.

CILLIERS V. VAN DER MERWE.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £1,100, with interest at 6 per cent., and that the property specially hypothecated be declared executable.

Order granted.

STEVENS V. HAGER.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £600, with interest at the rate of 6 per cent., and for £2 8s. insurance premiums paid by the plaintiff, and that the property specially hypothecated be declared executable, with costs.

Order granted.

FURMAN V. SERF AND SERF.

Mr. Alexander moved for provisional sentence on a promissory note for £39 11s., with interest and costs.

Order granted.

ILLIQUID ROLL.

ZEEDEBERG AND DUNCAN { 190A.
V. KISCH. { June 1st.

Mr. D. Buchanan moved in this matter for an order as to costs. The defendant was a surety in a debt contracted by another party. The principal had been paid.

Order granted.

COLONIAL GOVERNMENT V. BECHUANA-
LAND ESTATE SYNDICATE.

Mr. Howel Jones moved, under Rule 329, for £606, in default of plea by the defendants.

Order granted.

ESTATE BAM V. WILSON.

Mr. De Waal moved, under Rule 329d, for £30, being four months' rent and costs.

Order granted.

IMPERIAL COLD STORAGE V. ADAMS.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £914 1s. 8d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

IMPERIAL COLD STORAGE COMPANY V.
BAETIE AND SONS.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £128 15s. 4d., balance of account due for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

MATARE, BRUNS AND CO. V. NUNS.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £185 6s. 11d., balance of account due for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

CAPORN AND CO., LTD. V. DUMAS AND
FLEURANT.

Mr. Gardiner moved for judgment, under Rule 319, on a declaration which

claimed £130, less £30 paid on account, balance due for certain goods sold and delivered, with interest and costs.
Order granted.

DAVIS AND KATZ V. BERNHARDT AND
SARIEFF.

Mr. Sutton moved for judgment, under Rule 329d, for £38, less £6 paid on account, for rent, with interest *a tempore morae* and costs.
Order granted.

FINDLAY AND CO. V. TALANDA.

Mr. Sutton moved for judgment, under Rule 329d, for £156 16s., for work and labour done and goods supplied, with interest *a tempore morae* and costs.
Order granted.

ST. LEGER AND WILSON V. SCHMIDT.

Mr. Pyemont moved for judgment, under Rule 329d, for £23 15s., being account for professional services rendered, with interest *a tempore morae* and costs.
Order granted.

ZEEDERBERG AND DUNCAN V. COHEN.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £15, defendant being the surety of the principal, who was an unrehabilitated insolvent, and also for interest *a tempore morae* and costs.
Order granted.

DE WET V. MANSCHETER.

Mr. Roux moved for judgment, under Rule 329d, for £75, being rent due for certain premises leased from the plaintiff; also £9 1s. 5d., costs incurred on the defendant's behalf, with interest *a tempore morae*, and costs.
Order granted.

DE WAAL AND CO. V. COLYN.

Mr. De Waal moved for judgment, under Rule 329d, for £16 3s. 7d., balance of account rendered for goods sold and delivered, with interest *a tempore morae*, and costs.
Order granted.

REHABILITATIONS. { 1904.
 { June 1st.

Mr. W. P. Buchanan moved for the rehabilitation of Petrus Jacobus Pienaar.
Granted.

Mr. W. P. Buchanan renewed the application for the rehabilitation of George Hadley Walden.
Granted.

GENERAL MOTIONS.

REYNOLDS V. GOODMANSON.

Mr. J. E. R. de Villiers moved for a rule nisi, granted February 18, for leave to sell certain property, to be made final.
Rule made absolute accordingly.

VAN NIEKERK V. WILL AND OTHERS.

Mr. Graham, K.C., moved for a rule nisi to be made absolute, restraining the sale of the certain land known as Lentslands Pan, in the district of Gordonia, pending an action to be brought by the applicant, Susannah Magdalena Niekirk, to have her rights in the farm declared.

Mr. Gardiner appeared for the first respondent, Will; Mr. W. P. Buchanan appeared for the second and third respondents, Rosenblaut and Wessels.

The affidavit of the applicant stated that she purchased the farm, which comprised 15,000 morgen, from the rightful owner, Piet Boch, and that she was farming it with small stock. Boch was now deceased, and there was no representative of his estate. She understood that the farm was in danger of being sold by the sheriff in execution of a judgment obtained against the first respondent, Will, by the other respondents. Will claimed the farm, but any titles which he put in were forgeries.

The affidavit of J. Herbert N. Will said that he was an attorney, that the applicant had never previously claimed the property, and that the applicant must have known that he was the registered owner. Other affidavits were put in on behalf of the respondent Will.

Mr. Graham submitted that the applicant had clearly made out a case for the rule to be made absolute. It was quite evident that the point of the ownership could not be determined on motion. The plaintiff would bring her action as early as possible, but it was apparent that, owing to the remote place of abode of the parties, some time must elapse.

Mr. Gardiner said that he hoped that the action would not be left over indefinitely.

Mr. Buchanan said that whichever party succeeded, his clients must be held harmless.

Rule made absolute, the present motion to stand instead of summons, the declaration to be filed by the first day of next term, costs to be costs in the cause.

LEFEVRE AND OTHERS V. BORDIGONI.

Mr. McGregor moved in this matter to have a rule nisi granted against the respondent, Bordigoni, discharged. Counsel said that it had been arranged between the parties to allow the matter to stand over pending a decision of the Attorney-General, as to whether the two sanitary systems were similar, and now that the decision had been arrived at, counsel asked that the matter should be dealt with according to the letters patent. (See 13 C.T.R., 1140.)

Mr. W. P. Buchanan, for the respondents, pointed out that the applicant was really the inventor of the system in which the present respondents had joined in partnership, and now he thought he could leave them in the lurch, and exploit a rival system in opposition to that of the applicants.

Hopley, J.: Under the deed of partnership between the parties, Bordigoni, was in no way bound down not to invent a better system, and to exploit it for his own benefit. The Attorney-General has since decided that the two systems of sanitation are entirely different, and his decision has not been set aside or questioned, so that the Court must assume that the two systems are distinct. The interdict must therefore be discharged. In regard to the costs, the then applicants were wrong in interdicting the respondent, and the costs standing over must be paid by them, as well as the costs of the present application.

SUPREME COURT

CRIMINAL SESSIONS.

[Before the Hon. Sir JOHN BUCHANAN and a Jury.]

REX V. MARAIS. { 1904.
June 1st.

Minor—Criminal responsibility.

A certain woman and her daughter were jointly charged with assault with intent to do grievous bodily harm. The age of the girl was about 16 to 17 years, and at the instigation of her mother (as the mother admitted) had thrown into the face of a certain complainant a quantity of corrosive fluid, thereby inflicting serious injuries. When charging the jury,

Buchanan, J., said that though one person committed a crime, yet, if two or

more combined to carry out the crime they are equally guilty. In this case, the actual assault was committed by the younger prisoner, but there was the connection between the two, and the fact that the vitrol was purchased by the elder prisoner. When the case came into court the senior prisoner had come forward and said, "I take the whole responsibility for this upon my shoulders. My child did it, but she did it at my instigation, and did it for love of me." Therefore, the elder accused admitted complicity, and the jury could not acquit her because she did not herself inflict the injury. In fact, there had been no defence set up as to the guilt of the elder prisoners. The whole defence, as I gather, from the eloquent address of learned counsel for the defence, is in mitigation of punishment, or rather with the intention of getting the jury to return some recommendation. When they returned their verdict he (the learned Judge) was bound to tell them that, though the mother took the whole responsibility upon herself, in law there was no such protection given to a child of the age of the junior prisoner, as to justify them in saying that she was not answerable for the act which she had committed. Children of tender years could not be convicted of a crime, but children of maturer years, children old enough to know the consequences of their acts, were in a different position. The only relation in which the law recognised the principle of coercion was as between husband and wife, in certain misdemeanours. That presumption of coercion did not apply to parent and child, and, therefore, in law, no defence could be set up on the ground that the elder prisoner took the whole responsibility. It was for the jury to say with what intent the act was committed. It was said that the child did not know what she was doing. Well, the jury must take a child of that age and determine for themselves whether she could have committed the act without any volition, without any knowledge that she was doing anything wrong. Did the jury consider that when she threw this vitrol in Mr. Marais' face, she did not think she was doing him an injury? Were the words spoken by her at the time consistent with such an idea? As to what recommendation should be made and what punishment should be passed, the recommendation was for the jury, the punishment for the Judge to determine.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

PROVISIONAL ROLL.

BAMFORD V. BROWN. { 1904.
June 2nd.

Mr. W. P. Buchanan moved for a decree of civil imprisonment on a debt of £26 16s. 11d.

It was agreed to postpone the matter in view of a settlement.

Subsequently, Mr. Buchanan said he was instructed to agree to the order being suspended pending payment of £5 a month.

The order was granted to be suspended on payment of £4 a month, the first payment to be made on the 1st July.

GARLICK AND OTHERS V. DICKER.

Mr. J. E. R. de Villiers moved for the final sequestration of the defendant's estate, and for the appointment of a provisional trustee.

Order granted, Mr. H. Gibson appointed as provisional trustee.

INSOLVENT ESTATE BLACK V. CRESSWELL.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

OHLSSON V. S. COHEN.

Mr. D. Buchanan moved for provisional sentence on two mortgage bonds for £5,150 and £54 10s., the balance of interest in arrear, with interest, and that the property specially hypothecated be declared executable.

Order granted.

OHLSSON V. H. COHEN.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £3,500, which had become due by reason of non-payment of interest.

Order granted.

EATON, ROBINS AND CO. V. SWANEPOEL.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ILLIQUID ROLL.

LIEBERMAN AND BUIRSKI { 1904.
V. DAY. { June 2nd.

Mr. W. P. Buchanan moved under Rule 329d, for £130 5s. 4d., and interest on £200 at the rate of 8 per cent., being an amount guaranteed by the defendant in a debt contracted by another party.

Order granted.

STOFFBERG V. MEYER.

Mr. W. P. Buchanan moved, under Rule 329d, for £103 1s., being the balance of an amount due in a transaction concerning the sale and purchase of mules, with interest and costs.

Order granted.

BOTHA V. DE BRUIN.

Mr. De Waal moved for the appointment of two *curators bonis* in the estate of Jacobus de Bruin, who had been examined at the request of the Chief Justice by the Assistant Resident Magistrate of Maraisburg, and declared incapable of managing his own affairs.

Order granted; Martinus Marais and Nicholas de Bruin appointed as curators.

DE VILLIERS V. LOUW.

Mr. Close moved to have the respondent declared of unsound mind, and to have the Secretary of the Paarl Board of Executors appointed as *curator bonis*.

Mr. Russell, as *curator ad litem*, said that he could not oppose the application to have the respondent declared of unsound mind, but he thought the appointment of the Secretary of the Paarl Board of Executors as *curator bonis* was inconsistent with his position.

Order granted.

TELFER V. CAPE TOWN GAS CO.

Mr. Uppington moved to have judgment signed against the plaintiff for not proceeding with his action, according to the Rules of Court.

Order granted.

FRIBERG V. LLOYD AND TEARMAN.

Mr. Gardiner moved for judgment for £26 10s. against Lloyd, with costs.

Order granted.

GRUNEBERG V. DREYER.

Mr. Gutsche moved for judgment against the plaintiff for not proceeding with his action, according to the Rules of Court.

Order granted.

GENERAL MOTIONS.

Ex parte WEIDEMAN. { 1904.
Junc 2nd.

Mr. Gutsche moved to have a rule *nisi* granted under the Derelict Lands Act made absolute.
Rule made absolute.

Ex parte WARRINGTON.

Mr. J. E. R. de Villiers moved to have a rule *nisi* granted under the Derelict Lands Act made absolute.
Rule made absolute.

SMITH V. SMITH.

Mr. De Waal moved for leave to sue the respondent by edictal citation for restitution of conjugal rights, failing which, a decree of divorce, with forfeiture of the benefits arising out of community of property. The parties were married in December, 1900, at Wynberg, and a year later the respondent deserted his wife. He was presumed to be in Johannesburg.

Leave granted to sue by edictal citation, personal service to be effected, if possible, failing which, one publication in the "Cape Times" and in two Johannesburg papers at least three weeks before the 14th July.

Ex parte COLSON.

Mr. Alexander moved for an order authorising the Registrar of Deeds to amend an ante-nuptial contract by the substitution of the petitioner's name, viz., Hubert Louis Arnold Colson, instead of Louis Hubertus Arnold Colson, as it at present stands.

Order granted.

Ex parte STRAUSS.

Mr. W. P. Buchanan moved for an order authorising the Master to pay out to the applicant the sum of £1,040, in respect of money, being the proceeds of a sale of a farm in which he had an interest, and in which certain minors were also interested, and for interest at the rate of 6 per cent. from January, 1901.

The Master did not oppose the application.

An order was made in terms of the Master's report.

TABLE BAY HARBOUR BOARD V. MARX.

Mr. M. Bisset moved for an order on Marx to pay the costs of an action

brought by him against the Table Bay Harbour Board, the action having been withdrawn.
Granted.

ASKEW AND CO. V. BRAY AND WRIGHT.

Mr. Van Zyl, who appeared for the applicants, said that the matter came before the Chief Justice on the 17th May, on an application for leave to sue by edictal citation, and his lordship then directed that it should stand over for further information as to the date on which the debt was incurred, when Wright left the Colony, whether he had changed his domicile, and where he was last heard of. An affidavit made by applicant was now read, stating that the debt was for forage sold to Wright in August, 1901. Wright left the Colony in the latter portion of the same year, and went to England, to the best of deponent's knowledge, his present whereabouts being unknown. Certain goods were left in applicant's possession as security, and applicant was taking the present action with a view of levying execution upon these.

Leave was granted to sue Wright by edictal citation, returnable on the 16th August, service to be made by publication in the "Daily Telegraph" and in the "Cape Times."

SUTHERLAND V. SUTHERLAND.

Mr. D. Buchanan moved on behalf of the wife for leave to sue by edictal citation for restitution of conjugal rights, failing which for divorce, on the ground of desertion. Petitioner believed her husband was at present in Bulawayo.

Leave granted as prayed, personal service to be effected. The return day was fixed for the 4th July.

Ex parte VAN DER WESTHUYSEN.

Mr. Rainsford moved for the appointment of a curator to assist a minor in the sub-division of certain property, in which the minor was interested.

Order granted as prayed.

Ex parte VAN DE VENTER AND OTHERS.

Mr. Van Zyl moved for an order authorising the Registrar to pass transfer of certain property, and authorising the Master to pay costs of survey, and partition of certain property out of the funds held by him in trust for minors. The Master reported favourably to the application.

Granted.

LEVY V. LAZARUS.

Arbitration—Order of Court.

This was an application upon notice of motion calling upon respondents to show cause why the award of the executive committee of the Grand Order of Israel, Lord Milner Lodge, No. 21, who were appointed by the parties to settle certain disputes between them, should not be made an order of Court. The parties sued each other for damages for slander, but agreed to refer the disputes to the executive committee of the lodge, who adjudged that, in the case of Lazarus against Levy, the plaintiff (Lazarus) should receive judgment, with costs; and that in the case of Levy v. Lazarus, the latter should pay all costs, pay £5 5s. towards a fund connected with the lodge, and insert an apology in two local papers. Applicant now asked that the award be made a rule of Court, and respondent opposed, on the ground that the arbitration should have been made by a board consisting of honorary members of the Lodge, as provided by rule of the Order, and not by the executive committee. He alleged that he was not given an opportunity to produce his witnesses.

Mr. Alexander for applicant; Mr. Burton for respondent.

Mr. Burton said that written notice was sent to the respondent to bring his witnesses on the 3rd April, and counsel contended that even if a verbal notice was given, it was before his letter was considered—a course which he was led to believe would be taken.

Mr. Alexander submitted that if the arbitrators gave a clear award in a case, that the Court would not interfere with it. The respondent in this case was not really entitled to consideration, for the serious charges he had made against an attorney of this Court. Anything in the nature of an apology would be sufficient to satisfy the award, and counsel submitted that the Court could give such an order.

Hopley, J.: In this case the parties prior to the 23rd March, had certain disagreements, and each party had instituted an action against the other for defamation of character. Lazarus against Levy in the Magistrate's Court for £20 damages and costs. On the 23rd March, Lazarus in the Supreme Court for £250 damages and costs. On the 23rd March, 1904, they signed the following document: "We, the undersigned brethren of the Grand Order of Israel, Lord Milner Lodge, No. 21, do hereby agree and bind ourselves to abide by the decision of the Executive Committee, and the same decision to be made an order of the Court."

There were two other signatures to this document, but they do not take any part in the present application,

which is one by Levy to have the award of the Executive Committee made an order of this Court.

The document is not a formal or well drawn deed, but it is clearly intended to be a submission to arbitration by the Executive Committee of the said lodge, which, after enquiry into the case or cases made the following award:

"I. A. Lazarus v. A. Levy.

"In this case the plaintiff received judgment with costs.

"II. A. Levy v. A. Lazarus.

"In this case the defendant was found guilty, and that he pays all costs with an additional five pounds five shillings sterling, which sum is to go towards the Distress Fund of the Grand Order of Israel, Lord Milner Lodge, No. 21, and that the said A. Lazarus make a public apology in two local papers."

Before the award was issued the respondent Lazarus, who had attended the first meeting of the Arbitrators, had withdrawn, and asked that the arbitration should be carried out by an arbitration board to be constituted according to the rules of the order, but the Executive, after warning him to attend a further meeting, proceeded with the investigation with the result above stated.

Now it seems to me that the submission having been to the arbitrament of the Executive Committee, it was not competent for the respondent during the progress of the investigations to attempt to change the terms of the submission, and he must be held to be bound by the award, which was carried out in so far as it did not go beyond the terms of the submission.

The awards, however, do seem to me to go beyond the powers of the Arbitrators, at all events with regard to the second award. The Arbitrators had no power to award any sum to any charity, nor, I think, will this Court enforce their finding compelling the respondent to make public apology in the newspapers. This Court never makes such an order, and will not make such an award a rule of Court. And I think such parts of the award must be treated as surplusage and struck out. With regard to the first order of the Arbitrators, I think it merely means that the plaintiff (now respondent) should be awarded his costs without any damages, and this Court will now order that the awards should be made a rule of the Court to the extent indicated, viz., that in each case the plaintiff receive a judgment for his costs only. The respondent in this motion, who has opposed the making of any order by the Court, and has made no tender of any consent, must pay the costs in this Court.

[Applicant's Attorneys: J. Buirski; Defendant's Attorney: Michau and De Villiers.]

Ex parte LAWRENCE AND CO. AND
WISNER AND CO.

Mr. Rainsford moved to have a provisional trustee appointed in the estate of Ah Young in the interest of the creditors. The estate had been sequestered on the 25th May, and it was desirable now that certain assets should be taken charge of.

Hopley, J., said that it was unusual to appoint a provisional trustee before the second meeting, and the application could not be granted.

CLARKE AND CRESSWELL V. GORDON
AND OTHERS.

This was an application to stay an action in the Magistrate's Court on Monday next. Gordon, who had been the agent of the applicants, obtained from the respondents, Parry and Joachim, a promissory note for £185 1s. 8d., but during the currency of the note the applicants had cancelled his power of attorney.

Mr. Gardiner was for the applicants and Mr. Graham, K.C., was for the respondent Gordon.

Mr. Parry appeared, and said he was prepared to pay the money into the hands of the Registrar at once.

Hopley, J., said that there was no necessity to proceed with the action in the Magistrate's Court. The money would be waiting for respondents if they established their claim.

Mr. Graham said that if the matter were adjourned in order to allow respondents to peruse the affidavits on the other side, there might be no further litigation.

The Court, by consent, ordered the respondents Parry and Joachim to pay the amount of the promissory note on the 8th inst. It was further ordered that the action in the Magistrate's Court be stayed and that the Registrar hold the money pending further order of Court, costs being reserved. Leave was granted the applicants to sue Gordon by edictal citation, personal service to be effected, service being made returnable on the 30th June.

ROSS V. ESTATE OF SCHWAB AND ROSS.

Mr. Burton appeared for the applicant to move to set aside certain insolvency proceedings.

Mr. McGregor appeared for the trustee of the insolvent estate.

Ross stated, on affidavit, that he was not a partner in the alleged firm of Schwab and Ross, and had not been served with notice of the insolvency proceedings. They were joint owners of a certain property, but further than that, they had no connection. He (Ross) was shown in the schedules as a creditor of the supposed firm for £14.

A replying affidavit was made by Mr. Hazell, the trustee in the insolvent estate, in which he stated that Schwab came to him, and said he was a member of the firm of Ross and Schwab, and that the firm wished to surrender. Notice was published in the "Gazette" of the intention of the firm to surrender, and subsequently the estate was sequestered by order of the Supreme Court. Notice of this proceeding was duly published. When witness sent notice to one Ross as a creditor, he was not aware that this person was the plaintiff. Deponent stated that transfer of a certain property had been taken by Ross and Schwab in undivided shares, and that Ross and Schwab had given powers to pass certain bonds.

The matter was ordered to stand over for a week for further information.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REX V. HARRIS.

{ 1904.
June 3rd.

Act 36 of 1902—Application to compel Magistrate to take preliminary examination instead of proceeding with trial.

In an application to restrain a Resident Magistrate from proceeding with a trial for a contravention of one of the provisions of Act 36 of 1902, on the ground of the extreme gravity of the offence.

Held, that as the Legislature has conferred the enlarged jurisdiction on the Magistrate's Court, the Supreme Court should not interfere to restrain the exercise of such enlarged jurisdiction.

This was an application as a matter of urgency, for an order for the summary trial now proceeding against one Max Harris in the Court of the R.M. at Cape

Town, to be converted into a preparatory examination, and authorising the A.R.M. (Mr. Broers) to admit the petitioner to bail.

The petition set out that on the 14th May the prisoner was charged with having, between the 1st January, 1903, and the 12th May, 1904, contravened section 33, sub-section (a) of Act 36 of 1902, to which he pleaded not guilty. The case was postponed until the 26th May, whereupon plaintiff applied to be admitted to bail, which application was refused. On the 26th May the case was postponed until the 30th May, and a further application for bail was refused. On the 26th May a preparatory examination was commenced of the petitioner on a charge of conspiracy with intent to defeat the ends of justice, which preparatory examination had not yet been concluded. On the 30th May the petitioner was further remanded until the 6th June. Petitioner objected to the jurisdiction of the Magistrate's Court to proceed by way of the summary trial on the ground that there was a preparatory examination proceeding on another charge, both charges having arisen out of practically the same set of circumstances. Petitioner believed that he would be prejudiced unless both cases were tried at the same time and before the same tribunal.

The replying affidavit of Mr. C. W. Broers, A.R.M., stated that the case was remanded to the 30th May for the purposes of the defence, but on that date the defendant's agent said he was not prepared to call witnesses for the defence, and applied for a further remand, and objected to the jurisdiction of the Court from proceeding with the case as a summary trial. Under section 28, Ordinance 40 of 1828, it was left to the discretion of the Magistrate, and not to the accused, to decide whether a trial should stop and whether a preparatory examination should commence. The case was remanded until the 6th June, which day was being kept open for the hearing of the case.

Mr. Van Zyl for the applicant; Mr. Nightingale for the Crown.

Mr. Van Zyl said that the applicant contended that, as both cases arose out of the same circumstances, he would be considerably prejudiced if both matters were not tried together. The ends of justice could not be defeated if both cases were brought before the Supreme Court at the same time. If the defendant were convicted in the first case, then there would be a strong presumption of guilt in the second case, and the defendant would therefore be seriously prejudiced if the cases were separated.

[De Villiers, C. J.: What is he charged with in the first case?]

With living upon the earning of prostitutes. Counsel asked that the prisoner should be admitted to bail.

Mr. Nightingale strongly opposed the application for bail on the ground of danger that the prisoner would probably abscond.

[De Villiers, C. J.: That statement should be fortified by affidavit.]

Mr. Nightingale said that he could easily secure affidavits. He went on to say that the cases were really distinct, and that the matter was one of great importance. In the event of bail being granted, he hoped the Court would fix the bail in a very substantial amount—say two landed proprietors of £1,000 each, and personal recognisance of £2,000.

De Villiers, C. J.: There are two distinct charges against the accused. The first is "knowingly living wholly or in part on the earnings of prostitutes." The second charge is one of conspiracy with intent to defeat the ends of justice. The two charges are perfectly distinct. It is quite possible that some of the evidence that may be given in the one case may be evidence in the other; but the charges still remain perfectly distinct, and they will be so treated no doubt in the Courts which have to try the prisoner. The Act 36 of 1902 specially directs that all offences against this Act shall be cognisable before the R.M. or A.R.M. within whose jurisdiction such offences shall have been committed, and such Magistrate shall impose the penalties respectively by this Act provided. Now, the present application is brought under the 28th section of Ordinance 40 of 1828 (section read). I am not prepared to say that there may not be cases in which the Court would restrain a Magistrate from proceeding with a trial, if the case is of such a nature that it could more be properly tried before a higher Court. I express no opinion on that point; but I do say this, that, considering that the Legislature has expressly conferred this enlarged jurisdiction upon the Magistrate, by the Act of 1902 the Court should not interfere so long as the Magistrate does not exceed the limits of that jurisdiction. It is suggested that the reason why the Court should now interfere is because a conviction of the one offence might prejudice the accused if he is tried for the other offence. In some degree that may occur, even if the accused were to be indicted in two different Courts. But that possible prejudice cannot affect the question which the Court has now to decide. The Court has no doubt that the Magistrate who has to try the case will do justice in the matter, and that he will do perfect justice between the prosecutor and the accused. I am of opinion, therefore, that there is no ground whatever for the application to restrain the Magistrate from proceeding with the summary trial. In regard to the application for bail, that seems somewhat pre-

mature until the trial has taken place, because, in reference to the summary trial before the Magistrate, I understand that within a few days the trial will take place, and there is therefore no necessity for granting bail immediately. After the trial the Magistrate would be quite justified in requiring substantial bail, and the bail suggested on behalf of the Crown seems to me perfectly fair, viz., the accused in the sum of £2,000 and two landed proprietors in the sum of £1,000 each. I consider, if that were obtainable, it would be the duty of the Magistrate after the first trial is completed, to allow the accused on bail, pending the trial for conspiracy to defeat the ends of justice. Upon the question whether the two offences can be tried separately or whether the accused can be found guilty of both offences, that is a question that can be raised afterwards upon the trial for conspiracy. If it is a good defence that it cannot be done, then that defence can be raised before the Court which tries the prisoner upon the charge of conspiracy. But there is no ground for the application, which must be refused.

[Applicant's Attorneys: Michau and D. Villiers.]

ASTON V. ASTON.

{ 1904.
{ June 3rd.

This was an action brought by Albert Aston, of Observatory-road, against his wife, Emily Aston, for restitution of conjugal rights, failing which a decree of divorce. Mr. Rowson appeared for the plaintiff; the defendant, who was believed to be residing in the County of Radnor, England, was in default. The suit was brought by edictal citation.

The plaintiff, Albert Aston, said that he came out to the Cape in August, 1900, in order to better his position. He was now in the employ of the C.G.R. He had asked his wife to join him, but she would not come out. He wrote to her in 1902, asking her to come out in October of that year, promising to provide a home for her, and praying her not to put her parents before her husband. In her reply, she said she had told the defendant she would never come, and that she would rather die to-morrow than come out. She advised him to get a divorce, and marry someone out here in the Cape, and be happy and comfortable. He had, she added, killed the love she had had for him. Continuing his evidence, witness said they lived happily together at Home for a few years until a difference arose in regard to another man. It was with her full consent that he left England. He asked for custody of the child of the marriage.

By the Court: He was prepared to pay the passage of his wife if she would come out to the Colony.

E 1

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th August, failing which, rule to issue calling on defendant to show cause on the 31st August why a decree of divorce should not be granted to the plaintiff, with custody of the child, with costs, rule to be served personally, together with an offer on the plaintiff's part to pay the passage money of the defendant and the child to South Africa.

Postea (December 12th). The rule was made absolute.

FOULDS V. FOULDS.

This was an action brought by Mary Foulds, of Cape Town, against her husband, Arthur Foulds, a carpenter, also of Cape Town, for divorce on the ground of his adultery in Selkirk-street, and elsewhere, with divers women of ill-repute. The petitioner also prayed for custody of the child of the marriage. Mr. W. P. Buchanan appeared for the plaintiff; the defendant was in default.

The plaintiff, Mary Foulds, said that she was married to the defendant on the 14th February, 1898, while she was living at Clayton-le-Moors, Lancashire. She produced a certificate of the marriage. There was one child of the marriage, born in 1899. After the marriage, they stayed for some time at Clayton-le-Moors, and in March or April, 1902, her husband came out to the Cape for the purpose of settling here. Witness came to the Cape, at his request, in September, 1902. They lived together at Woodstock and Observatory-road. Defendant was a carpenter, but he was not successful in his business. She had had to support him in a large measure by keeping a boarding-house and by sewing. The defendant had been away several times to Port Elizabeth, Stellenbosch, and elsewhere, but he had returned on each occasion. He went away to Bloemfontein, but had since returned. When he had left for Bloemfontein she heard certain allegations against the defendant's moral character from the boarders.

James Foster, of Sir Lowry-road, Cape Town, said that he formerly lodged with the parties at Observatory-road. On the 27th September last he went out with the defendant; they proceeded to a house of ill-fame in Reform-street, where the defendant misconducted himself.

Wm. Turner, who was formerly a boarder at the defendant's house, also spoke to another visit paid by the defendant to a house of ill-fame.

Decree of divorce granted as prayed, plaintiff to have custody of the child of the marriage.

JACOBS V. JACOBS.

This was an action brought by Edith Mabel Jacobs, of Cape Town, against John Jacobs, whose whereabouts are unknown, for restitution of conjugal rights, failing which a decree of divorce, on the ground of his malicious desertion.

Mr. Alexander was for the plaintiff; the defendant was in default.

Wm. Thomas Birch, clerk in charge of the Marriage Register, produced copy of the register of marriage.

Edith Mabel Jacobs said she was married to the defendant in Cape Town in March, 1897. They lived here together for a short time. Her husband had certain business interests in the Transvaal to settle, and they went up there; afterwards, when the war broke out, they proceeded to Durban, and subsequently went on a holiday to London. It was arranged that they should return to the Cape, but they were waiting for money. She afterwards came out to the Cape, thinking that defendant had come, but she had not ascertained that he had come out, and, in fact, had lost all trace of him. She had no idea where the defendant was. She was now in business as a dressmaker. There was one child of the marriage, aged about 5 years; the last that she heard was that the child was with the defendant.

Mr. Alexander said that exhaustive inquiries had been made with regard to the whereabouts of the defendant, but all to no purpose.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th August, failing which rule to issue calling upon him on the 31st August to show cause why a decree of divorce should not be granted, with costs, with leave to the plaintiff for substituted service, as directed in regard to citation.

Postea (October 15th). The rule was made absolute.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

REVIEW CASE.

REX V. LOUW. { 1904.
{ June 3rd.

Sale and purchase—Theft.

Hopley, J.: A case came before me on review from the Resident Magistrate's Court of Calvinia, which I have submitted for the consideration of my brother judges, and we are all of opinion that the conviction cannot be confirmed. The circumstances were somewhat peculiar. The accused was a white European farmer called Stephanus

Louw, and he was charged with having stolen a couple of goats from some coloured people. He went on to the farm of these people and took away two goats under the following circumstances: It would appear that the day before he took away the goats he had a talk with the husband of the owner of these goats, and proposed purchasing, and he swears that the husband agreed that he should have the goats for 10s. each. On the day on which he took the goats he went into the veld and spoke to the herd, and gave him £1, and took away the goats, saying that he was not going to wait for the master any longer. The boy gave the £1 to the husband, but his wife was apparently not anxious to part with the goats, and possibly the husband then said he never agreed to sell them. The accused was a well-known man, and it was unlikely, if he intended stealing the goats, he would have taken them away in the manner in which he did, and, again, a sovereign was not alleged to have been an unfair price. The accused might have committed some civil wrong, but, in his opinion, he had no intention of stealing the goats, and the Magistrate was wrong in finding him guilty. The conviction must, therefore, be quashed.

TRIAL CAUSES.

ROBERTSON V. ROBERTSON.

Mr. Close, for the plaintiff, moved for leave to sue the defendant (his wife) by edictal citation for restitution of conjugal rights, failing which, for a decree of divorce. The defendant was barred from pleading.

The declaration set out that the parties were married in Durban in July, 1889, and in 1898 the defendant deserted her husband, who had repeatedly written to her asking her to return.

Evidence was then called for the plaintiff.

John Alexander Robertson stated that he was married to the defendant in July, 1889. They lived at Durban for some time, and in 1894 a post-nuptial contract was entered into. Subsequently he went to Johannesburg, where he was joined by his wife. In 1898 there was a little trouble over a friend of his, although he made no charge against his wife. At the end of 1898 his wife went on a visit to some friends in Natal, but never returned. He joined the irregular forces, and fought through the war. He had written to her innumerable times asking her to return, but she never sent him a reply.

The defendant was ordered to restore conjugal rights to the plaintiff by the

3rd July, failing which, to show cause on the 14th July why a decree of divorce should not be granted, and why she should not pay the costs of the suit, personal service to be effected forthwith.

Postea (July 14th). The rule was made absolute.

CROMBLEHOLME V. MARKS, HIGHMAN AND COMPANY.

Building contract—Extras.

This was an action brought by Albert Crombleholme to recover from the defendants the sum of £102 10s., being commission and salary for work done.

The declaration set out that the plaintiff was a building contractor, residing at Stellenbosch, and the defendants, hotel proprietors, residing at the same place. On the 3rd January, 1903, it was agreed upon that the plaintiff was to complete certain alterations at the Masonic Hotel, Stellenbosch, and in consideration thereof he was to receive a monthly salary of £20. He was wrongfully and unlawfully dismissed in December last, when the work was not completed, and for the breach of contract he claimed a month's salary, £20. £75 being 2½ per cent. commission of the estimated sum of £3,000 to complete the work, and a bonus of £100, all of which were embodied in the contract, with interest and costs.

The plea admitted the formal allegations, but set out that the plaintiff was not diligent in his work, and was, therefore, not entitled to the bonus. The actual cost of the alterations was £6,704, and under the terms of the agreement the plaintiff was to pay 5 per cent. on the amount over and above his estimate of £3,000. In reconvention they claimed £185, from which they were willing to deduct £167 12s., being 2½ per cent. on £6,704, and £300 damages for the defendants' neglect in the execution of the contract.

The replication denied that the work cost £6,704, and the plaintiff put the defendants to the proof thereof. He also denied that he was guilty of any misconduct. Should the plaintiff in reconvention be entitled to 5 per cent. on any sum in excess of £3,000, the defendants were entitled to set off against that 2½ per cent. on the excess.

Mr. Close (with him Mr. M. Bisset) was for the plaintiff, and Mr. Upington (with him Mr. Gutsche) was for the defendant.

Mr. Close called the plaintiff, Albert Crombleholme, who stated that he was a building contractor, residing at Stellenbosch. In November last year the defendants saw him about the reconstruction of the Masonic Hotel. The work was pointed out to him by Mr. Highman.

It was agreed that he was to do the work in accordance with the plans and specifications, but he had never seen any specifications. During the course of the work, he had no control over the expenditure, and could merely give his opinion as to sub-contracts. The only specifications that existed were verbal specifications between witness and Highman. The old floors that had to be removed were a departure from the original scheme. He protested against the additional alterations, but they said it would not affect his commission. After the work was commenced several new alterations were ordered and carried out. He brought up an estimate of £2,400 over and above the £3,000 agreed upon. As the work was outlined to him on the first occasion, it ought not to have cost more than £4,000. There was never any complaint made about the way in which he did the work. He considered when he left on December 21 the work was practically done, and that a month would complete it. On December 21 he received a letter from Marks, thanking him for his work, and stating that his services would no longer be required. There was no discussion about what he was entitled to when it was agreed that he could devote a few hours to other work. He told Highman he was really entitled to a month's notice if the work was not actually finished. Witness never heard of the allegations that he was guilty of misconduct and neglect until these proceedings were commenced. He had diligently performed his part of the contract all through.

Cross-examined by Mr. Upington: Witness had to do work on the ground floor and above. He did not ask the defendants to insert the conditions in the contract that if the work were done for less than £3,000 he should receive 5 per cent. on the difference between the actual cost and £3,000. The original plan provided for a dancing hall, but in lieu of that, stables were put up. In his statement witness allowed £500 for the hall not built, and charged £750 for the stable. Witness engaged and controlled the labour, and received the money every week to pay for the labour. He gave orders for material as he wanted it. He had protested against the alterations. He was approached by Dr. McPherson, and asked to do some work for him. He told Dr. McPherson he could not do the work, as he was under contract with defendants, but that he might find some men who would do it. Witness did some work for Dr. McPherson, such as writing orders out, which he did at night. He did not supervise this work; he went there occasionally in the evenings or on Saturday afternoons. Witness never went away from the Masonic in order to look after Dr. McPherson's work. To witness's recollection, he was not, in November or

December, during working hours, at Dr. McPherson's property superintending the work there. He might have been there; there might have been many circumstances which would take him there. Witness did not take a contract from Abdol Fabier in October; his brother did. Witness did not attend to Fabier's work during the daytime. The arrangement with Fabier was not that witness should supervise his work. Witness had refused to let defendants have the working plans, after they told him they no longer required his services. Witness wanted to leave the service of the defendants in November, and offered to give certain hours of the day to supervising their work, so that he could be able to undertake other work which was offered him. Witness thought the building could have been completed in a month. He may have taken away some of the carpenters from this work to do a trifling job for him; he had no recollection that defendants paid the time of these men while they were doing his (witness's) work. If witness charged the wages to the defendant, he did so unintentionally. Marks complained of the slow progress of the work, and an arrangement was made that certain of the work should be done on piecework. Witness did not obstruct the men who were doing the piecework on contract; he gave them every facility. Witness had pulled down a portion of the work these men had done, because they had not done it correctly.

Jacobus Bloemestein, foreman carpenter on the work, said that the plaintiff seemed to him to work all right. He was surprised when he heard that plaintiff was dismissed.

Cross-examined by Mr. Upington: He did not know why two men were put on piecework. He did not remember football playing during working hours. There were not enough carpenters on the job. Three men were dismissed before Cohn and Goldnicht came on the job.

Wm. Somerville, plumber, gave similar evidence. There was a difficulty about getting material, as a result of which work was delayed.

This concluded the evidence for the plaintiff.

By consent of the parties, His Lordship ordered that the matter be referred to Mr. A. T. Babbs, quantity surveyor, for report as to the difference between the work provided for in the plans and the work actually done, and that the case stand over until the 17th inst.

Postea (June 20th).

The report of Mr. Babbs was put in. In it he stated: In accordance with a consent paper dated June 7th, 1904, signed by the attorneys of the above parties in pursuance of an order granted by the Hon. Mr. Justice Hopley, on June 3, 1904, whereby certain questions in the

case were referred to me, I now have the honour to send you my report. The consent paper above referred to directed me to ascertain and report upon: (1) The cost of re-building and reconstructing the premises known as the Masonic Hotel and Tap, Stellenbosch, according to the original plan and design furnished by the defendants to the plaintiff; (2) the additional cost incurred owing to the alterations made from the original plan and design. I have accordingly visited the Masonic Hotel at Stellenbosch, and inspected the premises in the presence of Mr. Marks and the plaintiff, and have taken all necessary notes, measurements, etc., and heard the explanations of the parties as to the various works carried out. I have also been furnished with the drawings of the work, and a copy of the specification originally deposited with the Municipality. In the light of the information and particulars thus obtained, I have taken off the quantities, and have prepared a careful independent estimate of the cost of the several works. With reference to question No. 1, I find the cost of the work necessary to rebuild and re-construct the premises according to the original plan to be £5,740. With reference to No. 2, I find the cost of the additional work actually carried out to be £1,554, from which there is to be deducted the sum of £1,009 for works omitted or executed at a less cost, making the net extra of £545. My estimate of the total cost, is therefore, £6,285. These estimates are framed as nearly as possible on a prime cost basis, and do not provide for any profit or commission, and are in accordance with the rates of labour and material prevailing at the time the works were carried out. I am confidently of opinion that it would be impossible to execute the works at a less cost than the amount I have stated."

Mr. Upington said the report left two questions to be decided, the amount of damages sustained by reason of wrongful dismissal, if there has been wrongful dismissal, and the question of the bonus, which the contract stipulated should be given for diligent and trustworthy services at the completion of the work.

Evidence was then led for the defence.

Teduschi Marks said that before purchasing materials Crombleholme went over the building with witness. Crombleholme had specifications, and estimated the price of the alterations. Witness wrote the letter of December 31, by which he dismissed the plaintiff. In the course of that letter he said, "As it is now considered the building is completed, we hereby beg to notify you that your kind services are no longer required after today. . . . Of course, we hope that in the event we may require you any day for a hour or so, you will be good enough to do so." Before that he had made complaints to Crombleholme. About three months previously he noticed that plaintiff was frequently away from the job,

and he had had to leave his own work to superintend Crombleholme's work. Sometimes Crombleholme was away for two or three days. The men were idle because there was no one to look after them, and though the expense continued to be as great the rate of progress diminished. Witness got Cohen and Golding to finish work, which plaintiff ought to have done, and agreed to pay them £50. Cohen and Golding had complained to witness, and he had told plaintiff that they had represented to him that they could not get material. When he left the work plaintiff took with him the plans upon which Cohen and Golding had tendered, and without which the latter could not go on with their work. Witness had sent to plaintiff for these plans on three occasions, but could not get them. These were plans which plaintiff had prepared, and which were attached to Cohen and Golding's contract.

[Hopley, J.: The point is whether the defendants had a right to the plans this man had made.]

Mr. Uppington: I submit they had, my lord. He must give the workmen the details so as to enable them to do the work properly. The workmen could not possibly proceed with the building without having the working plans. These were the basis of the contract between these carpenters and the defendants.

Witness (continuing) said that in many respects the work was done diligently, particularly in the early stages, but during the last three months the work was disgracefully carried out. On one occasion the skylight was left open, and the rain came in, while on another occasion there was a leak in the roof, through which the water percolated very badly. The roof had been defectively constructed under plaintiff's supervision. It was not true that witness would not supply glass for this skylight. Before the dismissal, witness spoke to Crombleholme about his working at other places. Plaintiff told them that he had the Rhenish School contract, and that he wished to give up the hotel work. There were a number of things used in the work which defendants paid for, but which plaintiff retained possession of. On the 14th January, witness's solicitor wrote, demanding return of these, the articles being specified in the letter. The work was hindered in consequence of the men not having these things.

Cross-examined by Mr. Close: Witness had not seen plaintiff remove any articles from the building, but he had admitted to witness that he had taken things. If plaintiff stayed away he would know witness would be aware of his absence. Plaintiff told witness, when he complained, that he did not care whether or not he got his bonus. He told witness he supposed he would not get it, as he had gone over his price, and witness replied that that was no reason why he should be less

diligent. Crombleholme ordered the materials. Witness's chief complaint was that plaintiff was not at the work to superintend the men. The letter of the 31st December was meant to be sarcastic.

By the Court: He did not mean what he said in the letter of December 31. He wished to get rid of the plaintiff amicably, and so wrote in these terms.

Pierre Francois Haupt, auctioneer and broker, Stellenbosch, said he had had opportunities of seeing the progress of the work. At first he thought the work was carried on with due diligence. Later on he saw that the men were doing practically nothing. Everybody seemed to "boos" himself. The plaintiff was absent on a good many occasions during working hours. The rate of working was much slower when the plaintiff was absent. Mr. Marks called his attention later on to the billiard table at the hotel. He found that the water had come through the skylight on to the table. The frame of the skylight had been fixed, but no glazing had been done. On another occasion his attention was called to a leakage in the roof. He also noticed that the drainage was unsatisfactory. There was a bad smell in the billiard-room.

Cross-examined by Mr. Close: He had acted as agent of the defendants. He thought he could have inspected the building himself very much better than Mr. Crombleholme did.

Joseph Cowin, carpenter, said that he had been in business with one Goldnek. They tendered for a certain work at the end of last year at defendant's premises. Their tender was accepted. He remembered certain skirting being broken. He spoke to Mr. Crombleholme about it, but the plaintiff made no reply. Whilst witness was there the work was going on very slowly. He was delayed about a fortnight because he could not get a plan from the plaintiff. He had to go to the Municipality for the plan. He was also hindered owing to want of material, but he had never spoken to Crombleholme about this. He had spoken to another man, who said he did not know where the material was, but he could never find Crombleholme.

Lars Larsen, carpenter, said he was working on the property, and always had enough work to do. If there were not material for one piece for work there was for another.

Sergeant-Major Pritchard, resident at the Masonic Hotel, said that on one day in April he had to put on an overcoat to get out of his bedroom into the passage owing to the water, which came through the roof. There had been leakages previously on the occasion of every rainfall.

Dr. McPherson, of Stellenbosch, deposed that in November last he entered into an arrangement with Crombleholme respecting stables, which witness wanted built. Crombleholme said he was very busy, but would try to get someone to come and do the work. Crombleholme

made out quantities and so on, and men came and did the work. Sometimes witnesses paid the men, and sometimes Crombleholme did so. Crombleholme charged witness 7 per cent. He told witness he would see that the work was done properly.

Mr. Uppington closed his case, and counsel were then heard in argument on the facts.

Hoppley, J.: The report of Mr. Babbs seems to have been very carefully compiled, and having regard to that report, it seems to me that the amount of the commissions in terms of the contract would work out something like this: The total cost of the building, as originally planned, would have been £5,740, and the amount of the extras, as they had actually been put up on the ground, was £1,554. But then there have been omissions from the original plans, which were estimated at £1,090, leaving a balance of extras of £545, which would not have been contemplated at the time this contract was entered into. Adding £545 to the original amount, it brought up the whole total of what the building actually cost to £6,285. Now, as to this £6,285, the plaintiff was entitled under the contract to 2½ per cent. commission, and that worked out at £157 10s. as to this sum, it must be diminished by £62 10s., which it was admitted had been paid to the plaintiff on account. Therefore, there would be due to him, if there were nothing to be set off against it, an amount of £95. But upon the contract, the cost seems to have been grossly underestimated. They seem both to have been equally negligent in this respect, for it seemed to me that by calling in a capable man who was able to survey, and take out quantities and so on, they could have arrived at a proper result; but they chose to make a wild shot at an estimate of what the work would cost. I think the plaintiff must be held to his bargain, and as he has undertaken to pay back 5 per cent. a sort of penalty on any excess above his estimate, that five per cent. on the real excess, namely, £2,740, would amount to £137. The case does not, however, stop there. There have also to be considered the further claims for damages. On the claim in reconvention, I think the plaintiff's (defendant in reconvention) view of his position is the correct one, and that he was entitled to keep the plans which he had himself prepared. It seems to me that the defendants have failed to prove any of their claims in reconvention. In regard to the claim for damages for wrongful dismissal I am not satisfied that in the month in respect of which wages were claimed, plaintiff had not earned that amount, or was not in a position to have earned it. Then comes the question of the bonus, and in regard to this, when I consider the terms of the handsome letter of the 31st

December, in which the defendants thanked the plaintiff practically for his diligence, I cannot find that there was any want of diligence and trustworthiness which would disentitle the plaintiff from recovering the bonus. The letter almost estops the defendants from coming into Court, and I cannot on the face of that letter do anything but award the plaintiff his bonus. On the whole, therefore, I find the defendants entitled to the 5 per cent. on the excess cost, viz., £137. As against that amount, plaintiff is entitled to the £157 10s., as his 2½ per cent. on the total cost. The sum of £62 10s. has been paid to plaintiff, and this will leave a sum due to defendants of £42. Plaintiff has further succeeded in establishing his claim for the £100 as bonus, and deducting the £42, it will leave an amount due to him of £58, for which judgment will be given, with costs.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: Faure and Zietsman.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

BECKER V. HAZELL. { 1904.
{ June 6th.

Mr. Burton, for the applicant, moved for an order restraining the respondent from parting with or dealing with any assets of the assigned estate pending the decision of two actions in the estate of one Cohen.

Mr. D. Buchanan, for the respondent, said that he appeared merely to oppose the costs of the summons. The respondent did not oppose the application.

Mr. Burton said it seemed hard that the applicant should have to pay the costs, because it must be clear he incurred this expense at the special request of the creditors in the estate of Cohen, who asked him, as their servant, to carry on the business. The creditors declined to pay him, and now he was forced to come down on the respondent, who merely held the money without being a

trustee in the estate, the order for sequestration of which had been discharged.

[De Villiers, C. J.: I cannot make any order as to costs against Hazell personally. Why not make it a claim in the action against the creditor Atmore.]

The summons is out already in that action. The costs of this application might be made to stand over pending the hearing of the action.

Mr. Buchanan said that the summons was against the respondent, who had no official capacity in the estate. It was necessary, counsel submitted, for the respondent to come to court.

De Villiers, C.J., said it appeared to him that if the respondent had properly incurred any costs in respect of the money he would be entitled afterwards in his account to the principals to charge any necessary expense. The Court would grant the order applied for, but there would be no order as to costs.

Ex parte BREYTENBACH.

Mr. M. Bisset moved for the appointment of a curator in the estate of Hendrik Breytenbach and Anna Breytenbach in the interest of four minor children.

Order granted.

Ex parte BURNS.

Mr. J. E. R. de Villiers, for the applicant, Martin J. Burns, moved for leave to pass transfer of certain property in the estate of the late Patrick Burns and his deceased spouse.

Leave granted.

Ex parte KIEFT.

Mr. J. E. R. de Villiers, for the executor in the estate, moved for an order authorising the Registrar of Deeds to cancel a mortgage bond, which had been paid off in the estate of Apollós Korolos, and which after a diligent search could not be found.

A rule was granted calling on all concerned by the last day of the term to show cause why an order should not be made as prayed, one publication in "Ons Land" and a copy of the rule to be sent by registered letter to the mortgagee's son.

Postea (July 14th). The rule was made absolute.

AURET V. SMITH AND ANOTHER.

Mr. J. E. R. de Villiers moved to have made absolute a rule granted on the 7th June interdicting the respondent from drawing on the manager of the Standard Bank, at Muizenberg, any of the money in the name of the partnership. There had been due publication in

the "Cape Times" and the "Government Gazette," and there had also been personal service on the bank manager at Muizenberg, the other respondent.

Rule made absolute, with costs only against the respondent Smith.

Ex parte MORUM.

Mr. Schreiner, K.C., moved for leave to execute and register a certain antenuptial contract which by an oversight had not been executed before marriage. Leave granted.

WILLIAMS V. THE MASTER.

Mr. J. E. R. de Villiers applied for an order discharging the attachment of the applicant's property, the Civil Service Club, Middelburg. Counsel said that the provisional order of sequestration was granted by the Eastern Districts Court against one Adams on the grounds that the property did not belong to the applicant. The affidavit of the applicant set out that he knew that the estate of H. Adams was placed under the provisional sequestration. He acquired the club from Adams prior to the sequestration for £715, of which £215 was paid in cash, and the balance four months from the date of sale. He was under the impression that Adams was disposing of the premises to pay off the debt he owed the petitioning creditors, Messrs. Haydorn and Co.

The Master said that according to the 13th section of the Insolvent Ordinance the Messenger of the Court should be accompanied by the petitioning creditor, who pointed out what goods should be attached.

De Villiers, C.J., said it was very important to know whether the sale to the applicant was the cause of the act of insolvency on the part of Adams, and ordered the matter to stand over for further information, and in the meantime the Master might be able to suggest the name of someone to act as provisional trustee.

Postea (June 16th).

Order and attachment set aside on condition that the applicant gives security to the satisfaction of the R.M. of Middelburg in the sum of £500 for the restoration to the insolvent estate of H. Adams of the property mentioned; in case it should be decided in an action that the property belongs to the estate, and not to the applicant, the costs of the application to stand over.

Ex parte THE PAARLSOME LAND-AANKOOP MAATSCHAPPY.

Mr. W. P. Buchanan moved for an order confirming the final report of the ar-

bitrators in the estate of the Paarlische Landaankoop Maatschappij. The assets amounted to £1,674 6s. 9d., and the liabilities £87 17s. 3d., leaving a balance of £1,586 9s. 6d., which they proposed to distribute by payment of the claim of £1,471, leaving a balance of £114 19s. 6d., and they prayed that they might be granted £100 for their fees, and that the £14 19s. 6d. be applied to advertisements, stamps, etc.

Order granted.

VAN HEERDEN V. ESTATE { 1904.
VAN HEERDEN. { June 6th.
" 7th.

Executor—Payment of debts—
Compromise or transaction—
Exception to plea.

The plaintiff claimed from the estate of a deceased person the sum of £2,500, alleged to have been a debt owing by the deceased to the plaintiff. The defendant, as executrix, disputed the debt, but afterwards compromised the claim by undertaking to pay a certain sum in annual instalments. In an action brought for payment of one of the instalments, the defendant pleaded that no debt was ever owing by the deceased, and that consequently nothing was owing under the compromise.

Held on exceptions to the plea, that an executor should pay only such debts as were actually owing by the estate, and the exceptions were consequently not allowed, but leave was reserved to the plaintiff to raise the question at the trial whether the compromise was for the benefit of the estate.

This was an argument on exceptions arising out of an action instituted by Johanna van Heerden against the first defendant, Martha van Heerden, in her capacity as the executrix testamentary in the estate of the late Izaak van Heerden. The declaration set out that the plaintiff was the widow of Jacobus van Heerden, son of the late Izaak van Heerden. The second defendant was appointed as curator *ad litem* to the children of the plaintiff. The late Izaak van Heerden was indebted to the plaintiff in the sum of £2,500, by virtue of a promissory

note. The first defendant, as executor testamentary to the estate, disputed the said promissory note. On the 11th July, 1898, the plaintiff and the first defendant entered into an agreement whereby the latter agreed to pay to the plaintiff as long as she remained unmarried £135 per annum, and, further, on the expiration of the lease on certain farms, that the plaintiff was to have possession on payment of £500, the balance of a mortgage bond. The defendant agreed to give an extension of time from June, 1903, to the 31st January, 1904, to the plaintiff to consider whether she should pay the £500. Plaintiff tendered the £500 before the time, but the defendant now refused to deliver up possession of the farms. Plaintiff claimed judgment in her action for £67 10s., with interest from the 31st December, 1903, an order compelling the defendant, upon payment of the sum of £500, to deliver up possession of the farms, an order compelling the defendant to account for and pay over to the plaintiff all rent received in respect to the said farms, since 1st July, 1903; or, in the alternative, judgment for £2,500, the amount of the promissory note, less what instalment had been paid to the plaintiff, with costs of suit.

The defendant, in her plea, denied that the said Izaak van Heerden was indebted to the plaintiff in the sum of £2,500; and, further, that she had entered into the agreement without the knowledge or consent of the other heirs, and that, by doing so, she exceeded her capacity as executrix testamentary. She refused to be bound by the agreement, which could have no force or effect in law. In reconvention, she claimed £675, which was the amount of certain annual payments to the plaintiff.

The plaintiff excepted to this plea on the ground that the same disclosed no defence in the action, the first defendant, as executrix testamentary in the estate of Izaak van Heerden, having full power in law to enter into the agreement. The plaintiff also excepted to the claim in reconvention, as it disclosed no ground to return the sums of money referred to.

Mr. W. P. Schreiner, K.C. (with him Mr. D. Buchanan) was for the plaintiff; Mr. Burton (with him Mr. Close) was for the first defendant; and Mr. McGregor was for the curator *ad litem*, the second defendant.

Counsel having been heard in argument.

Cur. Adr. Vult.

Postea (June 7th).

De Villiers, C.J.: There can be no doubt that a compromise was entered into by the executrix, but the defence raised is that there was really no debt owing by the estate, and that consequently the executrix had no right in law to enter into any com-

promise. The plea expressly states that there was no debt owing, and consequently it denies the right of the executrix to enter into this compromise. To the plea an exception was taken, that it was really no defence in law, inasmuch as the compromise was perfectly binding on both parties. I quite accept the general statements of the law by Mr. Schreiner in regard to the effects of the compromise, but it is just because the compromise has such far-reaching effects that the Court should scrutinise whether the persons had full power to effect it.

It was the duty of the defendant, as executrix, to pay the debts of the estate, and if the plea is correct in stating that there was no debt whatever owing, then the executrix had no authority whatever to compromise. It is impossible, therefore, to hold that the plea is bad, but as the plaintiff may be able to prove at the trial that it was for the benefit of the estate that the compromise should be entered into, no final order will now be made on the exceptions. The costs of this argument will abide the result.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; First Defendant's Attorneys: Dampers and Van Ryneveld; Attorneys for the Curator *ad Litem*: Harsant and Harsant.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLBY.]

TRIAL CAUSES.

SOYERS V. SOYERS. { 1904.
June 6th.

This was an action brought by Mrs. Soyers, of Prince Albert, against her husband, James Edward Soyers, late of Prince Albert, for divorce, on the ground of his malicious desertion and adultery. Plaintiff also prayed for custody of the child and for a declaration that the defendant had forfeited the benefits of the marriage in community. Mr. Struben appeared for the petitioner; the defendant was in default.

Mr. Thomas Birch, clerk in charge of the marriage register, Colonial Office, produced the marriage register, showing that the marriage took place at Prince Albert on the 19th September, 1887.

The plaintiff said they lived together for twelve years. Her husband left her in September, 1899, while she was living at Prince Albert; he went and lived in a house near by with a woman named Drich Meyer. He went away some time afterwards, and witness discovered that he was subsequently living at Kalk Bay with a woman. She had not seen the defendant since he left Prince Albert.

Rose Lawott, of Prince Albert, gave corroborative evidence.

Mr. Struben said that he had subpoenaed Constable Molloy, of the Simon's Town section, to give evidence as to the adultery of the defendant near Kalk Bay, but the witness had not put in an appearance.

The plaintiff was recalled, and gave further evidence with reference to the relationships of the defendant with the woman Meyer.

Hopley, J., said he thought there was sufficient evidence of the adultery, and he would grant a decree of divorce, with custody of the child and costs of suit.

PEEK BROS. V. AUSTRALIAN
BRICKFIELDS LTD. { 1904.
June 6th.
" 7th.
" 8th.
" 9th.

Contract — Bricks — Custom of trade.

No alleged trade custom can be pleaded against the express terms of a written contract.

This was an action brought by James and Wm. Peek, brickmakers and burners, of Observatory-road, against the Australian Brickfields, Ltd., of Cape Town, for £183 3s. 3d., for making certain bricks under contract, £44 1s. 6d. for work in connection with the packing and running of bricks, and £119 3s. 6d. damages for breach of contract, with interest *a tempore morae* and costs.

The declaration set out that on or about the 2nd July, 1903, the defendants entered into a written contract to employ the plaintiffs to make, burn, and deliver on the defendants' property one million bricks at 25s. per 1,000, defendants to supply clay, buy mills, moulds, etc. Plaintiffs thereupon went to work, and at the end of November had made and burned and delivered to the defendants 523,373 bricks, for which the price was £654 2s. 7d. The defendants paid £470 19s. 4d., leaving a balance due to the plaintiffs of £183 3s. 3d. Then, in December last, the plaintiffs packed and burned on behalf of the defendants 176,300 bricks, not part of the aforementioned contract, for which they were to receive 5s. per 1,000. Plaintiffs said that a reasonable price for this work was £44 1s. 6d. Plaintiffs had demanded from the defendants payment of the said sums, but the defendants had refused, and still refused to pay these sums, or any part thereof. In November, 1903, the defendants, in breach of the said contract, refused to pay for any more bricks, and took away the moulds and necessary tools. By reason of the said defendants' breach of contract, the plain-

tiffs had been deprived of the profits which would have been made on the said contract, and had sustained damages in the sum of £119 3s. 2d.

The defendants, in their plea, said that the plaintiffs undertook to make, burn, and deliver to the defendants for 25s. per 1,000 one million thoroughly good, sound, well-burnt bricks, including not less than 75 per cent. of bricks which conformed in quality and colour to a certain sample known as blue hard. It was further provided that only properly-burnt bricks would be paid over. Plaintiffs delivered to the defendants 523,000 odd bricks, whereof by far the greater number did not conform in quality or colour to the said sample. Plaintiffs were ready and willing to accept 411,000 and to pay for the same, but the remaining quantity were wholly useless and valueless. They had paid the plaintiffs the sum of £470 19s. 4d., and now tendered £43 0s. 8d., being the price of 411,119 bricks, viz., £514, less £470 paid on account. The defendants admitted that one of the plaintiffs, James Peek, did run, stack, and burn certain bricks, part of the contract, with one Stallard, for 176,000, of which 20,000 had been run and stacked, and that there was due to the said James Peek, in respect of the bricks so packed £43 1s. 9d., whereof £3 10s. had been paid to the said Stallard and £33 11s. to the plaintiff, leaving a balance due to the plaintiffs of £6 0s. 9d. Defendants did not admit that the said sum could be lawfully claimed in this action, but, for the final ending of disputes, they had tendered and now tender £6 0s. 9d. The plaintiffs had sustained no damages for which the defendants were liable, and, subject to the above tender, they prayed that the claim be dismissed, with costs.

[Mr. Wilkinson for plaintiffs; Mr. Upington (with him Mr. Alexander) for defendants.]

James Peek, one of the plaintiffs, said that, before they entered into the contract, he went to the defendants' works at Stellenbosch. He was shown a hole which contained very good clay, and, in fact, he saw no other hole. When they came to work, they did not receive any clay from this particular hole.

Hopley, J., said that this was not the time to raise such a point, but it ought to have been raised, if at all, when the contract was in course of execution.

Mr. Wilkinson said he was only leading this evidence formally.

Mr. Upington said that he wished to enter an objection against evidence being led outside the pleadings.

Witness (continuing his evidence) said that very poor clay was supplied to them with which to work, and a large quantity of the stuff had to be thrown out. There was a good deal of bottom soil in the stuff. He entered a protest with Mr. Downes, the manager, who said

that he would take the consequences. He had turned out 523,000 bricks according to sample. The contract specified 75 per cent. of the quality and colour of the sample; he should say that 80 to 90 per cent. were according to quality and colour of the sample. He could not be responsible for breakages that were due to rotten clay having been supplied to him. The defendants supplied him with two double pug mills, with one horse each. The mills should have had two or three horses each to be properly worked. He had to alter the mills. He was constantly asked for more horses for the mills. No complaints were made about the quality of the bricks until late in October or the beginning of November, when Mr. Downes took away one of the horses, saying that he was overworking the animal. Downes also stopped two of the men. Witness lodged a complaint with the secretary. Mr. Downes frequently interfered during the last few weeks of the contract, and said that the bricks were too small and poor in quality. Witness told him to throw out the unsatisfactory bricks, but Downes threw away some good bricks. Downes was not a practical brickmaker. The bricks were made from moulds supplied by the defendants. In November none of the bricks he had burned had been sold; at the present time all the bricks had gone, except for about 160,000. A week ago he saw about 90,000 bricks he had made in a clamp on the defendants' property; 85 per cent. of those were of the quality and colour of the sample. He formed his estimate from what he had seen of the stripping of the clamp, which had been carried out about 3 or 4 yards deep all round.

Mr. Wilkinson: You are a practical brickmaker? How long have you been in the trade?

Witness: I was brought up with a brick in my mouth, as they say. My father was a brickmaker, and is so in England to-day. Continuing his evidence, witness said he had seen all the kilns of the bricks he had made broken into. The first kiln was the worst lot, and contained about 50 per cent. of bricks equal to sample. In the other kilns all the bricks were first-rate and equal to sample. The waste would not average above 2½ to 3 per cent. A good deal of the waste was occasioned by the way in which the defendants had pulled the kilns about. A lot of the waste described by the defendants was not waste at all; half bricks and three-quarter bricks were not waste. Two half bricks made a whole brick; they were recognised as such on brick-fields and among builders. From 8 to 10 per cent. had been put to one side by the defendants as waste; fully one half of the quantity were not waste. There were half bricks and whole bricks amongst the heap. The bricks had been carelessly sorted. He was afterwards

asked by the company to pack some of the clamps of the defendants. A good deal of the waste was due to the faulty unpacking of the clamps by defendants' servants, probably 3 to 5 per cent. of the waste being attributable to this cause. A further 2 to 3 per cent. of waste was occasioned by the removal of the bricks on the line. Finally, Downes stopped the workmen at the end of November, and removed the horses, tools, and so on, and witness could not proceed with the work. Witness saw the secretary of the company, but was told that he could not do anything until a meeting of the directors had been held. He called several times afterwards, and got no answer. After the meeting he saw Mr. Firth, one of the directors. In January, he sent a statement of account to the company, but the directors told him that they could not see that they owed him anything, and that as far as they could see, he had not been stopped, but had stopped himself. A little after he had given up work, the defendants ceased to make bricks at that place. About this time, too, the demand for bricks had fallen off a good deal, and sales were difficult to effect. He had repeatedly applied to be allowed to complete his contract, but had been refused facilities. The defendants ultimately sent him a letter, in which they claimed to have a balance against him of £41 1s. 10d. for loss sustained. They said that there was waste to the extent of 112,181 bricks, which, at 15s. per 1,000, amounted to £84 2s. 6d. With regard to the packing and burning of the machine-made bricks, this was a transaction not between himself and the defendants, but witness and his brother and the defendants. With regard to the claim for damages, he had sustained 5s. per 1,000 damages upon the balance of the million bricks which he should have made. Witness went with other gentlemen to look at the only remaining kiln that he made on the 31st May.

Cross-examined by Mr. Upington: The brick (produced) was not the one that he signed for as sample. The brick he signed for was not as good as the one produced, and was not of the same colour. The sample that he signed for was equal to the broken brick now produced. He did not know that large quantities of bricks which he had made had been rejected. He objected to clause (e) of the contract, that only entire and blue hard bricks were to be paid for. The total number of bricks that came out of his kiln was 523,000 odd. He had not counted the number of thoroughly good, hard, well-burnt bricks. The spot from which he had to take the clay was pointed out to him before he entered into the contract. This was the old pit. The pug mill was removed from the old pit to a point about 200 yards away, but this was for the defendants' convenience, and left them room to lay

down the green bricks. The usual price for bricks was 22s. 6d. to 25s. a thousand.

Mr. Upington: This was a very good price that you were getting from the defendants?

Witness: Not under the conditions that I had to work under. I had to pay more for my labour than anybody else did. It was three miles from the village.

Cross-examination continued: Witness received 30s. per 1,000 at the Paarl. The only difference between the two contracts was that he had to dig the clay at the Paarl. His brother received a letter from the company complaining that he (witness) had treated disrespectfully Mr. Downes, the manager, and that he was not complying with the terms of clause (e) of the contract. He admitted that in the correspondence with regard to the proposal to submit the matter to arbitration, no mention was made of damages for breach of contract, and that it was not until he had given instructions to his present attorney that such a claim was mentioned. The only explanation he had as to the reason of being stopped was that the company could not get a market for their bricks.

Re-examined: It was not until witness had sent in his account that the suggestion was made that he had given up the work voluntarily. He challenged the manager to a comparison between the bricks that he (witness) was producing, and those produced at Salt River and Woodstock.

Wm. Peek, brother of the last witness, gave corroborative evidence upon several points. He said that he did not think Mr. Downes was a practical brick-maker, because the latter asked him about the plant, and the various classes of bricks, etc. He saw Mr. Downes interfere with the work on several occasions. The horse at the pug mill was worked ten hours a day; he thought that that was too long, and they applied to the defendants for more horses. He considered that 5 to 10 per cent. waste should be allowed for the removal of bricks. He should think about 15 per cent. of waste went on in this brickfield, owing to faulty supervision; under ordinary circumstances, he thought the waste should not be more than 8 per cent.

Cross-examined: They thought they would get clay out of the old clay pit. The clay with which they were supplied was largely black clay, the company having taken away most of the best parts. There was work for two horses on each of the mills. He thought it was quite right to take the horses five times round the pug mill without a stop. In England the horses went round with the mill without any stop except for meals. He was confident that the brick (produced) was not the sample brick on which the contract was taken. The sample brick bore his own and his bro-

ther's initials, and also the initials of two directors. The sample brick was of about the same quality as the broken brick (produced).

Walter Peek, brother of the plaintiffs, said that he was a brickmaker. The clay supplied to the plaintiffs with which to carry out the contract was of very inferior quality. In regard to the clamps of bricks made by the plaintiffs, Nos. 2 and 3 were blue hard bricks, but No. 1 clamp was not so good, and consisted mainly of red hards and seconds. No. 1 clamp contained from 8 to 10 per cent. of waste; in the other kilns, from 80 to 90 per cent. were good blue hards. As to the latter, if the bricks were moved by good practical men, the waste would be from 2 to 3 per cent., while, if moved in the way the defendants moved them, the waste would be from 8 to 10 per cent. There were some half bricks; the defendants threw these out. They should have used the half bricks. If people ordered a thousand bricks, they expected to get a number of half bricks.

[Hopley, J.: Not if your contract says whole bricks, and that is what this contract says, as far as I can see.]

Witness, continuing his evidence, said that the general working at the brickfields was unskilful. He thought the unpacking of the kilns was carried out in a negligent manner. The bricks made by the plaintiffs were equal to the first sample produced by the defendants. In regard to the pug mills, supplied by the defendants, the machines were of extraordinary size; witness had not seen such pug mills before, either in England or anywhere else. Two or three horses were really required to work them properly. The manager (Mr. Downes) stopped both mills, and took away each of the horses.

Cross-examined by Mr. Alexander: Witness formed his estimate as to the quality of the bricks in the kiln from those that he saw at the top. If the top bricks were good, those underneath were certain to be good.

Re-examined: The brick produced was machine made by the defendant company. It was a very inferior brick, and seemed to have been both boiled and baked. The brick had certainly been steamed.

[Hopley, J. (to Mr. Wilkinson): Surely we are not trying the class of work that the defendant company do?]

No, my lord, but this just goes to show the general carelessness which is displayed by their whole staff.

Titus Amos, brick moulder, formerly in the plaintiffs' employ, gave evidence as to the pug mills having been interfered with by the defendants' manager, Mr. Downes.

Harry Hendricks, another brick-moulder, formerly in the plaintiffs' employ, gave similar evidence.

Johannes Petrus Jacobus de Villiers, carting contractor, Stellenbosch, said that he had been in the defendants' ser-

vice and that he was discharged in November last by Mr. Downes, who said that the brickfield was stopped. He had always thought that the pug-mills should be worked by two horses each and had complained to Mr. Downes about only one horse being inspanned to each machine. Mr. Downes told him when he terminated his engagement that they could not get a price for the bricks.

Solomon Henecker, brick-moulder, Stellenbosch, formerly in the plaintiffs' employ, also gave evidence.

John Edgar Pearson, manager of the Fernwood Brick and Tile Co., Newlands, said that he was a practical brick and pottery manufacturer and had gained Colonial and International medals. He visited in May the clamps pointed out to him as having been made by Peeks. The bricks were blue hards of very good quality. In the kiln he saw the bricks had been carefully packed, but had been unpacked badly and a good many bricks had been broken. In the kiln pointed out to him about 90 per cent. of the bricks were blue hards in colour. There was a great amount of waste lying about through the unpacking, which was unskilled, but he thought the chief amount of waste was due to the quality of the clay from which the bricks were made. There had been a "slump" in the brick trade during the last year and a half. It became acute about twelve months ago. There was a slight ascendancy about six months ago, and there was a slight ascendancy yet. In the clamps he saw about 75 per cent. would be equal to the samples produced by the defendants.

Mr. Wilkinson: Did you see the pug mills?

Witness: I saw something that imitated a pug mill.

Mr. Wilkinson: Would you have such mills on your premises?

Witness: No. Continuing his evidence, witness said that the machine was a two-horse or steam-mill.

Cross-examined by Mr. Alexander: His company had been in existence one and a half to two years. Their output had been one and a half million bricks. His output at present was nothing; he has stocked his yard owing to the weather. His ancestors went back about 300 years in this particular trade. About 80 per cent. of the bricks conformed in quality to the samples produced by the defendants.

Alfred Charlton Reid, brickmaker, Rochester Works, George Sargent, manager of the Government Brickworks at Maitland, and Henry John Reid, foreman setter, Rochester Brick Works, gave further evidence to the effect that they made an inspection of a kiln at the defendants' brickfields, Stellenbosch, on May 31st, and that the bricks, which had been made by the defendant, were about 80 or 90 per cent. blue hards.

They all agreed that a good deal of waste had been occasioned by unskilful unpacking. The witness Sargent declared that he thought the defendants must have caused a considerable portion of the waste for the purposes of this case. He admitted that he did not count the bricks.

Mr. Wilkinson: How long would it take to count the 300,000 bricks that the defendants allege were there?—Witness: About twelve months.

The witness H. J. Reid, described the pug mills as "curiosities," they were huge tube with a large blade to grind dirt.

Roland John Wilkinson, articled clerk to the plaintiffs' attorney, having given evidence,

Wm. Brown, master brickmaker, Cape Town, said that he went to the field at Stellenbosch on Saturday and saw a kiln of bricks pointed out to him as having been made by the plaintiffs. He judged that the bricks were 90 per cent. of them equal to the sample produced by the defendants. He considered that a good part of the waste had been brought about by careless unpacking.

Mr. Wilkinson closed his case.

George Septimus Firth, C.E., managing director of the defendant company, said he went to the works at Stellenbosch on the 2nd January and saw James Peek stacking bricks on the ground. He saw three kilns. No. 1 was very bad in regard to waste; No. 2 was better, and No. 3 was still better. He should say that No. 1 was 75 to 80 per cent. bad, and No. 2 was "patchy," with bars of seconds running right across the kiln. No. 3 was undoubtedly the best. Later in the month James Peek called at the office for his money, and witness told him that he did not think anything was due to the plaintiffs. Peek said that they had been knocked off at the works by the manager. Mr. Downes (the manager) contradicted Peek, and Mr. Hudson was asked about this and he also denied that the Peeks had been knocked off the work. Witness counted the bricks on the 21st April by calculations made on the basis of the contents. In kiln No. 3 he found standing 116,384 bricks; he deducted 5 per cent. for waste, leaving 110,565 bricks, of which two-thirds were blue hard and one-third red hard. He took the bottom of the kiln separately where there were 4,560 seconds in the fire-holes. The kiln had been opened up since and he found that his allowance for waste had been too small. He also found 10,748 seconds stacked round the kiln. There were 13 heaps removed from No. 1 and No. 2 kilns, holding 27,888 blues, 68,170 reds, and 150,337 seconds. The No. 1 and No. 2 kilns had been dispensed with by this date. Up to that time they had sold 15,100 to Jenkinson, 11,000 to the Stellenbosch Council, and 6,000 to Pieter Louw. The

number of whole bricks thus made by the plaintiffs was: blue hard, 118,598; red hard, 105,025; seconds, 180,745; total, 404,368. The defendants tendered payment for 411,000. The figures showed a waste of 119,005 as compared with the total claimed by the plaintiffs, viz., 523,373. The company took a contract at Newlands and supplied 15,100 bricks made by the plaintiffs, which were rejected. As far as he could see, the large proportion of waste was due to using too much ash in the production of the bricks, making them brittle. The plaintiffs knew perfectly well that they could not get their clay from the old clay-pit, and that they would have to be supplied from the new clay-pit. He did not think there was a great deal of difference between the two clays, except that the new pit yielded more black stuff.

Cross-examined: He admitted that there were flaws in the sample brick produced by the defendants in connection with the contract. He was sure that if half the proportion of ash had been used the bricks would have been much better. He could not suggest any reason why the Peeks should have used a good deal of ash unless they thought they would get the bricks harder.

Geo. S. Firth, managing director of the defendant company, in further cross-examination, said that, practically speaking, none of the bricks conformed to samples. He considered that the evidence given by expert witnesses on the other side to the effect that 80 or 90 per cent. were equal to sample was absolutely false. He was not a brickmaker, but he had had control of eight yards at one time, and had had experience of managing a brickfield for four years. He thought the evidence given by Messrs. Sargent, Pearson, Reid, and Brown was absolutely false. The bulk of the bricks of No. 1 and No. 2 kilns were still on the ground, but the kilns had been dismantled, so that the bricks could be counted. He did not think it was unfair not to have informed the plaintiffs that they were dismantling the kilns in order to count them. He did not know why they did not communicate with the plaintiffs. The company had a farm, on which they had used bricks made by the plaintiffs. These bricks were used by the company subsequently to the 21st April, and had been included in the returns he gave as bricks lying on the ground on that date. On the 14th May, 1,500 bricks went to the farm, on the 15th 1,600, and on the 17th 2,000. He had accounted for all the hand-made bricks that had been sold by the company. Only machine-made bricks were sold to the Cape Town Municipality; 50,000 were sold under contract to the City Council. None of these had been made by Peeks. He was not aware that a number of Peeks' bricks had been sold through an agent named Grey to Howard and Scott. The witnesses on the

other side were utterly wrong when they said that the company had thrown whole bricks away among the waste. The two bricks (produced) had run together, not through the excessive use of ash, but because of heat, and they must have been taken from close to the fire holes.

By the Court: Work was temporarily suspended at the brickfields owing to the slackness of trade. The brickfields had not been abandoned by the company, and the company had still a large quantity of bricks there.

Thomas Henry Downes, late overseer of the defendants' brickfields at Stellenbosch, said that Wm. Peek continued at the yard until the 27th November, but James Peek remained there some time longer, stacking the bricks. The two bricks he now produced illustrated the cause of the trouble. The trouble arose when the bricks were in the green state. He complained to the Peeks about the moulds not being properly filled. He had had to complain about the way the horses were being worked. He saw the boys' whipping and trotting the animals, and he took the horses away on two occasions. The plaintiffs paid no notice to his complaints for a while. They did not pay very much attention to the work, but seemed intent simply on getting the number of bricks completed. He restored the horses to the pug mills again on both occasions. The treatment of the horses by the plaintiffs improved. Hudson (one of the directors) came out to Stellenbosch, and told the Peeks that the bricks they were making were not bricks at all, and that they would have to make a better brick, and have to satisfy witness. The Peeks then said that if the company proposed to be so strict that they would knock off on Saturday. James Peek told the boys they need not continue later than the Saturday. Peeks told him on the 27th November that they were knocking off that day. He denied having taken away the tools from the plaintiffs. He did not give the Peeks any notice to stop off work. In connection with Stallard's contract, the total bricks burned and stacked was 176,370, but of these 4,000 were burnovers, leaving 172,370. Stallard paid £3 10s. for running and stacking 20,000 bricks, and the company also allowed Peek £1 10s. for burning these bricks. That left 152,370, run stacked, and burned by James Peek, which, at 5s. per 1,000, amounted to £38 1s. 9d. The company had paid to James Peek £33 11s., thus showing a balance of £5 0s. 9d. in favour of the plaintiffs. This sum the defendants tendered. Witness denied that there had been any carelessness in unpacking, or that waste had been occasioned through this cause. They used men for unpacking whom Peeks themselves had employed. He took an exact calculation of the bricks

on the 20th May, and he found there were 405,396 bricks on the ground. Even these were not all entire bricks, but he made a liberal allowance. The fault of the plaintiffs' bricks was that too much ash had been used; the company used about half the proportion that the plaintiffs used. Both the plaintiffs and the company used clay from the same pit, only, if anything, the company used more of the black stuff.

Cross-examined: He had not made any bricks himself, but he had been in the building trade many years, and he was a good judge of bricks. He denied having stood by the pug-mills timing the horses. He did not discharge one of the boys because he had laughed at him. He could tell within half a dozen bricks how many bricks there were in a stack by measuring. He did not think that a mere look at a kiln enabled even a practical brickmaker to say with accuracy the number of bricks in a kiln. He did not believe in rule of thumb. The brick (produced) appeared to have been steamed, owing to the wet weather. He had never heard the term "boiled brick." There had been no waste of bricks by the defendants such as had been described by the plaintiffs and their witnesses; they were also wrong in regard to the percentage of good blue hards. None of the bricks had come to Cape Town.

Frank B. Cliffe, secretary of the defendant company, said that, in consequence of a complaint by Downes, he wrote to the plaintiffs, pointing out that they were not making proper bricks, and that they were ill-using the horses, and also drawing their attention to clause (e) of the contract, in which the kind of brick was specified. The company had allowed the plaintiffs for 411,000 bricks, which was more than they had shown of entire bricks. Of the bricks made by Peeks, the company had sold 57,700.

Cross-examined: When they closed their works at Stellenbosch, trade was not "too good." They stopped making bricks by machinery. He did not know that people generally preferred machine-made bricks. He did not know that the market generally was better for machine-made than hand-made bricks.

By the Court: Hand-made bricks were rather cheaper.

Cross-examination continued: He had been in this trade ever since the company started in July or August, 1902. He did not remember James Peek coming to Cape Town soon after the contract had stopped, and speaking to him about payments. Peek might have called, but witness did not recollect any distinct occasion.

Wm. Lindley, manager of the Caporn Brickmaking Co., said that he had counted the bricks lying on the field at Stellenbosch. He found 313,000 bricks

there, made up thus: blues, 77,000 odd; reds, 85,000 odd; seconds, 140,000 odd. Of the blues, 15 per cent. were equal to the sample. The reds and seconds did not comply with the terms of the contract either in colour or quantity.

Cross-examined: He had not made a brick himself. He had had fifteen years' experience of supervising and governing. Generally speaking, one could draw an inference as to the contents of a kiln after seeing the outside stripped and looking down from the top. He did not say it was always a safe inference.

Mr. Wilkinson (in further examination) asked witness if he were in Court yesterday.

Witness: Yes; and the day before. He thought that the estimate of 90 per cent. blue hards put in for the plaintiffs was absolutely incorrect.

The witness Sargent was recalled by his lordship in order to explain the meaning of the term "bolt" applied to a stack of bricks.

The witness Lindley (in further examination) said that he had not heard the term until yesterday, and he thought it would be a provincialism.

Mr. Wilkinson: Yes, apparently because you are not acquainted with it.

Witness said that he thought too much ash had been used in the making of the bricks.

Archibald Dichmont, builder, Cape Town, a director of the Central Brick and Tile Co., said he agreed with the witness Lindley as to the number of bricks on the ground and the proportion of blues, reds, and seconds, and percentage of bricks equal to sample.

Romeo Bisalati, in the employment of the Australian Brickfield Co., stated that sometime in November he stopped bringing clay, on the instructions of the plaintiff.

Mr. Upington closed his case.

Mr. Wilkinson said that the question arose on the contract between the parties whether whole bricks only were to be paid for, or whether, in accordance with the custom of the trade, a fair percentage of portions of bricks should also be paid for. This contract bore on its face marks of having been prepared by a person not skilled in the trade, otherwise it would not have borne the word "entire." He submitted that the real meaning of the contract was that the terms referred to in Peek's letter in reply to the defendants were substituted for clause (E) in the contract. On the question as to who had broken the contract, he urged that all the direct evidence, except that of Mr. Downes (defendants' manager at Stellenbosch) supported the view that the contract was put an end to by Mr. Downes and not by the plaintiffs. On the point of advantage, he contended that it was all to Peek's advantage that the contract

should not be broken. Considering the state of trade, it was very much to the defendants' interest to get rid of the contract. Not only was the overwhelming mass of evidence in favour of the view that, not the plaintiffs, but Downes himself, broke the contract, but that evidence was also confirmed by the probabilities of the case. He also submitted that the absence of any correspondence was more telling against the defendants—a proper business house—really than the plaintiffs, who were masters of the working-class type. The defendants in their plea admitted that the number of bricks claimed for by the plaintiffs were delivered, but they said that the great proportion did "not conform in colour or quality to the sample which was the basis of the contract." He contended that the weight of evidence was overwhelmingly in favour of the plaintiffs' version as to the character of the bricks. Counsel commented on the limited amount of technical knowledge as to brickmaking on the part of the defendants' witnesses, and asked whether these men were really competent to decide the quality of the bricks?

Hopley, J., put it to counsel whether, after all, the question was not so much the quality of the bricks as the quantity, and whether the half-bricks and three-quarter bricks should be regarded as embraced by the contract.

Mr. Wilkinson said he thanked his lordship for the question. Everything, he contended, went to show the superior "skill" of the witnesses called by the plaintiffs, and they all confirmed the evidence of the Peeks. These things should be taken into account when weighing the evidence as to the counting of the bricks. The very method adopted by the defendants in counting revealed their unskillfulness, their ignorance of the trade. Counsel submitted that there was clear evidence of a good deal of unnecessary waste in the bricks made by the plaintiffs, having been occasioned by the negligent and careless work of the company's servants.

Mr. Upington was not called upon.

Hopley, J., said he did not think it was necessary to call upon counsel for the defendants to argue their view of the situation. He thought he was in a position without further elucidation from their side to give judgment in this case to the best of his ability. He admitted he felt some sympathy for the plaintiffs in this matter, but that sympathy was to a large extent limited to this point, that he thought it was a great pity that it was not possible for them to get this matter arbitrated upon and settled in a very much less expensive way than had eventually become necessary. He thought it was a pity, and he was sorry that the plaintiffs had been advised—he did not say by their legal advisers, but by their friends possibly—that they had such a claim in this contract

paid on proof that the machine could fulfil the conditions specified, and the balance within 30 days. About the middle of October the defendant notified to the plaintiff that he would not accept the plant, as it had not been shipped.

Sir H. Juta, K.C. (with him Mr. J. E. R. de Villiers), was for the plaintiff; and Mr. W. P. Schreiner, K.C. (with him Mr. W. P. Buchanan), was for the defendant.

Frank Cook, plaintiff, stated he represented Fawcett's, of England. Mr. Alex. Murray, of Murray and Co., introduced the defendant to him. Witness guaranteed the portable machine would make from 6,000 to 8,000 bricks daily, and that he would have it within three months' time. A week later an agreement was entered into, and the defendant agreed to buy the machine for £275. Witness did not undertake that the plant should arrive within a month. Within a couple of hours of the contract he cabled to hurry the machine on. On the 27th November he wrote to the defendant stating when his plant would arrive, and asking him if he could book him an order for coke and coal which was coming by the same steamer. The defendant did not say in October that he would not accept it; if he had done so, witness would have stopped the machine leaving England. The goods arrived about the 8th January, and a few days later he saw the defendant, who refused to accept the plant, stating that it was on order six months. On the 21st January the defendant's attorneys wrote stating that the reason their client refused the machine was because it was not delivered within "reasonable time." From October last year the brickmaking trade commenced to fall, until January, when it was difficult to sell bricks.

Cross-examined by Mr. Schreiner: About the 14th of September he first saw the defendant, but that was not the occasion on which the arrangement was entered into. The defendant asked to have the machine hurried up. Witness did not say that the machine was coming forward. He could not say if there were any negotiations with regard to a machine for East London. The cable was sent at the defendant's suggestion. The defendant called, and sometimes missed witness at the office. He knew that the brickmaking business was half way through in January. The defendant did not say in October that he would not accept the machine.

Re-examined by Sir H. Juta: If they had repudiated in October, or November, he could have cabled and stopped the machine.

Harry Davis, secretary of the Croydon Brick Company, corroborated what Mr. Cook had said about the brickmaking trade from September last.

Cross-examined by Mr. Schreiner: A man wanting to build for himself would naturally benefit by the hurrying out of the machine.

The evidence of Alex. Murray, taken on commission, showed that the bargain was struck on the 21st September. The defendant was told that the machine was being made, and would be delivered in about three months, which meant more or less.

Sir H. Juta closed his case.

Wm. John Schrieber, defendant, stated that he and his brother undertook to build 25 houses upon certain ground, and they arranged to take a brickmaking property last year. Witness saw Mr. Murray about the beginning of September about getting a brickmaking plant. Mr. Murray sent for Mr. Cook, and as the result of one interview in which the plaintiff showed him a drawing of a portable machine that was coming out, the contract was arranged. He knew nothing of the cable. He called several times, but could not see the plaintiff. Ultimately, he and his brother saw Mr. Cook, and declared the contract off on account of the delay. Plaintiff then said it did not matter, as he had another customer in East London.

Cross-examined by Sir Henry Juta: He had known Mr. Murray for some years, and his business transactions with him had been satisfactory. The time of delivery arranged was "one month," and that was what his attorney meant by a "reasonable time."

Re-examined by Mr. Schreiner: If the machine had come out in a reasonable time beyond a month, he would have accepted it.

Mr. R. Schreiber, brother of the last witness, corroborated the defendant as to what took place at the interview with the plaintiff.

The plaintiff (recalled) stated that he never sold a machine in East London, and there was not the slightest truth in the statement that he said that it did not matter, as he had a customer in East London.

Mr. Schreiner closed his case.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: It is admitted that the price for the plant was to be £275, but there is a conflict of evidence as to the exact terms of the contract. The plaintiff states that the terms were half cash on receipt of the plant, and the balance in thirty days. The cost of erection was to be charged extra, and paid for by defendant, the plaintiff represented that his firm were shipping to him from England as a sample a new pugmill, including engine and boiler, of the latest invention, and represented that it could make 6,000 to 8,000 bricks daily, and the plaintiff undertook that the said plant would arrive within a month, and, after discussion, the plaintiff offered to

sell to the defendant the said plant for £275, payable in two instalments, the first amount being due upon proof that the machine would perform its duty satisfactorily. According to the plea, therefore, there was a double guarantee, the first as to the capacity of the plant to do certain work, and, secondly, that it would arrive at a certain time. As to the question of capacity, it must be taken that the machine had the capacity it was stated to have. The second question to decide is as to the statement that the machine would arrive in one month. In the ordinary course, such a statement seems most unlikely to be made. The plaintiff was not a manufacturer, he was an agent trying to dispose of articles in this country. He knew that it would be a considerable time before a machine of this kind would be delivered. If the plaintiff knew that the machine was not on the water, the Court cannot understand why plaintiff should make statements that were absolutely false for the purpose of selling this machine to the defendant. Taking the evidence given, I find that the plaintiff's evidence is supported by Murray, who appears to be a respectable gentleman in a good position. Murray supports the plaintiff in every point, and he says the conversation was to the effect that it would take three months before the machine could be delivered. He heard nothing about the machine being on the water. It was suggested that Murray gave this evidence, because he was to get commission, but he would probably have got the commission independently of this cause, and, therefore, it could not be assumed that for the sake of the paltry commission that he was to get that he would state matters that were absolutely false. The Court does not believe that Murray gave his evidence from interest on either side, but if he had had any interest it was rather in favour of the defendant, in order to retain his custom. The tendency would be that way, but quite independently of these matters, there is the absolute statement made by Mr. Murray confirming the statement made by plaintiff. Unfortunately the defendant is not similarly supported. All the letters show the perfect *bona fides* of the plaintiff. Everything appeared to be done in the ordinary course of business. The plaintiff is completely supported by the cablegram. If he had stated to the defendant that the machine was on the water, the Court can not imagine why the plaintiff should have had all this correspondence with Fawcett, or that he should cable to Fawcett if the machine was on the water. Then it is admitted that on October 14 a letter was written by plaintiff, and received by the defendant, in which the plaintiff said, "Sorry, I missed you each time you called. I have a letter from Fawcett saying the plant is being com-

pleted, and will be despatched with all possible speed. I will let you know again later." If the plaintiff had said within a month that it was on the water, it would be very barefaced to write and say it was now being completed, and the right thing for the defendant to have done would have been to write and say: "In concluding the sale, you said the machine was on the water; now you say it is being completed." Defendant did not however, write, but went over with his brother to see the plaintiff; but the reported conversation was denied by the plaintiff. Then we have the extraordinary statements made by these persons that the whole transaction was cancelled. If this cancellation had taken place, the defendant would have taken some opportunity in the subsequent correspondence to refer to it; but on April 21, the defendant's attorneys, in writing that their client disclaimed all responsibility in respect of the cancelled contract, said nothing as to plaintiff having consented to the cancellation. Taking all the circumstances into consideration, the Court is of opinion that the plaintiff has proved his case upon every point, and is entitled to judgment as prayed.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorney: G. Trollip.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

SMILES V. FREEDBERG, { 1904.
COHEN AND CO. { June 8th.

Lease—Eviction—Security.

The plaintiff sold his chemist's business to the defendants, one of the conditions being that the plaintiff would execute a lease of the premises in favour of the defendants for a period of five years, with a right of renewal for another five years. The defendants took possession of the business and occupation of the premises, but refused to join in the execution of the lease, on the ground that the

plaintiff was himself lessee, and that under the terms of his lease he might at any time be erected. The contingency was that the original lessor might die before the end of ten years, but she was proved to be of middle age and in good health.

Held, that there was no ground for the defendants' refusal, but on the suggestion of the Court, the plaintiff offered security against erection, and the defendants were accordingly ordered to join in the execution of the lease subject to such security.

This was an action to compel the defendants to execute a certain bond and a certain lease and for payment of £300, with interest on a sum of £1,528 8s. 3d. Or in the alternative for an order for the cancellation of a certain sale and payment of £600 as and for damages for breach of contract; together with certain small sums as rent for the use of a telephone and for goods sold and delivered.

The plaintiff's declaration was as follows:

1. The plaintiff is a chemist, residing and trading at Mowbray, in the Cape Division; the defendants trade under the style or firm of Freedberg, Cohen and Co., and carry on the business known as the Peninsula Aerated and Mineral Water Factory, at Church-street, Mowbray, and the Aerated and Mineral Water Factory there, which said business and factory was formerly carried on by the plaintiff.

2. On or about February 16, 1903, the plaintiff sold to defendants, who purchased from him, all stock-in-trade, machinery, plant, buildings, goodwill, etc., of the aforesaid business, then carried on by the plaintiff, under certain terms and conditions, set forth in the agreement, copy whereof is hereto annexed, marked A.

3. It was agreed that the price to be paid for the said business should be the value of the stock, plant, buildings, apparatus, etc., taken over, to be determined as in the said agreement provided, together with the sum of £250 for the goodwill.

4. It was further agreed that £600 should be paid by defendants in cash on taking possession of the business, and the balance in half-yearly instalments of not less than £150 each, payable half-yearly, with interest at 6 per cent., to be secured by a notarial bond over the stock, plant, etc.

5. It was further agreed that the stock-in-trade should be valued at Cape

Town prices, less 20 per cent.; buildings at £175; horses, carts, and all other assets, not otherwise provided for, at a price to be fixed by a competent valuator, to be mutually agreed upon; machinery, plant, fittings, etc., at the English cost price, plus cost of importing and erecting, and less a fair amount for depreciation, to be fixed upon by a competent valuator to be mutually agreed upon.

6. The plaintiff further agreed to give defendants a lease of the ground in Church-street, whereon the factory stands, for a period of five years, at a rental of £4 per month, payable monthly, with the option of renewal for another five years.

7. The defendants paid the sum of £600, and on or about February 16, 1903, took possession of the said buildings, but they have failed and neglected to pass the said bond.

8. The plaintiff at the date of signing the said agreement, in the presence and with the assistance of the defendants, took stock of the assets and drew up stock-sheets thereof; and thereafter, the defendants having failed and neglected to agree with plaintiff upon any valuator, the plaintiff affixed values upon the said stock-in-trade, taking as the basis of the said valuations the provisions of the aforesaid agreement in that behalf; the total value of the whole stock-in-trade, machinery, buildings, goodwill, etc., arrived at as aforesaid, amounted to the sum of £2,128 8s. 3d.; the said valuation is fair and reasonable, and the defendants have not raised objection thereto.

9. By agreement between the parties certain citric acid was excluded from the said stock lists, but thereafter the defendants took over 98 lb. thereof, whereof the value, according to the basis laid down in the said agreement, is the sum of £8 16s. 5d., but the defendants have failed and neglected to pay the said sum.

10. Thereafter, in or about the month of December, 1903, the plaintiff tendered to defendants the lease and bond referred to in the agreement, and called upon them to execute and complete the same; and further, to pay the rent provided for in the said lease of the ground, and also the sum of £5 5s. for the rent or use of a telephone in the aforesaid buildings.

11. Thereupon, in January, 1904, the defendants paid two months' rent for the lease of the said ground, but failed and neglected to pay the other sums or to execute the said bond or lease.

12. The £5 5s. due by defendants for use of the telephone is due under an agreement arrived at between plaintiff and defendants that each should pay half of the amount due to the Post-office authorities for the use of a certain telephone and an extension thereof

from February 16, 1903, to September 24, 1903.

13. There is further due by defendants to plaintiff the sum of £300, being the amount of the two half-yearly instalments of not less than £150 each, due on August 15, 1903, and February 15, 1904, in respect of the purchase price of the aforesaid business, as provided in the said agreement A, with interest.

14. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to call upon the defendants to sign and execute the said bond and lease, and to pay the said sum of £300, together with interest at 6 per cent. per annum on the sum of £1,528 8s. 3d. from February 16, 1903, and the sums of £5 5s. and of £8 16s. 5d., but the defendants neglect and refuse to sign the said documents or to pay the said sums.

15. In the alternative to the order on defendants to sign the said documents and pay the sum of £300, and the interest as aforesaid, the plaintiff submits that he is entitled to claim a cancellation of the said sale, and an order that the defendants pay him the sum of £600 as damages, he retaining in addition the £600 paid as aforesaid by the defendants.

The plaintiff claims: (a) An order on the defendants to execute the aforesaid bond and lease, which the plaintiff has tendered, and hereby again tenders for their signature; (b) payment of the sum of £300, with interest on the sum of £1,528 8s. 3d. from February 16, 1903, or in the alternative to (a) and (b), an order for the cancellation of the said sale and payment by the defendants of the sum of £600 as damages for breach of contract, plaintiff retaining the said sum of £600; (c) payment of the sum of £5 5s., half-share of the rent or expense of the telephone; (d) payment of the sum of £8 16s. 5d., the price or value of the citric acid purchased or taken over by the defendants; (e) interest *a tempore morae*; (f) alternative relief; (g) costs of suit.

The defendants' plea was as follows:

1. They admit paragraph 1.

2. As to paragraphs 2, 3, 4, 5, and 6, they admit entering into the agreement annexed to the declaration, and crave leave to refer to it for the terms thereof.

3. As to paragraph 7 they admit that they paid the sum of £600, and that on or about the 16th February, 1903, they took possession of the said buildings, and that they have not passed the said bond, but say that they have not passed the said bond for the reasons hereinafter set forth.

4. As to paragraph 8 they admit that the plaintiff at the said date, in their presence, and with their assistance, took stock, and drew up stock sheets, but they deny that they failed and neglected to

agree upon a valuator. They say that they are ready and willing to have the stock valued by a competent valuator as provided in the said agreement, but that the plaintiff has never suggested or asked them to suggest any valuator. They are ready and willing, and hereby tender to have the said stock valued by such valuator as this Honourable Court may appoint, failing any agreement between the parties as to such valuator, and to pay such sum as he may value the stock at in terms of the agreement. They admit that the plaintiff has valued the stock, etc., at £2,128 8s. 3d., but deny that the said valuation is fair and reasonable, and say that they have always objected thereto.

5. They admit paragraph 9, and hereby tender the plaintiff the sum of £8 16s. 5d.

6. As to paragraphs 10 and 11 they admit that the plaintiff in or about the month of December, 1903, tendered to them a lease of the said premises, and also the bond referred to in the agreement, and called upon them to execute and complete the same, and that they did not execute the said bond and lease. They say that the lease tendered to them by the plaintiff set forth that the plaintiff holds the said property on lease from the owner thereof, and that they refused to execute the said lease and bond until the plaintiff furnished them with the consent of the owner of the property to be leased to them or adduced proof that he, the plaintiff, was entitled to grant the defendants the said lease. They are ready and willing, and hereby tender to execute the said lease and bond on production of such consent or proof, save as above they admit paragraphs 10 and 11.

7. As to paragraph 12 they deny the agreement therein alleged, but are ready and willing, and hereby tender to pay the said sum of £5 5s.

8. As to paragraphs 13, they say that they are ready and willing, and hereby tender to pay to the plaintiff the said two instalments of £150 each on the said lease and bond being executed after the production of the consent or proof set forth in paragraph 6 hereof, but say that until such production the plaintiff is not entitled to claim the said instalments.

9. Save as above pleaded, they deny the allegations in paragraphs 14 and 15.

Wherefore, subject to the above tenders and to payment of costs to date, which they hereby tender, they pray that the plaintiff's claim may be dismissed, with costs.

Mr. Graham, K.C. (with him Mr. Pittman), for plaintiff; Mr. Gardiner for defendants.

De Villiers, C. J., said that the matter between the parties seemed a very small difference, and he thought it would be better if both sides could come to some agreement without incurring further expense.

Mr. Graham said he would suggest that the Court might adjourn for half an

hour, and perhaps they might arrive at some conclusion.

The Court adjourned at 11 o'clock, and on resuming at 11.30, Mr. Graham said he regretted that the parties were unable to come to terms.

Evidence was then called for the plaintiff.

Robert Smiles, chemist, of Mowbray, stated he had a mineral water business, which he carried on for about four years. In December, 1902, the defendants came out to see him, and after many interviews a deed of sale was entered into in February, 1903. The defendants were informed that the plaintiff was not the owner of the ground. The price of the building was fixed at £175. Witness obtained a lease from a Mrs. Robertson. He was prepared to drop £250 for goodwill, and allow defendants to retain possession of the amount for ten years as security for his carrying on the lease. Defendants took possession of the business on the 16th February, and some of his employees remained on in the business. Stock was taken on the 15th or 16th February by witness, and the three defendants. On the second day witness's brother-in-law, Van Niekerk, assisted. Defendants said they did not want some of the things, but they had since taken them. He had repeatedly asked defendants to appoint a valuator, but they had refused on the score of expense. Witness marked the prices on the stock lists according to the market value. The stock lists were drawn up accurately in terms of the agreement. Goods which subsequently arrived from England were added to the stock lists in accordance with arrangement. Witness had asked the defendants if they had any objection to the stock lists, and they only excepted to one item, which witness explained to them. Witness's profits in the business amounted to £450 a year, during the time he had it. He had had the books audited, and the auditors computed the profits to be at the rate of 27½ per cent. The capital of the business was about £3,000. He made a profit of £225 a year from the sale of cordials.

Cross-examined: Before the lease witness told all the defendants that Mrs. Robertson only had a life interest in the property. Witness did not return the stock lists, priced, to defendants until August. It was not true that they objected to a number of items. The stock lists had been open, and were still open to the defendants for correction, but they had never taken advantage of it.

In reply to the Court, witness said he was prepared to reduce the claim from £2,128 to £2,000.

De Villiers, C. J., said he would like to hear the defendants on the question of the value.

Mr. Gardiner called

Morris Maskew, one of the defendants, who said that the additions to the stock list were incorrect. One of the additions

was for bottles in circulation, which defendants did not agree to collect; nor did they agree to take over the syphons in the possession of customers. Nine hundred show-cards were charged for, but there were only 600. Defendants had only used 60 cases of cordial boxwood at 50s. per case. They were also charged for 52 carbonic gas tubes, while there were only 50. There were only 242 dozen bottles, while 1,250 dozen appeared on the stock list. Besides, the 242 dozen bottles, defendants had only collected about 100 or 200 dozen bottles. Witness had told Smiles that defendants would take over any bottles which he (Smiles) would collect, but that they would not be responsible for the bottles in circulation. Witness considered the machinery was overcharged. Witness had been after Smiles for six months before he got the stock lists, in order to get a valuator. Witness objected to a number of items on the stock list. If the lease were cancelled, it would involve considerable loss to defendants.

Cross-examined by Mr. Graham: Bottles came in every day from customers, but the same customers took them out again. There were a dozen customers from whom they had collected no bottles.

Counsel were then heard in argument on the facts.

De Villiers, C. J.: It appears to me upon the evidence, that the defendants are bound now to execute the bond and the lease in accordance with the agreement arrived at. The defendants are in actual possession of the premises, which have been let, but they object now to execute a lease, because there is a contingent possibility that the lessor to the plaintiff might die, and that the plaintiff may be evicted. This is a contingency that may possibly happen, but from all the evidence it does not appear to me to be an event which will probably happen. But if the defendants had asked for some security from the plaintiff to provide against such a possible contingency, I am satisfied that the plaintiff would have given that security. The case never hinged upon the point as to whether the plaintiff ought to give security or not, and as soon as the matter of security was suggested by the Court the plaintiff expressed his willingness to give security; but the defendants are now bound to fulfil their part of the contract. They must execute what they promised to execute, but the Court will make an addition to the lease, which I think the plaintiff will be willing to have added to it. Therefore, in giving the order in terms of the first prayer of the declaration, the Court will order that the following addition be made to the lease, as the tenth paragraph of the lease: "As security for the performance by the said lessor of

all his obligations under this lease he hereby consents to the detention by the defendants of the sum of £300, being part of the price of the purchase of the lessor's business and goodwill until the expiry of this lease, or, in case of renewal, for five years thereafter." In regard to the prayer "B," the sum of £300 is already payable, and the only other question is as to the amount which should be held to be the purchase price of the property. The full value of the property is said to be £2,128 8s. 3d., but the plaintiff was willing to forego £128 1s. 3d., and therefore the amount in prayer "B" must be reduced. The Court will order the payment of the sum of £300, with interest on the sum of £1,400 from the 16th February, 1903.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendant's Attorneys: Van Zyl and Buissonné.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION.

{ 1904.
{ June 9th.

Mr. De Waal moved for the admission of Johannes Albertus Erasmus Euvrand as an attorney and notary.

Application granted, oath to be taken before the R.M. of Steynsburg.

PROVISIONAL ROLL.

ATMORE V. TWINE.

Mr. Percy Jones moved for provisional sentence on a promissory note for £75, with interest and costs.

Order granted.

COWLING V. STABLEFORD AND CO.

This was an application for provisional sentence upon a mortgage bond for £750, with interest from the 1st July, 1903. The bond, was passed by the defendant in favour of one Wm. Lambert Kidney, and was ceded by him on the 29th October, 1903, to the plaintiff. It had now become due by reason of the non-payment of interest on due date.

The affidavit of Mr. J. E. P. Close, liquidator of the defendant company,

entered into a detailed statement of the circumstances, which led up to the bond being passed. He stated that Wm. Stableford purchased certain properties in Maxwell-lane, and Strand-street, the former for £2,500, and the latter for £4,500. Mr. Stableford expended £460 in improvements to the Maxwell-lane property, and afterwards sold the properties to the defendant company for £6,500 each. Kidney had been secretary and accountant of the company. The bond in favour of Kidney was raised by the company to pay expenses of transfer, and balance of purchase price, etc. The deponent stated that Kidney had received £700 profits on the re-sale of the properties. He stated that the liquidators' contention was that the said properties purchased by Wm. Stableford on his own behalf were in effect purchased for the company, in which case the bond for £750, had been obtained from the company without consideration having been given, and that there had been fraudulent collusion between the said Stableford and the company. The books of the company had been kept by the secretary, Kidney, in such a fashion that only during the last few weeks had the liquidator been able to unravel the accounts.

The replying affidavit of plaintiff, John Frederic Cowling, stated that he was unable to admit or deny the allegations as to the relations between Wm. Stableford and Co. and Wm. Lambert Kidney. He was applied to in October last by Kidney for financial assistance, and he received the bond in return for valuable consideration.

Mr. Upington for plaintiff; Mr. McGregor for defendant.

Mr. McGregor said his submission was that this was not a case for provisional sentence at all.

[Buchanan, J.: But what are the rights of the plaintiff in this matter?]

Mr. McGregor said that his position was that in the first place the cedent had no right to sue upon this bond, and in the second place the cessionary could not claim greater rights than the cedent. Counsel was proceeding to argue further, when

Buchanan, J., pointed out that the argument seemed to him beside the point. Counsel appeared to want him to decide that the transactions between Wm. Stableford and Kidney and Wm. Stableford and Co. were fraudulent and illegal.

Mr. McGregor said that his contention was that the Court should not give judgment on such a bond, having such a serious set of facts before it until the whole of the facts were before it. Counsel added that he was instructed that the cession was not registered, although the bond was. Kidney transferred his right, title, and interest to the plaintiff, and if the transaction was one that was vitiated by improper dealing with the company's money, then the

whole transaction was bad. As to the facts he submitted that it was a fair presumption that these properties were bought for the company by Stableford, that it was intended that they should be re-sold to the company at a profit. There was the significant fact that the first bond was paid out of money raised for the company. He urged that on the facts shown, the transaction was one which required close scrutiny. Counsel went on to quote authorities in regard to the position of a director or official of a company.

Without calling upon Mr. Upington, the Court granted provisional sentence.

Buchanan, J.: It is an elementary principle of law that improper conduct on the part of a person in a fiduciary position should not be allowed to go to the profit of that individual. But that is not the question that I have to decide. The question I have to decide is the application for provisional sentence on a mortgage bond. The mortgage bond has been put in. It was passed eighteen months ago, and was duly registered, and the consideration is stated to be for money lent for the part payment of the purchase price of the ground mortgaged. The bond was ceded to the plaintiff for value on the 29th October, 1903. The holder for value of such a bond duly registered, has *prima facie*, a good cause of action. From his affidavit, which it is not denied, it appears that he took his bond without any notice of anything which vitiated it in equity, and gave good consideration for it. He is clearly entitled to provisional sentence. In the liquidator's affidavit, which deals with the transactions between Stableford and Kidney and the company, it is not alleged that the sale by Stableford to the company was fraudulent, illegal, or improper, or that he had committed an abuse of his position; but simply because when he bought the property for himself some months afterwards he sold it to the company. It was argued that, therefore, the present holder of the bond cannot recover. What the position of Stableford and Kidney may be will have to be determined when the liquidators bring actions against them if they think fit to do so. It is not a matter which can properly be discussed now. It seems to me to be outside the present case. Provisional sentence will be given as prayed, with costs, and the property declared executable.

I. AND J. HERMANN V. VIVIERS.

Mr. Pitman moved for provisional sentence on two promissory notes each for £100.

Mr. Buchanan, who appeared for the defendant read an affidavit of the defendant, in which he stated that the promissory notes were given in respect

of the purchase of 30 bicycles. The arrangement between him and the plaintiffs was that £100 was to be paid on the delivery at Beaufort West of the bicycles, and that two promissory notes each for £100 were to be given. The bicycles had not been delivered, and he had written cancelling the order.

Mr. Pitman read affidavits to the effect that the bicycles were to be forwarded on receipt of the £100, and that defendant had neglected to pay that amount. The promissory notes were now due, and the bicycles were stored in readiness to be sent to the defendant when he fulfilled his part of the contract.

Buchanan, J., asked why the £100 was not sued for.

Mr. Pitman said that the only course open to plaintiffs to make the defendant pay was by suing on the promissory notes.

Buchanan, J., said that the matter of the payment of the £100 and of the promissory notes was one transaction between the parties. Plaintiff should not have split up his claims in this way. The issue was the same in both cases, and the Court would order the parties to go into the principal case, costs to abide the result.

WIGGETT V. MORTIMER.

Dr. Greer moved for provisional sentence on a bond for £600, and for property specially hypothecated to be declared executable.

Granted.

SMIT V. WESSELS BROS.

Mr. Molteno moved for provisional sentence on two promissory notes for £4,987 17s. 9d. and £2,204, less £500 paid on account.

Granted.

SILBERBAUER, WAHL AND FULLER V. STEPHAN.

Mr. W. P. Buchanan moved for the final sequestration of the defendant's estate.

Granted.

VAN DER WESTHUYSEN V. KRUFCHIEFT

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £700, and for property specially hypothecated to be declared executable.

Granted.

CILLIERS V. DU TOIT.

Mr. Rainsford applied for provisional sentence on a mortgage bond for £500.

Mr. Van Zyl appeared for the defendant, and applied for a stay of execution. He read an affidavit stating that defendant was unable to pay at present, and was endeavouring to raise a loan. If a forced sale of the mortgaged property were ordered, he would suffer great loss.

Mr. Rainsford pointed out that it was not asked that the property should be declared executable.

Buchanan, J., said that, under these circumstances, it was not necessary to stay execution. Provisional sentence would be granted, with costs.

EQUITABLE FIRE INSURANCE TRUST CO. V. LA GRANGE.

Mr. D. Buchanan moved for provisional sentence for £45, interest on a mortgage bond.

Granted.

SEIFONTEIN V. FOURIE.

Mr. Rainsford moved for provisional sentence on a "good for" for £42 12s. 6d.

Provisional sentence was granted, subject to the "good for" being stamped.

PHILLIPS AND CO. V. LOUW.

Mr. W. P. Buchanan moved for a decree of civil imprisonment on an unsatisfied judgment for £82 18s. 8d. and £16 19s. 11d. costs.

The defendant gave evidence on oath. He admitted that he owed the money, but had no means of paying. He was not doing anything at present. His estate was sequestrated in the Transvaal in 1899, and he had not been rehabilitated. Judgment was obtained in the Transvaal for this debt in 1898, before he became insolvent.

By Mr. Buchanan: Witness's wife kept a boarding-house at Somerset West, but was in arrear with the rent.

No order was made, leave being granted to plaintiff to apply again.

CUNNINGHAM AND ANOTHER V. BETHEL.

Mr. W. P. Buchanan moved for provisional sentence for £1,221 16s. on certain conditions of sale.

Granted.

BLIGNAUT V. WEINTROB.

Mr. W. P. Buchanan moved for provisional sentence on two mortgage bonds, each for the sum of £4,000, and that specially hypothecated property be

declared executable. The principal had become due by reason of the non-payment of interest.

Weintrob asked for an extension of time for two months.

Buchanan, J., said defendant must make terms with the plaintiff.

Provisional sentence was granted as prayed.

ILLIQUID ROLL.

ESTATE ARNOLD V. ESTATE (1904.
DENEFS. } June 9th.

Mr. Close asked for leave to sign judgment against the plaintiff under terms of Rule 330.

Leave granted.

HAMILTON AND SETTICKS V. ALEXANDER.

Mr. M. Bisset moved for judgment, under Rule 329d, for £26 9s. 6d., for board and lodging, with interest and costs.

Order granted.

FEDERAL SUPPLY CO. V. AFRICA.

Mr. W. P. Buchanan moved, under Rule 329d, for £315, balance of account for goods sold and delivered, with interest and costs.

Granted.

BRINCK V. STRYDOM.

Mr. Roux moved, under Rule 329d, for £22, for professional services rendered.

Granted.

LIBERMAN AND BUIRSKI V. ROSSOUW.

Mr. Russell moved for judgment under Rule 329d, for £38 4s. 6d., less £8 paid on account, for goods sold and delivered, with interest and costs.

Granted.

LEWIS V. FERRIS.

Mr. Close moved for judgment, under Rule 329d, for £41 5s., for rent, with interest and costs.

Granted.

SHAW BROS. V. JOHNSTONE.

Mr. Rainsford moved, under Rule 329d, for £125 14s. 6d., for goods sold and delivered, with interest and costs.

Granted.

REHABILITATIONS. { 1904.
{ June 9th.

Mr. Gutsche applied for the rehabilitation of Solomon Esias Marais. The application had the consent of the creditors.

Granted.

Mr. Roux applied for the rehabilitation of Tobias Mostert de Villiers. The estate was voluntarily surrendered in October, 1899, and the trustee's report was favourable.

Granted.

Mr. W. P. Buchanan applied for the rehabilitation of Thomas King. The estate was compulsorily sequestrated in July, 1894, the preferential creditors had been paid in full, and the concurrent creditors had received 7s. 9d. in the £. The trustee attributed the failure of the insolvent to too much freedom in giving credit.

Granted.

GENERAL MOTIONS.

Ex parte REYNOLDS.

Mr. De Waal moved to have a rule *nisi* granted under the Derelict Lands Act in March last, made absolute.

Rule made absolute, with the exception of the property marked "A."

HILDEBRANDT V. HILDEBRANDT.

Mr. Russell moved for substituted service, in order that the applicant, Clara Hilderbrandt, could sue her husband by edictal citation for restitution of conjugal rights, failing which a decree of divorce.

Order granted, the citation to be returnable by the 20th July, the intendit to be served with notice of trial, with one publication in the "Natal Mercury" and one in the "Wynberg Times."

VAN DER SPUY V. VAN DER SPUY.

Mr. Gardiner moved for leave to sue the husband by edictal citation for restitution of conjugal rights, failing which a decree of divorce, for malicious desertion.

Leave granted, personal service to be effected, if possible; one publication in "Ons Land," "The Star," Johannesburg, and the "Government Gazette," returnable on July 20.

Ex parte DYER.

Mr. W. P. Buchanan moved to make absolute the rule *nisi*, granted on the 5th May, 1904, authorising the applicant to pass transfer of certain property.

Rule made absolute.

BOYES V. CONTZEE.

Mr. W. P. Buchanan moved for leave to sue, by edictal citation, for the attachment of certain property by the applicant, in her capacity as executrix testamentary in the estate of her late husband.

Leave granted to attach the property, *ad fundandum jurisdictionem*, and to sue by edictal citation, returnable 14th August, personal service, failing which, one publication in the "Gazette" and one in the "Volkstem."

Ex parte HARTMAN.

Mr. W. P. Buchanan moved for an order, authorising the Master to pass transfer of certain property in interests of the applicant, a minor. The Master's report was favourable.

Order granted.

TEMPEST V. TEMPEST.

Mr. Gardiner moved, on behalf of the applicant, for leave to sue her husband by edictal citation for restitution of conjugal rights, failing which a decree of divorce. The parties were married in Bradford in 1898, and the respondent was last heard of in Johannesburg in April, 1903, since when he had failed to support the applicant.

Leave granted, personal service to be effected if possible, one publication in the "Star," Johannesburg, the intendit to be served with notice of trial, returnable July 20.

Ex parte ROOS.

Mr. Rainsford moved for an order authorising the cancellation of a certain bond which could not be traced.

Order granted.

Ex parte BEHR AND OTHERS.

Mr. Gutsche moved for an order cancelling the sale of certain property at Muizenberg to Messrs. Barris and Bertram, who failed to fulfil the conditions of sale.

His Lordship granted a rule *nisi*, returnable on the 14th July, calling on the respondents to show cause why the sale should not be cancelled, the rule to be published once in the "Cape Times" and once in the "Cape Argus."

Ex parte HUGO.

Mr. W. P. Buchanan moved for an order confirming the sale of certain property to satisfy the creditors in the estate of the applicant's husband, who

had been declared a lunatic, and for the applicant's release from the curatorship.

Order granted, except with regard to the applicant's release from the curatorship, which was ordered to stand over for the Master's report.

Ex parte DUGGAN.

Mr. P. Jones moved for the appointment of a provisional trustee in the sequestrated estate of Mackie, Young and Co.

Order granted, Mr. Harry Hands to act as trustee.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

SHANNON V. BRODIE. { 1904.
 { June 10th.

This was an application for provisional sentence on a certain acknowledgment of debt for £750, and to make absolute a rule *nisi* restraining respondent from selling a certain hotel. A rule *nisi* had been obtained by the applicant, interdicting the respondent from disposing of the Shakespeare Hotel, Cape Town, in respect of the balance of the purchase price, of which the acknowledgment of debt was given. It was agreed that the debt was to be reduced at the rate of £50 per month, for the first twelve months, and £100 per month thereafter, interest being charged at the rate of 5 per cent. The respondent was now in arrear to the extent of ten instalments of £50, together with £150, which he should have paid on entering into possession of the hotel.

The respondent, in his affidavit, repudiated the debt of £750, or any part of it. He further stated that the whole of the £1,750, for which the acknowledgment was given, had been paid, and he produced receipts to prove this.

The answering affidavit of the applicant set forth that the applicant agreed to dispose of the hotel to the respondent for £3,350. It was agreed that £1,500 was to be paid in cash, and that for the

balance, promissory notes should be given. Applicant asserted that the respondent had suppressed the last receipt for £50, which would have shown that the respondent had actually paid more than he alleged was the amount of the purchase price.

The replying affidavit of the respondent stated that this sale was made in the presence of his late partner, one Berman, and that the price of the purchase was £2,000. The whole of this sum had been paid.

Mr. Close appeared for the applicant, Mr. W. P. Buchanan for the respondent.

De Villiers, C.J., suggested that respondent should give security for the £750, and that the parties should go into the principal case.

Mr. Close asked that respondent should also be required to give security for costs.

The Court, by consent, ordered the parties to go into the principal case, respondent to give security for £850, costs to follow the result.

ESTATE OF KAMER V. DALY.

Mr. De Waal applied, on behalf of Daly, under Rule 330, for leave to sign judgment against plaintiff, he not having proceeded with the action, as required by rule of Court.

Granted.

GENERAL MOTIONS.

Ex parte KUPFER.

Mr. De Waal moved for an order authorising the Master to accept a certain will, in which an alteration was made by petitioner before she and the witnesses signed the will. Testatrix had substituted her maiden name for her married name.

The Court granted the order.

Ex parte FULLER.

Mr. Close moved in this matter, which stood over from the previous day, pending report by the Master. A report had since been made by the Master, in which he recommended that before the application was granted, notice should be published in prominent papers in Sydney, Australia.

An order was granted in terms of the Master's report, the rule to be published for six months at intervals of a week in three Sydney papers.

SHAPIRO V. FRIEDMAN.

This was an application for an interdict, but since the proceedings were

instituted, respondent had paid the amount of the debt. The only point in dispute now was with regard to the costs. Respondent had expressed his readiness to pay the costs, but had not tendered costs.

An affidavit of the applicant was put in, to which was attached a letter, in which he asked if respondent would give his personal guarantee for costs. Friedman wrote on June 9, saying he was prepared to give his personal guarantee. On the same day that reply was made, the plaintiff wrote saying he had briefed counsel to apply for costs. Mr. Buchanan (for respondent) contended that respondent should not pay costs incurred by plaintiff after the respondent had said he would guarantee the costs, though if counsel were briefed before that letter was received by applicant he could not object to respondent being ordered to pay the costs in that connection.

Mr. Burton (for applicant) was not called upon.

Respondent was ordered to pay all costs incurred by applicant up to the date of the receipt by the applicant's attorneys of the letter of the 9th June.

ROSS V. HAZELL AND (1904.
SCHWAB. (June 10th.

Partnership—Insolvency.

The applicant and S. bought certain property for the purpose of making profit out of cottages which they built thereon. Being unable to pay the creditors who had supplied goods to the partnership, S. informed the applicant that he would have to surrender the estate of the partnership. The applicant did not pay any of the debts, and S. surrendered the estate by petition, signed by himself on behalf of the partnership. After a trustee had been appointed, the applicant applied to set aside the sequestration.

Held, that as the estate was insolvent and no benefit would accrue to anyone from an order setting aside the proceedings, the application should be refused.

This was an application for an order setting aside certain insolvency proceedings. The matter had been ordered to stand over from the previous week for further information on certain points.

When the matter was previously before the Court Ross stated, on affidavit, that he was not a partner in the alleged firm of Schwab and Ross, which had been adjudicated insolvent, and had not been served with notice of the insolvency proceedings. They were joint owners of a certain property, but further than that, they had no connection. He (Ross) was shown in the schedules as a creditor of the supposed firm for £14. A replying affidavit was made by Mr. Hazell, the trustee in the insolvent estate, in which he stated that Schwab came to him, and said he was a member of the firm of Ross and Schwab, and that the firm wished to surrender. Notice was published in the "Gazette" of the intention of the firm to surrender, and subsequently the estate was sequestrated by order of the Supreme Court. Notice of this proceeding was duly published. When deponent sent notice to one Ross as a creditor, he was not aware that this person was the plaintiff. Deponent stated that transfer of a certain property had been taken by Ross and Schwab in undivided shares, and that Ross and Schwab had given powers to pass certain bonds.

The answering affidavit of the respondent Schwab, stated that he had entered into an agreement with Ross in July, 1903, whereby they undertook to jointly purchase a property in Cape Town for £1,700. Bonds were passed, signed by Ross and deponent. There was a loss on the transaction, and he (Schwab) determined, believing that the agreement made them partners, to surrender the estate of Ross and Schwab. Other affidavits were read to the effect that Ross and Schwab had received advances on account of loans raised on the property, and had both signed receipts for same.

Mr. Burton appeared for the applicant; Mr. McGregor for the first respondent, the trustee in the insolvent estate of Ross and Schwab.

[De Villiers, C.J.: Are the creditors brought up in the schedule persons who have advanced money in respect of this property.]

Mr. McGregor said it would seem so.

Mr. Burton read an affidavit by Ross, who said he had delayed proceedings, owing to being advised by his solicitor that he should take no notice of the affair. Applicant stated that though the signature on the power to pass one of the bonds was his, he did not know the nature of the document. He denied that he had had advances on account of a loan raised on the property. He said there was no partnership, and that he was solvent, and able to pay his debts. Money had been spent on the property.

Mr. Burton said the applicant was prepared to meet all his liabilities.

[De Villiers, C.J.: That is rather vague. The point is: Is he prepared to pay the £2,300 bond?]

Mr. Burton: I suppose he is, my lord.

[De Villiers, C.J.: Before appying for the insolvency proceedings to be set aside, he should have tendered the money to meet the liabilities.]

Mr. Burton urged that there was no partnership, and that one person could not surrender another person's estate with his own. This was a joint speculation, and he submitted that Schwab could not surrender a single speculation.

[De Villiers, C.J.: The creditors must prove that the money advanced, or the goods sold, were advanced or sold to the partnership.]

Mr. Burton said that if Ross owed money, which he was unable to pay, then he should be made insolvent, but he had no opportunity of showing he was able to pay, and he should not be dragged into insolvency in this irregular manner. He submitted that Ross was entitled to the order prayed for.

Mr. McGregor urged that every element of partnership was present in this case. In the various money transactions that took place sometimes one signed and sometimes the other, thereby binding both. It was at least peculiar that plaintiff should have made such mistakes as to the signing of the bond. Why did not plaintiff not go to see the trustee when he was asked to call? In any case, he trusted the Court would hold the trustee harmless as regards costs.

Mr. Burton pointed out that the estate was voluntarily surrendered without applicant's knowledge. If applicant had known, perhaps some arrangement might have been made to avoid the insolvency.

De Villiers, C.J.: Schwab and the applicant bought certain property together, and passed a bond for the greater part of the amount of the purchase price. They then agreed that each should hold a half share in the property, and that the existing buildings should be pulled down, and two stores erected. The work was to be done under the supervision of Schwab, who was to receive wages, and the stores when completed were to be let and sold when a favourable opportunity occurred, and the profits shared. Well, that is a partnership between the two in respect of these buildings, and no creditors are entitled to anything from that partnership, except those who have advanced money to be expended on the buildings. Schwab clearly believed that there was a partnership—that the agreement between them constituted them partners, and he surrendered the estate, and states the circumstances under which the surrender took place. He states one of the creditors demanded payment. Schwab spoke to Ross about it, and Ross said he could not pay. Nor could Schwab, according to his statement, pay. Subsequently Schwab received two letters from the solicitors, and certain creditors, and he thereupon consulted Ross, who said he could do nothing. Schwab then told

him they had better surrender the estate. The creditors were pressing, and Schwab thought it would be for the benefit of all to surrender the estate, and the Court believes that that was a legitimate conclusion to come to. Schwab told the person with whom he was practically a partner that they must surrender, and then carried out what he said he was going to do. In strictness, looking at the partnership, both should have joined in the surrender, but the surrender was effected, and all the proceedings gone through. The question is whether, owing to a technical mistake having been committed the proceedings should be quashed, and everything done over again in a strictly legal manner. The applicant does not tender to pay the debts. Schwab spoke to his partner before proceeding with the surrender, and therefore the applicant knew about it. It was advertised in the papers and in the "Government Gazette," and no objection was raised by the applicant. It is possible he did not see it, but on the other hand, the object of the notification in the papers was to give notice to all concerned. I do not think any good purpose would be served by granting the application. It is for the benefit of the creditors that the whole matter should be concluded, and the application must therefore be refused. As to the question of costs the Court presumes the trustee will be able to obtain his costs out of the estate. Therefore, the Court is of opinion that there should be no order as to costs. Each party will pay their own costs, the trustee to recover his costs out of the estate.

Buchanan, J., concurred.

[Applicant's Attorneys: G. Scanlon; Attorneys for Hazell: Syfret, Godlonton and Low.]

[Before the Hon. Mr. Justice HOPLEY and a Jury.]

	1904.
ANDERSON V. CALEDON	June 10th.
BATHS, LTD.	" 13th.
	" 14th.
	" 15th.
	" 16th.

Personal injury — Negligence — Damages.

This was an action in which one Duncan Campbell Anderson sued the Caledon Baths, Limited, for £5,000 damages for personal injuries alleged to have been caused by the carelessness and negligence of the defendant company or their servants.

The plaintiff's declaration was in the following terms:

1. The plaintiff is a manufacturers' agent, carrying on business at Cape

Town. The defendant is a duly incorporated company, which carries on the business of a hotelkeeper, and is the owner of a hotel at Caledon, known as the Caledon Sanatorium.

2. In or about the month of June, 1903, the defendant by itself, its contractors, or its servants, was constructing certain alterations to the building of the said Sanatorium, and in the course of the said construction excavated a deep hole in the stoep of the said Sanatorium.

3. The said hole was on or about the night of the 19th June, 1903, carelessly and negligently left by the defendant, its contractors, and its servants, open and unguarded, and without any light or other means of notifying to persons using the stoep the existence and position of the said hole.

4. On or about the said night, the plaintiff, who was a boarder at the Sanatorium, was lawfully, and, by the invitation of the defendant, walking on the said stoep, when he suddenly fell into the said hole, of the existence of which he was unaware.

5. The cause of the plaintiff's fall was the carelessness and negligence of the defendant, its contractors, and its servants, in excavating the said hole, and leaving it in the state set forth in No. 3.

6. By reason of the said fall, the plaintiff sustained divers injuries, from which his health still suffers, endured great pain, was put to great expense for medical fees, and other expenses, was unable for a considerable time to attend to his business, and sustained other damage.

7. The plaintiff estimates the damages sustained by him as in No. 6, set forth in the sum of £5,000, but the defendant neglects and refuses to pay the said sum or any portion thereof, though called upon to do so.

Wherefore the plaintiff claims:

(a) Judgment for £5,000 damages.

(b) Costs of suit.

The defendant's plea was:

1. The defendant has no knowledge that the plaintiff is a manufacturers' agent, carrying on business in Cape Town, and denies it. The rest of paragraph 1 is admitted.

2. The defendant admits that in June, 1903, a contractor under a contract with him was constructing certain alterations to the building of the said Sanatorium, and in the course of the said construction excavated a hole of considerable depth, but he denies that it was excavated on the stoep of the said Sanatorium, and says that the hole was excavated directly in front of the bedroom of Mrs. Halls, the manageress of the Sanatorium, and that the place where it was excavated was at no time part of the stoep for visitors, but was the entrance to Mrs. Halls' bedroom.

3. The defendant denies all the allegations in paragraph 3.

4. The defendant denies that the plaintiff fell into the said hole; he denies

that the plaintiff was lawfully or by defendant's invitation at the place where the hole was, and he denies that the plaintiff was unaware of the existence of the said hole.

5. The defendant denies the allegations in paragraph 5, and says that if the plaintiff fell into the said hole it was through his own negligence and carelessness, and not through the carelessness or negligence of the defendant or the contractor, which, even if it existed, which the defendant denies, could have been avoided by the plaintiff.

6. The defendant denies all the allegations in paragraphs 6 and 7, save that he refuses to pay the plaintiff any portion of the sum claimed.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The plaintiff, in his replication, said: Save in so far as any of the allegations in the declaration are admitted, the plaintiff denies all allegations of fact and conclusions of law contained in the plea, joins issue thereon with the defendant, and again, as before, prays for judgment with costs.

Mr. Schreiner, K.C. (with him Mr. Gardiner), for the plaintiff; Sir H. Juta, K.C. (with him Mr. Upington), for the defendants.

Duncan Campbell Anderson (the plaintiff) said he acted as representative of Robert McDowall and Sons, Edinburgh, T. and H. Smith, coffee essence manufacturers, and the Hovis Bread Company. He came out here in 1902. When at Home he used to travel for the Mazawattee Tea Company. He was then an active and vigorous man. He had an accident in 1897, by falling from a dogcart, which necessitated an operation. Between 1897 and 1902 he went actively about his business. He was now aged thirty-seven years. Before the dogcart accident he had a fall from a football stand, but, apart from these occurrences, he had had good health. He was enjoying good health in June, 1903. He went to the Caledon Baths to bring back to town his father-in-law, Mr. Jackson (who was an invalid), and Mrs. Jackson. He went to Caledon from Cape Town, and arrived there on the 18th June. His intention was to come back on the following Monday, the 22nd. He had his meals at the Sanatorium. He walked down to the village from the Sanatorium. In the evening a charade took place in the dining-room, which he attended, and afterwards he wrote certain letters. He made the acquaintance of certain people. Afterwards he walked out of the west door on to the stoep, simply for a breath of fresh air before retiring. "I walked straight out," he proceeded, "along the stoep, turned round the corner, and continued straight on, until I felt myself falling into space; I dropped into a hole." Continuing,

witness said that he had not been warned of the danger from the hole, and there was no light about to indicate danger. He suffered pain about the middle of the body and above the hip, as well as about his shoulders. He took a warm bath, but could not sleep during the night, owing to the pain. Next morning he informed Mrs. Hall, the manageress, of what had occurred. Mrs. Hall was very sympathetic, and distinctly blamed somebody else for not having put the barricade up. She said that she had given orders for it to be put up some time before. That day he returned to his home at Sea Point. He was suffering acute pain. His ankle appeared to have been twisted. Mrs. Anderson called in Dr. Waterston, who examined him, and said that she thought the case was one for a surgeon. Dr. Elliott afterwards saw him. He was confined to his bed for about three weeks. He had never been as vigorous since the accident. He was lame, and mentally his activity was also impaired. He had to engage special assistance. Dr. Nairn, who was chief surgeon of the Sanatorium Hospital at Glasgow, came out and saw him on the 10th February. He had known Dr. Nairn at Home, and had been under his treatment. Dr. Nairn consulted with Drs. Elliott and Stevenson, and they operated upon plaintiff. He was laid up for ten weeks. He had never been properly restored to his former health. He was still nervous and shaky, and had been very much reduced in size and weight. He was an abstainer from liquors. He went back to Caledon in September to try the mineral baths, but only stayed seven days. He had had a return prepared of his business transactions. He established the agencies in this country that he had mentioned. Between September, 1902, and June, 1903, his gross earnings, commission, and allowance were £1,192 15s. 7d., and his expenditure was £404 3s. 7d., showing a profit of £788 12s. In the period following his expenses had increased in consequence of engaging extra travellers and so forth, and as a result his transactions now showed a loss of £170 19s. 5d. He estimated his loss of profits, due to the accident, at £871 10s., and he had also incurred the following expenses: Dr. Nairn, £100; Dr. Elliott, £54 17s. 6d.; Dr. Stevenson, £25 4s.; visit to Caledon, £15; visit to Muizenberg, £14 16s.; chemists' account, £19 19s. 9d.; nursing expenses, £24. His actual losses in money were £1,296 6s. 8d. His health was very much impaired, and his future was uncertain.

Cross-examined by Sir H. Juta: He did not remember smoking while he was at the Caledon Sanatorium. He remembered seeing Miss Venter, the housekeeper. He did not have any conversation of a familiar nature with her. He was not smoking on the stoep at the

time of the accident. Building was going on; there were additions being made to the Sanatorium. He did not see anything going on at that time. He did not see outside Mr. Jackson's room on the balcony. From that balcony it was possible to see the hole into which he fell, but he had not noticed the hole at the time of his first visit. He did not look all round the place on the occasion of his first visit. He saw the building operation going on, as he was coming up from the village. He was not on the stoep in the course of the Friday afternoon. He had not walked round the house at all before the accident occurred. He had been attending to his business in the village during the day. He returned to the house for lunch and dinner. He had been troubled formerly in his back from the old place on his right side. The fall he had formerly sustained had left him with some slight suffering. He was not smoking a cigar while he was at the Sanatorium; he could not smoke a cigar. He fell into soil. It seemed to him to be a deep hole, but he did not think it was 10 feet deep. He clambered out by getting hold of something that seemed to be a ledge, or the root of a tree. There was no light over the hole from the room of Mrs. Hall's or the maid. He recognised the position from the model produced. He might have told several people that he got out of the hole by the root of a tree; he had not told Dr. Petersen so. He did not see the room of Mr. Green-slade, the secretary. He had not, since the accident, been to see the effect of a light from Mrs. Hall's room over the hole. When Dr. Elliott called upon him, the fistula in his back was suppurating; the doctor advised him to have an operation. When Dr. Petersen saw him in July he did not recommend an operation to him. In October Dr. Stevenson advised him to have an operation. Correspondence occupying a few months took place with Dr. Nairn, of Glasgow, in regard to the suggested operation. Dr. Nairn advised him to delay, unless an operation were absolutely necessary. Dr. Nairn arrived in this country on the 10th February of this year. He received a letter from Dr. Nairn in August last. Dr. Nairn advised him not to consent to an immediate operation, as the fistula could do him no harm, unless he had been particularly damaged by the fall. Witness was damaged by the fall. He felt a little better at the time he was at the baths. The £100 he had paid to Dr. Nairn was a final payment. The money was given in the way of expenses. The question of whether he would make any further payment to Dr. Nairn did not depend on whether he won this action, or not. He had a good business. Trade had been bad, but he did not think the difference would have been so great as in any other businesses, as he was interested in foodstuffs, tea, coffee, sugar,

biscuits, and so on. People must have food.

Trade was bad during the time he started business as well as last year.

Re-examined by Mr. Schreiner: Witness had never seen the side of the stoep where he fell until the accident happened. He was not aware of any other hole than the one he fell into. He bore the situation as well as he could until Dr. Nairn could come out. Dr. Nairn was an old friend of the family. He thought Dr. Nairn would be entitled to something more if witness won the case, but there was no agreement between them. He could not say whether he would have had to engage extra assistance if the accident had not occurred.

Dr. Elliott said that he examined the plaintiff on his return from Caledon. He found the left ankle swollen, an old fistula on the right side, and pain in the lower part of the back, principally on the left side, and also above the shoulder. There were no external indications of the injury except a slight swelling of the ankle. He saw the plaintiff again on the 5th July, and he continued to be called in from time to time. About the 5th July he noticed a definite swelling just above the hip on the opposite side to the fistula. He advised an exploratory operation to be taken to see whether there was any connection between the swelling and the fistula. Plaintiff returned to his business with the swelling still there. It was evident from the plaintiff's demeanour, when he was walking, that he was suffering. On the 27th October plaintiff was examined by Dr. Stevenson and witness. The swelling had increased. Dr. Stevenson and witness conferred, and they decided it would be best to operate. Dr. Nairn came out in February; on the 10th they had an examination and consultation, and on the 11th an operation was performed by Dr. Nairn. It was found that there was no connection between the old fistula and the swelling. An operation was performed on the old fistula and the abscess. He considered that the abscess was consistent with what might result from a fall, such as had been described. The plaintiff's general health was very poor; he was suffering from nervous shock.

Sir H. Juta cross-examined the witness in some detail in relation to the medical aspects of the case. Witness said that both Dr. Stevenson and he advised the plaintiff in October that an operation should be performed. It was a simple operation, and he did not think it needed a doctor to come from Scotland to perform it. He admitted that the plaintiff's health suffered by the operation being delayed. There might have been a connection by circulation between the suppurating fistula and the injured part, though not directly. The swelling, which after-

wards formed into an abscess, increased in size between October last and February of this year.

By the Court: He thought that the chance that the fistula had something to do with the abscess was very remote indeed.

Dr. Stevenson, of Rondebosch and Cape Town, gave evidence, substantially agreeing with the last witness's. Witness said that a conference took place between Dr. Elliott and himself, and Drs. Petersen and Fuller, in regard to the case. They agreed that the abscess had been caused by the accident, but they thought there might have been some accessories, and they thought some pus might have been conveyed to the abscess.

Cross-examined by Sir H. Juta: It did not strike witness in October that plaintiff's health was very much impaired by the accident. The operation was a simple one. The operation in February had, so far as the abscess on the left side was concerned, been successful. He thought it would have been better for the plaintiff if the operation had been carried out in October.

Re-examined by Mr. Schreiner: He was not aware that people now so strongly objected to surgical operations. They were now more educated, and they did not seem so reluctant.

Mr. Schreiner: But I suppose they prefer to have pus removed by poulticing rather than the knife. Women, for instance, would rather poultice?

Witness: I don't think so; I think they are very much more plucky than men.

Mr. Schreiner: Yes, but when they are themselves the persons to be operated upon?

Witness: Oh, yes.

The evidence of Dr. John S. Nairn, of Glasgow, taken on commission on February 23, was read by Mr. Gardiner. His evidence as to the condition of the plaintiff and the operation agreed with the testimony of Drs. Elliott and Stevenson. He said that his fee in the ordinary way for coming out here would be £500.

Mrs. Jackson, wife of James Jackson, Sea Point, and mother of the plaintiff's wife, spoke to the visit of the plaintiff to the Caledon Baths while witness's husband, who was an invalid, and herself were staying there. The plaintiff had been very active in business prior to the accident at Caledon. Plaintiff did not come to Caledon for the benefit of his health, but in order to take witness and her husband home. Witness told Mrs. Hall that plaintiff had fallen into the hole, and the latter seemed much distressed. There was no question at all about any other hole. Witness knew of the existence of that hole. Mrs. Hall told witness she had given orders for something to be put up at the hole. Witness had never seen a barrier before the accident. On the day after the accident

she saw what she considered to be an insufficient kind of barrier being finished. Mrs. Hall was very kind and sympathetic, and she never said anything to witness to indicate that she considered plaintiff could not have fallen into the hole. Plaintiff was very much changed since the accident.

Mrs. Annie D. Anderson, wife of the plaintiff, said that she saw her husband on his return home from Caledon. He appeared to be very ill. Up till the accident her husband had had good health since coming out to this country, and he had been very active. Witness spoke as to the treatment to which the plaintiff was subjected for his illness. Witness said she was very adverse to an operation being performed, and she persuaded her husband not to let an operation be performed until they saw whether there was a chance of Dr. Nairn (Glasgow) coming out. The operation was performed in February by Dr. Nairn. Her husband's health and demeanour had been quite changed by reason of the accident. He grew very irritable, and could not bear any noise. Her husband was in every way different from what he was. He was absolutely changed; he could not even speak as he used to do.

James Jackson, brother-in-law of the plaintiff, said that he had been helping the plaintiff in his business. The plaintiff was in splendid health before the accident. Witness corroborated the evidence given by the last witness as to the enfeebled condition of the plaintiff after the accident. He also spoke as to the shrinkage of the business which followed, stating that he (witness) was quite new to that line, having been an engineer. When plaintiff got back to business he did not appear to have the same grasp of the details that he had had before. There were two children in the plaintiff's family. Proceeding, witness said that he went down to Caledon Baths last month in consequence of certain rumours. He had prepared a plan of the building. A corridor was now built across the stoep. The photograph now produced did not show the stoep as it was when the accident occurred.

John Henry Morris, broker and insurance manager, said he believed the plaintiff was insured in one of the companies he represented, the Law Union and Crown. The plaintiff was entered in 1901 as a first-class life.

James David Louw, chief clerk of Mr. Masterton, accountant, gave evidence as to preparing a return of the profit and loss in plaintiff's business, and the payments to medical men, etc. The account was, he said, correct according to the best of his knowledge and belief.

William Martin, general dealer, Cape Town, said he was staying at Caledon Baths in June, 1903, when plaintiff arrived. He knew the side stoep where the excavation was. There was not the slightest precaution taken on the stoep

to protect people against the hole. He heard of the accident on the morning after the accident. Out of a "morbid desire," he went at once and looked at the place. There was no barrier at that time. A person might walk right along the stoep and into the hole. There was nothing to prevent one doing so.

Cross-examined by Sir H. Juta: He had not walked along that part of the stoep at night. He had stood at the corner of the stoep at night, and had seen a light far away coming from the drawing-room. He did notice any French windows right above the excavation. He had stood close to the hole.

Sir H. Juta: Didn't you notice any marks of a struggle in the earth?

Witness: I am not a detective. Why should I look for marks?

Sir H. Juta: But you had that "morbid desire," don't you know. Didn't that "morbid desire" lead you to want to know how he got out of the hole?

Witness: No, I wanted to see how he got in.

Francis Connolly, a detective in the Port Elizabeth Police Force, said he was staying at Caledon Baths for the benefit of his health at the time of the accident. He knew the stoep where the accident occurred. He had seen the hole; he saw it about six o'clock on the evening of the accident. The excavation was then without barrier. At 10 o'clock next morning he saw the place again, and found that it was protected by a barrier.

Cross-examined by Sir H. Juta: He had not walked round the stoep at night. It was dark at six o'clock on the night in question. He knew Mrs. Halls' room. He knew there were French windows over the excavation. He could not swear whether there were shutters outside Mrs. Halls' bedroom. There might have been a dim light burning in Mr. Greenslades' room.

By the Court: He was quite sure that on the evening of the accident at six o'clock there was no barrier at the excavation. The workmen had left. He noticed no lights. He could see the hole.

John Michael Hayes, hotel proprietor, O.R.C., and formerly of Port Elizabeth, said he was staying at the Sanatorium at the time of the accident. He had often used the stoep in question. He had seen no barrier there. He had children there, and he had called Mrs. Halls' attention to the danger that there was to children. Mrs. Halls merely smiled. He saw the plaintiff about nine or ten o'clock on the night in question leaving the Charades. Some time afterwards he again saw the plaintiff, who complained that he had had a fall, and that he was injured about his ankle and back. Witness saw the hole next morning before breakfast. There was no barrier at that time. It was a wet morning. About ten o'clock he saw a barrier.

Cross-examined by Sir H. Juta: He remembered a Miss Carroll staying there. He did not know Mr. Zietsman, the member of Parliament. There was not a pole across the hole before the accident. He did not see any bits of wood on the hole. He had been over the stoep at night. The morning after the accident he went into the hole; he found it was six or seven feet deep. He got out of the excavation quite easily by means of a ledge, the same as the workmen did. There were old roots of trees or shrubs about the top of the steps. He did not know whether there were shutters at the windows of Mrs. Hall's room.

John Jones Mills, asylum superintendent at Bloemfontein, said he was staying at the baths for the benefit of his health at the time of the accident. He was often at the new buildings. He saw no barrier at the hole. If there had been two boards across the hole he would have seen them. He was prepared to swear that there was no barrier at the hole until after the accident had happened. After the plaintiff had left Caledon, witness saw one or two pieces of wood across the excavation.

Cross-examined: He had not walked on that part of the stoep before the accident, nor had he stood at the corner at night.

Robert Brodie, manager of the Salt River Co-operative Society, spoke as to the change in the condition of the plaintiff between now and prior to the accident. He thought plaintiff's business had suffered in consequence of his not being able to get about.

John Henry Pfuhl, importer, Cape Town, also gave similar evidence as to loss of business to plaintiff and the change in his condition.

Counsel having read the correspondence, Mr. Schreiner closed his case.

Caroline Mary Hall, manageress of the Caledon Sanatorium, said she remembered the visit paid by the plaintiff in June of last year. She noticed that the plaintiff had a peculiar walk. Mrs. Jackson (his mother-in-law) told witness, after the accident, certain things. Witness's bedroom was on the left of the corridor on the side stoep. She kept a lamp and two candles in her room. The lamp was constantly alight in the evening. It would be lighted about 5.30 that part of the year. Witness did not retire before 11 o'clock. She was sure her lamp was burning on the night of the accident. There was a French door to the room; she had two small green blinds inside, but no shutters. She did not draw down the blinds until she retired for the night. When her lamp was lit the light fell outside in front of her bedroom door. Witness and others made an examination of the place in April. The lamp was put in the same spot where it was on the night of the accident. The light showed the board over the hole. Wit-

ness had meanwhile changed her room. She could see the excavation from her window when she drew down the blind. The light from Mr. Greenslade's room also showed along the stoep. On the night in question two of the servants were in a room above hers, where they were packing. As to the accident, plaintiff told her that he had hurt his ankle, but he made no complaint about his back or side. She never told the plaintiff that she had given instructions about the barrier. He said that he had had an accident near her door, and that he had gone along there for a walk. There were private bedrooms along that side of the building. They did not keep a lamp there, because they did not wish to encourage people to promenade on that part of the stoep. Before the accident two poles were placed across from the verandah at the entrance to the stoep. The poles were never removed with her knowledge or consent. She went to the place after hearing of the accident, and she found that the poles were still there. It would then be between 8 and 8.30 a.m. She denied that Mr. Hayes had ever complained of the danger of the hole. There was a cement slab, about the thickness of her finger, on the stoep; it was very brittle. She found no marks as of a man having been in the hole. The cement slab had not been disturbed. She went again later with Miss Venter (the housekeeper), and yet they found no indication of anybody having been in the hole. There had been an old peach tree near, but she saw no roots lying by.

Cross-examined by Mr. Schreiner: Witness's brothers started the Sanatorium at Caledon, and it was afterwards floated into a company. Witness's brother (Mr. Walsh) was a director. He was a large shareholder. Witness also had a good many shares in the company. Mrs. Jackson told her that Mr. Anderson had had an accident somewhere in a hole outside. Mrs. Jackson did not say that it was the hole on the side stoep. Mr. Anderson told her which hole he had fallen into. She did not ask him how he got past the barriers. She asked him what he was doing at her bedroom. He said he went for a walk. It did not occur to her at the time about the barriers. She did not take Mrs. Jackson to the spot and suggest to her that her son-in-law could not have fallen into that hole. She did not like to doubt the word of visitors. She did not suggest to any of them that there had been any impropriety of conduct on the part of the plaintiff. She was certain that the plaintiff did not fall in the hole. She could not say what took the plaintiff round to that part of the building. She did not know where the plaintiff got injured. She did not draw down the blind of her room that night when

she dressed for the after-dinner proceedings. Charades were not taking place; progressive whist was being played. The lamp would be burning all the evening at full. She was not sure whether the light from Mr. Greenslade's office shone on the excavation, but it extended a good way along the stoep. She did not remember having tested a lamp over the excavation prior to the accident. She would certainly say that anybody walking on the stoep was bound to see the hole when the lamp was lighted. She did not mean anyone necessarily looking on the ground. She saw the poles across the stoep before the accident occurred; she believed they were there when the railing was removed in front of her private stoep. The poles were there for at least a month. The poles were fixed, as far as she could remember. The barrier was quite near the hole, only a few inches away. She had never at any time thought there was any blame to be attached to the contractors. She did not know that such an attitude had been taken by the Baths in a letter to the contractor's attorneys. She had never blamed the contractor. She looked over the barricade for any marks in the hole as of a person having been there.

Re-examined: She thought anyone in the hole could have seen the light from her room. The cement of the stoep overhanging the excavation about 15 inches. The edges were jagged, just as the workmen had excavated underneath. The cement was all intact; there was no appearance of anyone having broken the edges away. She did not think anybody could have fallen into the hole without breaking the concrete.

By the Court: There were a few showers during the night following the accident. It was about 8.15 a.m. when she looked at the hole. They had a dog in the hole one night, and she remembered that it could not get out, and it barked all night.

Witness, replying further to the Court, said she could not suggest any reason why the plaintiff should have said he had fallen into the hole. She did not think that he had been there at all.

Dr. Julius Petersen stated that in the early part of July he examined the plaintiff, and advised him to have the fistula operated upon. The plaintiff told him that he was finding his way from the back to the front of the house when he fell into a hole, from which he extricated himself by the means of a root of a tree. He agreed with Dr. Stevenson and Dr. Elliott that a patient going about with an abscess would get worse and worse.

Cross-examined by Mr. Schreiner: Materially, he did not differ from the evidence of the other medical men. The plaintiff complained generally of pain without specifying any particular part when witness saw him in July. He

came to the conclusion that the infection came from the fistula, and there he differed from Dr. Elliott and Dr. Stephenson.

By Hopley, J.: The abscess might have been set up independently without the plaintiff having a fistula.

John B. Greenslade, resident secretary of the Baths, stated that he remembered the plaintiff coming to the Baths. He was walking in a somewhat peculiar manner. The lights were usually put out at half-past ten o'clock. On the Friday night in question witness was sitting outside the inside bar when he saw the plaintiff come upstairs, but he noticed nothing particularly wrong about him. If anybody had fallen into the hole he would have come out of it with plenty of adhesive mud on him. When witness saw the plaintiff next morning he strongly advised him to wait and see the doctor, but plaintiff said, "I have important business, I shall be all right." He saw the two poles in the same position on the Saturday morning that they were in during the week.

Witness saw no traces of roots of trees in the hole. A person could not have fallen into the hole without breaking the cement slab in front of it.

Cross-examined by Mr. Schreiner: He sold his shares out in the company before the accident. He was positive that the plaintiff passed upstairs within ten minutes either way of half-past ten o'clock. He was not the person who suggested the theories of the defence, nor was the person who was responsible for bringing forward the little-tattle about the plaintiff's character. He was not the person who worked up the case.

There was no warning to a person that he should not walk down the stoep. Within two or three feet of the wall six rafters projected across the stoep. When the plaintiff was down at the Baths in September, he said to witness, "If your directors were to pay me £500 and sundry expenses there would be nothing more about the case." The attorneys for the defence were informed of this. It was unlikely that he (witness) would suggest £1,000 to the plaintiff to settle the case.

Norton Elam, of Caledon, proprietor of the Alexandra Hotel, said he was acquainted with the Caledon Baths. He heard of the accident on the Saturday, the day after it had occurred. Before the accident happened, there were two pieces of scantling to protect the hole; he saw the scantlings across the stoep on the day of the accident.

Cross-examined by Mr. Schreiner: He was not a shareholder in the Baths Company. He often went up there; he was interested in the concert hall which was being built. He was on that side of the stoep, and he noticed the scantling poles. The matter had been mentioned to him two or three months ago. He believed some of

the solicitors asked him whether he knew anything about it. Mr. Jacobsohn mentioned the matter to him, and asked him if he knew anything about the accident. He had had no conversation before with Mr. Walsh or Mrs. Halls. He was at the baths when he was asked the question. Mr. Greenslade introduced him to Mr. Jacobsohn. He had not talked over the case with Mr. Greenslade on any previous occasion. It was not suggested to him that he had seen any scantlings there. He did not see any rafters there.

Re-examined by Sir H. Juts: He had not the slightest interest in the case.

By the Court: He was sure that it was not the morning after the accident when he first saw the scantlings on the stoep. He was certain that he was not at the baths on the Saturday; he was certain it was on the day when the accident happened.

Louis Frederick Zietsman, M.L.A., and attorney, Cape Town, said he was at the baths in April and May of last year. He remembered the side stoep, where building was going on; he saw an excavation. He saw some poles and scantlings erected there. There were two pieces of wood across, fastened either to an upright or a railing.

Cross-examined: He had no interest in the company. If his memory served him correctly, he thought it would be about the beginning of May when he left Caledon. He did not remember the exact date. He sent a cheque on the 7th May, and he thought that must have been immediately on his return from the baths. This matter of the case was first mentioned to him by Mr. Jacobsohn on Saturday last. The scantlings and spars were being put up about the time when he left the baths; the work was not actually finished. The hole would then be about 6 feet deep, he believed. He did not remember having noticed a railing across the stoep at that time.

Re-examined: He was quite sure there were at least two poles or scantlings at the hole.

John George Walsh, of Caledon, said he was interested in the baths before it was floated into a company, and he was now local managing director. He did not live at the baths. He received on the morning after the accident a letter from the secretary reporting the accident to him. He went up with Swales, a plumber, about 8.30 in the morning. They went to the hole. Witness saw a barricade of two poles across the stoep. He also saw a lot of joists, with their ends projecting on the stoep. He saw a slab of cement towards the wall. He had not the slightest doubt about the two poles being there. Witness saw the contractor walking towards the building. He instructed the contractor that the

barricade was insufficient, and that corrugated iron should be put up, so that children could not reach the hole. He had examined the hole; there were no roots or stumps of trees near by. He did not think it possible that there could have been any roots in the portion undetermined.

Cross-examined by Mr. Schreiner: He had not investigated the hole before a letter threatening a claim by plaintiff had been received. This would be a few days after the accident happened. He did not think plaintiff had fallen into the hole. He did not see the plaintiff. He did not know where the letter was that he had received from the secretary reporting the accident. He had as many shares in the baths as his brother; they held the major portion of the shares. He did not go up to see Mr. Anderson; he wanted to fix the responsibility of the barrier. Mr. Davidson was the contractor. Certain correspondence took place between the baths' attorneys and the contractor, stating that, in case they were mulcted in damages, they would look to him.

Mr. Schreiner: You thought this was a mere attempt to levy blackmail on the company?

Witness: It is what I believe. I believe it is a fraud Mr. Anderson saying that he fell into that hole.

Mr. Schreiner: And yet no mention is made of this in the correspondence or in the pleadings?

Witness: It all puzzled me to know what he was proceeding on at all. I had seen the barricade up. I did not know what leg he had to stand upon.

Mr. Schreiner: Yet, the plaintiff went there in September, and neither you nor Mrs. Halls, nor Mr. Greenslade had the delicacy to mention it to him?

Witness: I never went near him.

Mr. Schreiner: You see, not one of these things is raised in your plea, and you put the plaintiff to proof of everything he says in his declaration?

The hole into which the plaintiff alleged he had fallen was an old cellar. Witness was convinced that if the plaintiff had gone into the hole he would have hurt his head. Plaintiff might have fallen over the tennis court; which was in front of the stoep. There were trees near the tennis court.

By the Court: The hole was originally a cellar. The walls were still in good condition, and did not bear a crack. It was filled up with loose rubbish and stones, and with a covering of cement had formerly been made into a stoep. He was sure there could be no tree roots in it. The company's position was that if there had been no barrier, or there had been a bad barrier, then the responsibility was upon the contractor.

Richard Swales, plumber, Caledon, said that he was working at the Baths building on the day when the accident happened. He distinctly remembered hav-

ing seen two scantlings across the stoep near the hole. He did not think anybody who fell into the hole would be able to get out unaided. He had had frequent opportunities of seeing the place. The light from Mrs. Halls' windows shone on the excavation.

Wm. George Cowdrey, of Caledon, said that from April to October last he was employed as foreman bricklayer by Mr. Davidson at the Baths. He knew the excavation in question. They were digging a hole to put two cross walls in. At the time of the accident it was about 5 ft. 9 in. deep. He remembered his younger brother having been in the hole. It was perhaps a fortnight before the accident. His brother could not get out, and he had to be assisted out. When they built the wall there were no roots in the hole. There was no reason why the workmen should go in after the excavation had been made. It was partly witness's duty to see that the hole was protected. There were two scantlings across the stoep, placed in a slanting position. There was a portion of cement overhanging the excavation. He went to the place on the morning after the accident, about half-past nine. The barriers were still there; the cement did not seem to have been disturbed. It was impossible to have walked on the cement slab without its having collapsed. He had passed in front of Mrs. Hall's room many a time in the evening; he did not remember an occasion when the room was not lighted. There would be sufficient light from Mrs. Halls' window for anyone to see who walked along the stoep.

Cross-examined by Mr. Schreiner: He had not been in the employ of Mr. Davidson for seven or eight months. He was now in business with his brother at Caledon. He had not since been employed at the baths; he had not laid a brick for them yet. He showed to some of the plaintiff's witnesses about a month ago that the cement slab would not bear his weight. Certain joists were moved up to the stoep on the day of the accident. Some of the joist ends were placed across the stoep. If a man walked close to the wall he might still go by and keep clear of the joists. The joists were intended for the new concert hall. He went there the following morning expecting to find the man in the hole. He went up with Mr. Davidson, because, he thought, the man had just fallen in, and he expected to assist to get him out. He thought his employer (Mr. Davidson) was joking at the time.

Re-examined by Sir H. Juta: The corrugated iron was put up on the stoep on Saturday morning, after the accident.

Wm. Arundel Creden, masseur and medical electrician, said he had been employed at the Caledon Baths. He saw the plaintiff at the Caledon Baths on the morning after the accident. He looked

at the plaintiff's ankle; he failed to see any discolouration. He advised plaintiff to lie in bed until the doctor came. He had frequently seen the excavation. He remembered poles being put up at the excavation about a month before the accident. He looked at the spot on the day after the accident, but failed to observe any signs of a disturbance of any kind. He did not think anybody walking along the side-stoep in the darkness would be able to go into the hole without breaking the cement.

Cross-examined by Mr. Schreiner: He left the employ of the Baths about the end of 1903. He saw portions of the joists projecting on the stoep several days before the accident. He was at present doing work for Dr. Thompson, but he was shortly starting business on his own account. He had an office in the Cape Times Buildings. He saw poles at the hole on the day of the accident.

John Hunter Mitchell, retired publican, of Sea Point, said he knew the plaintiff, and he remembered the latter boarding with Mrs. Robertson at Sea Point. Plaintiff was ill about a fortnight or three weeks. He did not know whether it was before or after June; it was before. Witness went to England. Plaintiff said he had a bad cold, and Mrs. Anderson said he had an old complaint in his back.

Mr. Schreiner objected that the plaintiff or his wife had not been cross-examined on this point, and said that he would have the right to call rebutting evidence.

Sir H. Juta said he quite recognised that.

Cross-examined: Witness believed that plaintiff was suffering from diarrhoea at the time. He did not hear any mention of a fistula.

Re-examined: The plaintiff groaned when he turned over.

Mrs. Bella Swales said that she was in service at the Caledon Baths in June last year. She had to look after the room occupied by the plaintiff. There was a balcony near, from which one could look out on the stoep and the excavation. Plaintiff's father-in-law and he were sitting together on the balcony. Witness was in her room, over Mrs. Halls' room, all the evening of the accident, from half-past eight. Witness and Mrs. Parrish (the housekeeper) were packing. They did not hear a sound. The light from Mrs. Halls' room shone on the hole. She noticed two poles and a piece of string on the stoep on the afternoon of the accident. Next morning, about 10 o'clock, she went out on the stoep to see whether there was a ladder from the stoep to her window.

Cross-examined by Mr. Schreiner: There was a Scotch mist on the day of the accident, and yet Mr. Jackson, who was an invalid, was sitting on the balcony at four o'clock. The plaintiff treated her in a respectful way. She did not think

he was given to light thoughts. Nobody suggested to her that he might have been climbing to her room; the thought came from herself. She had heard that he was asking that she should go out for a walk with him. All that the plaintiff said to her was "Good morning."

Charles Maloney said he was a miner in the employ of De Beers at Kimberley. He was staying at the Caledon Baths between April and July of last year for the benefit of his health, as he was suffering from rheumatism. He used to sit at the corner of the front stoep, and he had an opportunity of seeing the excavation. Two boards were put up on the side stoep near the hole. The poles were there when the side wall was erected. On the morning after the accident he went to sit at his usual place. He saw that the poles were still there.

Cross-examined by Mr. Schreiner: He was now living in Cape Town. He was still weak, but he was better than he was last year. He was first asked about this case on Tuesday afternoon. He was seen by Mr. Greenslade. He had not seen the reports of the case in the papers, because he was unable to see well enough to read. He used to have a temporary bed on the east side of the building. He sat on the other side in the afternoon, as a rule. He sat at the cold corner on the morning in question for a short time. He did not remember whether it was wet on that morning, or whether it had been wet during the night.

Re-examined: He met Mr. Greenslade on Tuesday afternoon in Adderley-street. He was sure that the poles were across the side stoep before the accident.

By the Court: The poles were not put up as soon as they began excavating. He could not say exactly when the poles were put up. He noticed two or three short pieces of timber lying along the verandah. He could not say whether the poles had been removed to allow the timber to be brought on the stoep, but the barriers were there at ten o'clock on the morning after the accident.

Maria B. Venter, chief housekeeper at the Caledon Baths, said she knew Mrs. Halls's bedroom, and she also knew that it was the custom of Mrs. Halls to keep a light burning in her room in the evening. Two poles or rafters were across the side stoep prior to the accident. She was positive that the barriers were there. She was certain that the poles were there on the 1st June, because on that date she had just returned from her holidays. She remembered seeing Mr. Anderson about ten o'clock on the night of the accident. Witness then took some medicine to a bedroom, and when she came back, the plaintiff asked her where he could get some stamps. She got some stamps

for him; he posted the letters, and then went out by the front door. Plaintiff was smoking. She heard of the accident on the following morning before eight o'clock. She went out a little after nine o'clock, and looked at the hole. The poles were still there. The cement overhanging the excavation had not been disturbed.

John Davidson, contractor, Caledon, said he was engaged on the alterations at the Baths last year. The plaster model (produced) of the side of the building was made under witness's instructions and supervision. He described the operations at the stoep in question. There were no roots or shrubs in the hole. Two boards were put up on the stoep to prevent anyone falling into the excavation; these were put up about four weeks before the stated accident. The object was partly to protect children who were playing on the stoep. Those boards were never, to his knowledge, or by his instructions, removed. He went up on the morning after the accident, and, on Mr. Walsh's advice, he nailed corrugated iron to the boards. He would swear that he did not put up the poles for the first time when he put up the corrugated iron. He went to the spot between 8.45 and 9 a.m. on the day following the accident. He examined the hole, but saw no signs or marks of anyone having been down there. He looked for a cigar, as he had been told that the man had been smoking. The soil was black and sticky; the depth of soil was 3 or 4 inches. A man could not have got out of the hole without breaking down the cement. There were also heavy joists projecting on the stoep.

Cross-examined by Mr. Schreiner: The model was not made to scale. The width of the side stoep was 8 ft. 3½ in. He would not say that the cement slab as shown in the model was correct according to scale. He admitted there was an inaccuracy in the model as regarded the soil shown at the side of the hole. The wall in front of the hole had been finished about ten days before the supposed accident took place. The workmen would have to go into the hole in order to build the wall. He did not see any bits of cement lying in the hole.

Mr. Schreiner: You feel if this matter goes in favour of the plaintiff it is a matter that concerns you?

Witness: It is a matter of law.

Mr. Schreiner: I don't want you to prejudice your position. You have had these demands made upon you?

Witness: Yes.

Further cross-examined: He was sure that the poles were put up not less than four weeks before the accident. Mrs. Halls spoke to him about putting up some barriers.

Mr. Schreiner: I put it to you that you supervised the putting up of that barrier on the morning after the accident?

Witness: I did not.

Further cross-examined: He did not actually supervise the erecting of the corrugated iron on the day after the accident.

Sir H. Juta closed his case.

Mr. Schreiner said that if they were to take the theory put forward by the defence of a conspiracy on the part of the plaintiff to blackmail the Baths, then they must conclude that a man like Anderson, with a good business, was a dreadful sort of person, but if they thought he was a conspirator, then was it unlikely that he would have had a confederate? It was not the action of a conspirator to walk quietly to bed and say nothing about the accident. They were asked to believe first of all that the plaintiff did not fall into the sluit, and, secondly, that he could not do so, because of the barriers, but they would remember that it was only when Mr. Greenslade came into the box that they heard of anything about joists. Did they notice how the witnesses for the defence, after hearing Greenslade's evidence, came forward with ready resource and spoke of the joists? If they were going to find his client guilty of a conspiracy they must also find that he was absolutely perverting the truth; that he simply had no injury whatever. It was difficult for Mr. Walsh to see that the plaintiff was making an honest claim after he had been inspired, no doubt, by the gentleman, who patted Mr. Moloney on the back on the previous day. Could they believe the evidence of the girl who said that the plaintiff winked at her at the table, or did they believe that the plaintiff arriving only on Thursday night pushed against her in the corridor? If they dismissed these cock-and-bull stories they would have to believe the plaintiff on his oath.

Through a failure of memory, he omitted to call the plaintiff and his wife on the points raised by the evidence of Mr. J. H. Mitchell. With the indulgence of the Court, he should now like to put a few questions to Mr. and Mrs. Anderson.

No objection was raised.

The plaintiff was then called, and said that when he came to Cape Town he first stayed at Milner Hall, Sea Point. Before he left there, he had a slight attack of diarrhoea. That continued off and on when he boarded at Mrs. Robertson's. He was not obliged to take to his bed. Mr. Mitchell called late one night in June, 1902, when witness had gone to bed. That was the only occasion when Mr. Mitchell saw him in bed. Mrs. Anderson did not say, "That's his old complaint." He had not to call in a doctor.

Cross-examined: It was not true, as Mr. Mitchell alleged, that he used to come to his (witness's) boarding-house two or three times a day when he was ill.

The plaintiff's wife said that her hus-

band was not laid up by the illness described by Mr. Mitchell. She made no remark about the old complaint.

Cross-examined: She never spoke to Mr. Mitchell about the fistula. Mr. Mitchell might, perhaps, have heard it mentioned in conversation.

Mr. Schreiner then said he wanted the jury, where they had this conflict of evidence, to classify the testimony. He urged that the evidence given by Mrs. Jackson (mother-in-law of the plaintiff) was extremely strong corroboration of Anderson's account. Her evidence did not suggest for a moment that she was conspiring with the plaintiff. Four of the people who were visiting at the hotel had said distinctly that there were no barriers at the time of the accident. They were direct and positive in their evidence. The best evidence, he contended, would be, not the persons who were interested in the case, but the visitors at the baths. The only visitor called for the defence who was there at the time of the accident was the witness called that morning, Maloney. It was a most extraordinary circumstance that the defendants had not brought a single visitor who was staying at the baths at the time, except Mr. Maloney. Counsel proceeded to criticise the evidence given by Mr. Elam (of the Alexander Hotel, Caledon), and urged that he had been mistaken in fixing the day of the accident as the occasion of a visit which he paid to the baths. He commented on the disparity between the evidence of Mr. Zietsman, M.L.A., and Miss Venter in regard to the state of things at the side stoep early in May. Mr. Zietsman had said that the excavation had been begun when he left the baths early in May, and that he sent a cheque on the 7th May on his return to town. Then Miss Venter, upon whom the defendants' case hinged, came and told them that she went on holidays on the 6th May, and told them how surprised and disappointed she was when she came back to find that the stoep had been broken up, so that, presumably, the excavation had not been begun when she left. He asked them to disbelieve the evidence of Miss Venter, who had brought this trumped-up idea of a man making proposals to her for the first time in her life. Dismiss that, and the whole of this attempt to defend what was a perfectly just claim on the part of his client broke down entirely. He submitted that the conclusion the jury must come to was that this story of Miss Venter's was not to be believed. A deep-laid scheme of the most extraordinary character was charged by the defence against the plaintiff. The plaintiff was now practically on his trial, and if the defence were believed, then they practically found plaintiff guilty of the crime of perjury and of attempt-

ed conspiracy and fraud. In face of the evidence given by Mrs. Swales, how could they accept such testimony as had been given by Miss Venter? They had seen how the points in the defence had been dropped here and there. He commented strongly on what he described as the "cigar theory" of Mr. Davidson. There had evidently been a busy mind at work that very morning after the accident to prepare to meet the claim for damages that would manifestly arise. The case for the defence was built up on tittle-tattle, and they knew that from ancient times there was no place which was so full of tittle-tattle and scandal as a place of that kind. Counsel next dwelt upon the medical aspects of the case, and then addressed the jury on the question of the measure of damages to be awarded. He urged that it was reasonable that the plaintiff should have deferred the operation until the old family practitioner should arrive from Scotland. Surely it was not to be said that a man should immediately submit himself to the knife of the surgeon. Counsel next called the attention of the jury to the account of the plaintiff's business, and the gradual growth that it disclosed during the ten and a half months prior to the accident. He asked them to believe that the return was a fair test of what would have gone on under normal circumstances. Plaintiff made £83 profit per month while he was well, and then, in the subsequent period, his business showed a loss of £170. The plaintiff's claim consisted of £871 10s., estimated loss of profit for 10½ months and other items, bringing the total to £1,296 6s. 8d., in the way of medical and nursing expenses. But where in those figures did there come in the suffering, the destruction of life as it was, the loss of activity, the loss of nerve, the loss of business power? The man stood crippled before them, and he pleaded with the jury to award substantial damages. Counsel urged that the plaintiff had suffered singularly in the way in which he had had to prove his case. He called attention to a recent case in this court in which £3,000 damages had been awarded.

Sir H. Juta drew the jury's attention to several of the circumstances connected with the previous case of damages. He contended that counsel on the other side had in his excess of zeal not put that previous case to the jury in a fair light. In this case the question was not whether the plaintiff had met with an accident, but whether he had met with an accident owing to the defendants' negligence. The plaintiff had to prove that he met with an accident in this particular excavation. The jury would have to be satisfied that it was this hole into which he fell. The defendants also said that the accident was due to

plaintiff's own negligence. The jury would have to find, if they gave a verdict for the plaintiff, that it was owing to the negligence of the defendants that the plaintiff met with the accident in this hole. It was not denied for a moment that he fell somewhere. This was not a case in which all the witnesses were contractors and persons employed about the place and interested in the litigation. But he submitted that by far the larger number of witnesses called by the baths were not now in the employ of the baths. The baths had said all along to Davidson—and he recognised it—that if this case were going against the baths, the baths were going against Davidson. The baths were only the nominal defendants in this case. It was not really a question between the baths and the man, but between the contractor and the man.

Hopley, J., said he would like to know what ground counsel had for putting the point so strongly to the jury?

Sir H. Juta said that he admitted that the contractor did not acknowledge liability, but the matter had been put to him in that way by the Baths. Proceeding, he commented on what he described as the very extraordinary conduct of the plaintiff subsequent to the occurrence. He alluded to the delay between the plaintiff being advised to have an operation performed in October and the operation carried out in February. They had the letter from Dr. Nairn to the plaintiff, in which he said: "The mere fistula or abscess could do you no possible harm by waiting, unless you have been particularly damaged by the fall. Don't undergo any operation whatever, if you feel yourself improving. If the doctors say you require an operation immediately, let them clearly and definitely say it is owing to the injury that you have just now received, and that they are prepared to back you up, otherwise no operation."

"Now that's not playing the game, to say the least of it. Unless the doctors will back you up and say it was owing to the accident, go on getting worse—wait. Why? In order to show that he was suffering badly. Surely the common-sense thing would have been to have the abscess removed." Continuing, counsel observed that the strangest part to his mind was Dr. Nairn's coming out. As to the plaintiff's conduct, he did not think it was the straightforward conduct of a man who, having met with an injury, did what he could to repair the effects of the injury, and then came to Court with a claim for damages. The plaintiff had done nothing of the kind. The conduct of the plaintiff in delaying was absolutely contrary to what every ordinary straightforward man would do. When a man had, through his own wilful blindness to follow the advice which he went himself to seek, then he had only

himself to thank for his suffering. Who knew how fit he might have been today, if he had had that abscess removed in October? Continuing, counsel commented on the extraordinary conduct of the plaintiff at the hotel. Bar his statement, he submitted that there was not a tittle of evidence to show where the plaintiff went that night when he went out of the baths. He commented on the fact that the plaintiff never called out for assistance. He laid stress on the evidence given as to the lighting of the lamp each evening in Mrs. Hall's room over the excavation. Yet the plaintiff had told them that he saw no light. The plaintiff might have believed he fell in there, but he might be mistaken; and it was not a question of perjury, and so on, as his learned friend had suggested. He did not pretend that the plaintiff had not hurt his foot. Mr. Walsh said that the plaintiff could not have fallen down that hole; he did not say that the man had not hurt his foot. He wished the jury to ask themselves whether it was this particular hole that the plaintiff fell into, whether he was unaware of its existence, and whether he was himself to blame if he fell into that hole that night. On the question of the presence of a barrier, counsel remarked on the difference of character between the evidence of a person who said definitely he saw a certain thing, and another who said he did not see it. The former was either speaking the truth or committing perjury; but the latter, although a certain thing was there, might say that he did not see it, and yet be speaking the truth. Counsel proceeded to allude to the evidence, and confessed that he did not know what Mr. Hayes went into the hole for. In Mr. Hayes' zeal to help his friend he had gone a bit too far. According to the hypothesis of the plaintiff, that the place was in darkness, was it not likely, if that were the case, that he would have walked carefully? If there were no barrier, why did the plaintiff's witnesses want to know how Anderson got into the hole? It was ridiculous to suppose that Miss Venter would have concocted a most cruel and deliberate lie for the purposes of this case. To put it mildly, counsel suggested that the whole of that part of the evidence showed that the plaintiff was having a lark with the girls, and in all probability that induced him to walk away from the stoep. On the whole of the evidence before the jury, counsel contended that the plaintiff must prove that he walked into the hole, and that it was not guarded, and supposing they thought somebody removed the barriers, before they could make the defendants liable they must be satisfied that the removal took place with the defendant's knowledge. If the jury was against him, he would ask them on the question of

damages to think of how the plaintiff had injured his own business, and how he had ruined his own health, and so destroyed his chances of recovery.

Mr. Schreiner, in reply, remarked that counsel on the other side had placed before the jury some very clever arguments, but those arguments, he ventured to think, would not weigh with the jury. He contended that the company were the real, and not the nominal, defendants, as had been alleged by the other side. There would be important legal points involved in this question as to whether the company could recover from the contractors. Negligence, as had been said by his learned friend was the basis of the case. He submitted that it had not been proved that any barrier had been placed on the stoep as a protection against the excavation. As to the animadversions which had been made on the plaintiff's conduct, he urged that the plaintiff had allowed a natural delay to take place before he underwent the operation in February, the man very properly desired to avoid what might be an unnecessary operation, and he was quite justified in delaying the matter. He submitted that the conduct of the plaintiff on the night of the accident and the following day was not the conduct of a conspirator or blackmailer, the defendant company. They could not theorize on this matter; the simple fact was, as had been said by the plaintiff, that he walked out on the stoep and fell into a hole. The defence, again, was based largely on suspicion. They had the statement of Mr. Davidson that he looked in the hole for a cigar. The suddenness and adroitness of the scheme was significant. It seemed to have been anticipated from the outset that the claim for damages would be brought, although nothing was said about a claim until a few days after. In regard to Miss Venter's evidence, he did not see how that could be believed, for it was too utterly incredible. He was surprised to hear his learned friend suggest to the jury that they need not find the plaintiff to be a liar, but that they could find that he fell into some other hole. They had had, he insisted, an attempt made for several days past to prove the plaintiff to be a liar. If the plaintiff were not to be believed in the definite statements which he had made as to what happened on that night of June, 1903, what other conclusion could they arrive at than that he was a liar? Counsel proceeded to deal with the question of the lighting of the excavation from Mrs. Hall's room, and designated the theory set up by the other side as absurd. He commented strongly on the failure of the defendant company to disclose the letter sent by Mr. Greenlade (secretary of the Baths) to Mr. Walsh (the local managing director) on the morning after the accident. In conclusion, he submitted that the plaintiff was entitled to exemplary damages, and con-

tended that a sickly trail of suspicion and fraud had been cast over the plaintiff's conduct, and that the matter was one of immense importance to him.

Mr. Upington said that, with the permission of the Court, he would like to mention that counsel for the plaintiff had laid great stress on the point that the barriers were put up on the morning after the accident. He would remind the jury that the witnesses for the defence had not been cross-examined on that point.

Hopley, J., said he would like to put a question to the plaintiff.

Plaintiff then came forward, and was asked by his lordship which of his ankles was damaged by the accident. He replied that it was the left.

Hopley, J., dwelt on the extremely protracted nature of the trial, and the zeal and thoroughness with which the learned counsel in the case had brought out every point. Sir H. Juta had said that this was not really a case between the plaintiff and the Baths, but rather between the plaintiff and the contractor. He failed to see how or why the learned counsel should have said that. As far as they knew, there had been no attempt to shift the responsibility from the Baths' proprietors on to the shoulders of the contractor. It was true that there had been threats. The defendants, he thought, had made it extremely difficult, by the way of their defence, to cast the liability upon the contractor, Davidson. Alluding to the marked conflict in the evidence, he urged the jury to strip away from their mind the present surroundings as far as possible, and to take their thoughts to the Caledon Baths, and what happened there on that night in June last year, and to carefully weigh the circumstances and the probabilities. The whole defence amounted to this, that the plaintiff was a fraudulent swindler. They had to ask themselves whether the plaintiff and his connections were such that he was likely to be such a fraudulent person? Coming to the happenings at the Baths, he said the first point was, was the plaintiff injured at the Baths? The main question was, was that injury—if he did sustain such injury—due to the negligence of the defendant company? The question, it seemed to him, divided itself into two parts: Firstly, did the plaintiff fall into that particular hole, and, secondly, did he fall into it, because it was not properly guarded? A point that should weigh heavily with the jury was that the plaintiff on the very next morning told everybody that he fell into the hole on the stoep. His lordship commented on the fact that at the very outset the affair was treated by the company as of such importance that a letter was immediately sent by the secretary to the local managing director. The point remained that there was no other hole on the stoep, that the plaintiff swore that he was never

off the stoep, and that on the day after the accident nobody inspected any other hole. His lordship then addressed the jury on the question as to whether there was a barrier on the side-stoep on the day of the accident, and observed that it was evident somebody was lying in this case, and it was for the jury to say whom. The jury must judge by the acts and attitudes of the parties at the time, and on the spot. The learned Judge entered in some detail into the various aspects of the evidence, and put it to the jury why the four visitors called on behalf of the plaintiff should have given perjured evidence? He did not see why they should. If they were to be believed, then the hole was not protected. A great point in the case was, was there a barrier? If so, then the plaintiff's case broke down. He next directed the attention of the jury to the question of whether there was contributory negligence on the part of the plaintiff. Legally speaking, he thought the plaintiff was "invited" on the stoep. His lordship referred at some length to the nature of the plaintiff's injuries, and the measure of damages.

The jury found for the plaintiff, and awarded £1,000 damages.

Mr. Schreiner moved for judgment accordingly, and specially applied for costs as, between attorney and client.

Mr. Upington opposed the latter part of the application.

Hopley, J., said he could not see his way to grant the order for costs as between attorney and client, but he thought the expenses of witnesses from a distance, who had been waiting, should be allowed, and he should direct the Taxing Master accordingly. Judgment would be for the plaintiff for £1,000, with costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Walker and Jacobssohn.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

BASSON V. BASSON. { 1904.
June 13th.

This was an action for divorce brought by the wife, Catherine Sophia Caroline Basson.

The plaintiff married Stephan S. Basson in community of property at Port Elizabeth in 1883. Subsequently he deserted the plaintiff, and lived in adul-

try with a woman named Mary Ann Talmarke, at Albert-road, Woodstock. Plaintiff now sued for divorce, with forfeiture of the benefits in community.

Mr. Williams for plaintiff; Defendant in default.

Catherine Sophia Caroline Basson was called, and stated that she was married to the defendant in 1893. Her married life was always unhappy, and several years ago her husband left her and went to live with the woman Talmarke. Witness had been to the house, and had seen her husband and Talmarke.

W. T. Birch, clerk in the office of Mr. W. B. Shaw, deposed that he had written to the defendant claiming damages on behalf of a certain woman for seduction and breach of promise. Defendant had admitted his liability.

A decree of divorce was granted as prayed, with costs.

HEYDENRYCH V. JEFFERY.

Principal and agent—Promissory note—Payment to agent.

J. had engaged one S. to raise a loan. S. approached H., who advanced the money on J.'s promissory note, "payable to H. or order at S.'s office." J. paid the money to S., who, before paying it over to H., became insolvent. H. now sued J. on the promissory note.

Held, that H. was not entitled to recover.

This was an action for the recovery of £105, being the amount of a promissory note with interest *a tempore morae* and costs. The defence was that the amount of the note had been paid to Scott, in accordance with a condition endorsed on the promissory note that payment should be made at Scott's office. The note reads as follows: "Cape Town, October 15th, 1902. On the 5th day of November next I promise to pay to B. G. Heydenrych, or order, at James Scott's office, 10, St. George's Hotel Chambers, St. George's-street, Cape Town, the sum of one hundred and five pounds sterling, value received.--(Sgd.) T. JEFFERY."

The plaintiff's declaration was as follows:

1. The plaintiff resides at Observatory-road, and the defendant at Fairfield, both in the Cape Division.

2. On or about 15th October, 1903, the plaintiff lent to the defendant the sum of £100, and received from the defendant in respect of the said loan the prom-

issory note made by defendant (copy of which is hereunto annexed), and which the plaintiff prays may be considered as inserted herein.

3. The defendant failed to pay the note on the due date thereof, and still neglects and refuses to pay the same.

4. Alternatively, the plaintiff says that on or about the 15th of October, 1902, he lent to the defendant the sum of £100, for which the defendant was to pay him the sum of £105 on the 15th November, 1902.

5. The defendant has failed to pay the said sum of £105, and still neglects and refuses to pay the same or any part thereof.

Wherefore the plaintiff claims:

(a) Payment of the said sum of £105.

(b) Interest thereon *a tempore morae*.

(c) Alternative relief.

(d.) Costs of suit.

To this the defendant pleaded:

1. He admits paragraph 1.

2. As to paragraph 2, he admits that on the 15th October, 1902, the plaintiff, through his duly authorised agent, one James Scott, lent to the defendant £100, and the defendant delivered to the said Scott in respect of the said loan the said promissory note.

3. As to paragraph 3, save that he admits that he did not pay the whole of the note on the due date, he denies the allegations in the said paragraph, and says that he has paid the amount of the said note as hereinafter set forth.

4. On the 15th November, 1902, the due date, the defendant paid to the said Scott at his office for the plaintiff, the said Scott being the agent authorised by the plaintiff to receive the amount of the said note, and his office being the place of payment prescribed in the said note, the sum of £4.

5. The said Scott being duly authorised in that behalf by the plaintiff, agreed to extend the said note for the payment of the balance until the 29th November, 1902. Thereafter on the 29th November, 1902, the defendant paid to Scott at his office for the plaintiff the balance, £101.

6. As to paragraphs 4 and 5, the defendant admits that on the 15th October, 1902, the plaintiff, through his agent, lent him £100, and says that the plaintiff received in return for the said loan the said note, which note has been duly met, as hereinbefore set forth. Save as above, he denies the allegations in paragraphs 4 and 5.

7. If this Honourable Court should find that Scott was not on the 15th and 29th November, 1902, the agent of the plaintiff to receive the aforesaid payments, the defendant says that the plaintiff represented and held out to the defendant that the said Scott was and continued to be his agent to receive payment, and did not notify the defendant that Scott had ceased to be his agent until the 24th August, 1903, prior to which date—

to wit, in or about May, 1903, Scott absconded and his estate was sequestrated. The defendant, acting on the said representation and holding out, paid the amount of the said note to Scott as hereinbefore set forth, and by reason of the premises has lost all recourse against Scott, and the defendant says that by reason of the said representation and holding out the plaintiff is estopped from claiming from him the amount of the said note.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

To this plea the plaintiff made the following replication:

1. As to paragraph 2 of the defendant's plea, the plaintiff admits that a cheque for £100 payable to the defendant was handed by the plaintiff to the said Scott, who delivered to the plaintiff the said note, but the plaintiff denies that the said Scott was his agent in the matter, and says that the said Scott acted therein as the agent of defendant.

2. As to paragraph 4 of the plea, the plaintiff has no knowledge of any payment made by the defendant to the said Scott, and denies that the said Scott was ever authorised by him to receive, or ever received any moneys on his behalf.

3. As to paragraph 5, the plaintiff admits that an extension of time was granted by him to the defendant for the payment of the sum of £105, but says the said extension was granted upon the request of the said Scott acting as the defendant's agent. The plaintiff has no knowledge of the payment alleged to have been made by the defendant to Scott, and denies that the said payment was made on the plaintiff's behalf.

4. Save as above set forth and save as to admissions, the plaintiff joins issue with the defendant upon his plea, and again prays for judgment as claimed with costs.

Mr. Moltend for plaintiff; Mr. W. P. Buchanan for defendant.

Onus of proof resting on the defendant.

Mr. W. P. Buchanan calls

Thomas Jeffery, who states: I am the defendant in this case. I live at Parow, and have been there for 2½ years. I am well known in Cape Town and the suburbs as a builder. I signed the promissory note in question. About October I was trying to raise a loan on some property, and I was introduced to James Scott by James Scales. Scott said he could get the loan. He did not say from whom he would get it. He said he had one or two clients he would be able to get it from. I then left him the transfer deeds of my property. About a week or fortnight after, I went back, and he told me he had not raised the loan, but would do so within a day or two. I said I wished to meet certain bills, and asked him to let me have £100 on account. He said he had not got it

in cash, but would get it from one of his clients. Either that same evening or next morning he handed me a cheque and gave me a receipt, as I thought it was, to sign. I had never seen a promissory note before, and had had no transactions in connection with one. That is my signature to the promissory note produced.

By the Court: I promised to repay the money within a month's time, as I thought the loan would then be through.

Examination continued: I cannot say what time of day this was. I got the cheque before I signed the receipt. I think I got the cheque in the afternoon, and I hurried to the bank at Woodstock and paid it in. I went to the bank with the cheque on the same afternoon as I received it. It is so long since I cannot say for certain. The amount became due on the 15th November, a month afterwards. I could not pay at that time because the loan had not been put through, and I asked Scott to extend the time for a fortnight. He said he would see his client. I called in again and he said I could have the extension, but he was a bit short of ready money, and asked if I could let him have a few pounds, and which case he would get me the extension of time. I happened to have £4 in my pocket, and I gave it to him. I got no receipt for that. I got the cash on the loan inside the fortnight, and I repaid Scott for the temporary loan by cheque. The cash on the loan was paid to me direct by the lender. The cheque produced is the one I paid to Scott. It is in the handwriting of Scott, but the signature is mine. I asked him about the promissory note or receipt, as I thought it was at the time. He said, "I have not got it, but will let you have it to-morrow." I called twice after this, but he had not got it, and he then promised to send it by post. I never received it. I heard nothing more until after Scott had left, when I had an application from plaintiff. I often saw Scott after I had paid him, and thought the matter settled. I came to know plaintiff by getting into conversation with him when he was speaking to a friend of mine. I saw him several times afterwards, and we wished each other "Good day," but he never mentioned the matter of the promissory note. I asked Scott on the day he left to speak to me, but he said he had no time.

Cross-examined by Mr. Moltend: I asked Scott for the promissory note thinking it was a receipt. If I have paid money and have previously given a receipt, I want that receipt back. I did not think it of great consequence that I should get it back. This was the first bill I ever had to my knowledge. I had not got to meet bills, but I had paid out cheques knowing there was not enough money in the bank to meet them, and I wanted to pay this money in so

that the cheques would be honoured. The loan was for £1,500. I placed the matter in the hands of Scott, and he raised the loan for me. I was in urgent need of the £100 when I asked for it. I only signed the receipt after the cheque was given me. I remember making an affidavit in the previous proceedings (see 13 C.T.R., 866, in which I said I received a cheque for £100 from Scott. It was plaintiff's cheque, but Scott was writing a cheque at the time, and when he handed me plaintiff's cheque I thought it was the one he had just been writing. I just put the cheque in my pocket, and did not look at it until I paid it over the counter at the bank. I looked through a portion of the promissory note, but did not read it carefully. I cannot say on what day I went to ask for the extension. The letter produced was written by Mr. Scott, and I signed it.

Re-examined by Mr. W. P. Buchanan: As soon as I got the cheque I went to the Woodstock Bank and paid it in.

Further examined by Mr. Molteno: I cannot remember what amount I paid Scott for raising the loan. I paid him the £101 by cheque, and the £4 to settle the matter of the temporary loan. Scott found me a man to give the loan on the bond. I cannot say whether I paid Scott anything. I cannot carry accounts in my head for years.

Further re-examined by Mr. W. P. Buchanan: The £4 paid was part payment of the £105 due on the £100 loan. Mr. Hofmeyr gave me the loan on the bond. I paid Scott the £105 for the £100 loan, but nothing to Scott himself as agent for getting the loan from plaintiff.

Mr. Buchanan closed his case.

Benjamin Godlieb Heydenrych, states: I am the plaintiff, and am a financier carrying on business in Cape Town and Observatory-road. I remember Scott applying on the 15th October. He met me at Steer's office and said he had a man who wanted an urgent loan, and asked if I could discount a bill for £105. He said he was raising a loan of £1,500 on a bond, and when this was done Jeffery would repay the £105. I agreed to give him the money. He handed me the papers, including a power of attorney to sign a covering bond to me for £150 if the bill was not met. I came back in the afternoon and then gave the cheque in favour of Jeffery. I got the promissory note before signing the cheque. It is not the custom of any business man to give a cheque before he gets the promissory note. On the due date I got the note, which has been put in, asking for an extension of time. I allowed the extension. Scott brought the letter to me, but not with £4. The £4 was not mentioned. I went to Scott on the due date and asked about the matter, and he said the loan was not through, and might take another couple

of weeks. I do not think I have seen Jeffery before. He may have had a conversation with me, but I do not know him. When Scott disappeared I traced where Jeffery lived. I then wrote a letter in August, 1903, asking for payment. I have never at any time authorised Scott to receive money on my behalf. If I did such a thing I would give him the promissory note for collection. I do my own collecting, and never employ agents. When a promissory note is made payable in a bank I take it to the bank, but if there are no funds I take the note back again. I never part with a promissory note before the money is paid.

Cross-examined by Mr. W. Buchanan: I have no office in town. I usually make notes as due to me at Observatory-road. I had the transfer deeds and the power of attorney to pass a bond in my favour.

By the Court: I never had the title-deeds. Scott had them to raise the loan upon.

Cross-examination continued: The promissory note is in Scott's handwriting. It was ready for me before I accepted it. The promissory note was to be paid at Scott's office. I was willing to apply there for the money. I take a promissory note as an acknowledgement of payment. I presented the promissory note for payment at Scott's office, and he then handed me the letter. The letter may have been dated the 14th November, but I got it when I presented the note. Steer is my attorney, and his office is on the same flat as Scott's. I do not do my business there. Scott would apply to me for loans, but the people paid me. I applied a number of times after the fortnight had expired, and Scott always made the excuse that the loan had not been raised. I lent the money on the papers, but defendant's address was not on them. I asked Scott for the address, and he told me not to trouble about it as he was the man's agent, and was raising the loan for him. I was trying to find defendant before Scott decamped, but could not find him. I am certainly a very good business man. If the interest is going on I allow a man to keep a loan. A promissory note bears interest from the date it is due. Scott was the only man who could tell me whether the loan had been raised. I know that mortgage bonds are registered periodically, but I do not always follow them. I let this matter hang on, but I was anxious to get the papers. I was too lenient in allowing Scott to put me off so long. It is possible that I knew Scott had gone insolvent in May. I followed the general rule that as long as I held the promissory note I was entitled to payment. I found defendant's address from a certain person whose name I would not like to give.

By the Court: When I presented the bill I received the note dated the 14th which was arranged between Scott and defendant on the day before.

Re-examined by Mr. Molteno: My business is of a confidential nature, and I therefore do everything in connection with it myself, and, as a result, I am always extremely busy.

Mr. Molteno closed his case.

Mr. Buchanan (for defendant): The plaintiff did not apply timeously; he lies by for months until Scott had become insolvent, and we had lost our recourse against Scott. By his silence the plaintiff led us to believe that Scott had paid him. See *Bowstead on Agency Irvine and Co. v. Watson and Sons* (5 Q.B., 102) *Darison v. Donaldson* (9 Q.B., 627) (where see judgment of Jessel, M.R.). The promissory note given to plaintiff merely says that the money was payable at Scott's office. It does not appoint Scott as agent.

Mr. Molteno (for plaintiff): Counsel for the defendant seems to think that Scott had a good deal to do with plaintiff. Defendant knew very well that he had to deal with the plaintiff. The defendant went to Scott to get him to raise a loan. Scott could not raise it, so he went to the plaintiff, to whom he gave a promissory note, by which he bound himself to pay to plaintiff or to his order. It was his duty, therefore, to pay to plaintiff; see Bills of Exchange Act, sec. 87, sub-sec. (1). Instead of that he pays his own agent (Scott). In this case one of two innocent parties must suffer; the only question is "which one?" Surely the one who by his negligence has contributed to the loss.

Mr. Buchanan (in reply), cited the provisional case of *Heydenrych v. Jefferys* (13 C.T.R., 866.)

Buchanan, J.: Provisional sentence was prayed last September upon two promissory notes, both in favour of the plaintiff, when the cases were heard together by the judges then sitting. One was the case of Heydenrych against Hector, and the other was the case of Heydenrych against Jeffery. In both these cases the money had been received through one Scott upon promissory notes given by the defendants to Heydenrych, the plaintiff. Scott's agency was relied upon in both cases. In the case against Hector, the parties were ordered to go into the principal case. In the case against Jeffery, provisional sentence was refused absolutely. The case of Heydenrych v. Hector came for trial in the principal case before me recently (14 C.T.R., 375.) It was found that Hector had seen Scott, who raised the money from Heydenrych's office. Afterwards Hector, through his attorneys, paid Scott the amount borrowed but did not obtain back the promissory note. I held

in that case that, though Scott negotiated the transaction for both parties, and was to some extent the agent for both parties in raising the loan, he was not the agent of Heydenrych to receive the money from Hector, and consequently judgment was given against Hector. To my mind, the present case differs from that one. Here Heydenrych knew nothing of the debtor, whom he had never seen, and with whom he had had no communication, but dealt with him through Scott. Instead of making the note payable to himself at his own office, he accepted the note made payable at the office of Scott. He thus intimated to the debtor that Scott had authority to receive payment on Heydenrych's behalf. On the day before the due date, Heydenrych, at Scott's request, allowed fourteen days further time to be given, and on the date when the note was to be paid, according to this latter arrangement, the defendant brought his money and paid it into the office of Scott. This case, therefore, differs from that of Hector. In Hector's case the defendant did not perform his contract; in this case the defendant had performed his contract. He undertook to pay the amount at Scott's office, and he did so. He carried out strictly the tenor of the note—viz., to pay the £105 at Scott's office on the due date. But in this case there might even be a further defence on the equities. The defendant gave a power of attorney, which Heydenrych said was to enable him to pass a bond to cover this advance. Heydenrych afterwards returned this power and the title-deeds to Scott, treating him as his representative in this matter. He also received from Scott a guarantee that Scott would see that the amount was paid out of the loan to be raised for the defendant on bond. A loan was raised, and the amount of the loan was paid to Scott, at Scott's office, on the 29th November, 1902. Then, again the plaintiff made no demand upon the defendant for the amount after Scott had absconded and Scott's estate had been sequestrated. In these circumstances, even if the defendant had not so strictly performed his contract, as he had done, there would be considerable ground in equity for saying that plaintiff was now estopped from recovering from defendant. But it is not necessary to decide this point. Mr. Heydenrych says he never parts with his notes until he receives the money, even when they are made payable at a bank. Now, supposing the maker of a note had undertaken to pay at a certain bank, and, when that note became due he went and deposited the money at the bank to meet the note, and that some time afterwards before the holder got the money from the bank the bank stopped payment, would not the loss be that of the holder of the note? If Heydenrych had only inquir-

ed from the defendant in due time, he would have found that he had paid the money at Scott's office. This case differs so materially from the case of Hector, that I think the judgment in Hector's case does not govern this case. In this case, I have no doubt whatever that judgment must be for defendant, with costs.

This judgment was reversed on appeal (14 C.T.R.)

[Plaintiff's Attorney: V. A. Van der Byl; Defendant's Attorneys: Tredgold, McIntyre, and Bisset.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPELY.]

REVIEW CASE.

REX V. NIEKERK.

{ 1904.
June 14th.

Magistrate's Court—Irregularity.

Where a prisoner had committed a technical assault on M., with which he was charged, and had thereafter committed a serious assault on B., with which he was not charged, but to which most of the evidence was directed and for which the Magistrate admitted he had really sentenced the man. The Court quashed the conviction.

Hopley, J., said that a case had come before him for review involving a decision of the Assistant Resident Magistrate of Durbanville. One Abraham Niekerk was charged with threatening one Mosa with a knife. The evidence showed that Mosa kept a shop, and that there was some dispute between him and the accused, whereupon the latter threatened him with a knife. Nothing further happened, and that was undoubtedly a technical assault. Then Burghers Mahomet, a clerk to Mosa, intervened, and there was no doubt that the accused then had a struggle with Burghers, in the course of which he bit the latter on the arm rather severely. The Magistrate found the prisoner guilty, and sentenced him to three months' hard labour. The whole evidence dealt more with the bite

on Burghers Mahomet than any assault on Mosa, and therefore he (his lordship) sent back the case to the Magistrate, with a note asking what the sentence was for—the threat or the bite. The Magistrate replied that it was for the bite on the arm of Burghers Mahomet, which was of rather a serious kind. The Magistrate, however, admitted that he had sentenced the man for a crime with which he had not been charged in the indictment. There was a technical assault on Mahomet Mosa, and the practical result was that unless the proceedings were quashed for the irregularity mentioned, the man might have to serve three months for biting Burghers on the arm, and, on coming out, there was nothing to prevent him having another three months for that offence. The matter was really so irregular that there was no way of actually curing it except by quashing the sentence. The man had been in gaol since the first of this month for a technical assault on Mahomet for showing a knife at him. His Lordship trusted that magistrates would exercise a little more care in the future. The fortnight's punishment would in itself be sufficient punishment for the technical assault in threatening by showing the knife.

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

Ex parte THE EXECUTORS TESTAMENTARY IN THE ESTATE OF CHARLES HODGSON.

Mr. Graham moved as a matter of urgency for a rule nisi, interdicting Augustus Hodgson, brother of the deceased, from passing transfer of certain property, until his indebtedness to the estate was satisfied.

Rule granted, to operate as an interdict, pending further action, with leave to the respondent to move to have it set aside, a copy to be served on the Registrar, with no order as to costs.

TRIAL CAUSES.

FINDLAY AND CO. V. HEMPEL.

Mr. W. P. Buchanan said that in this matter he appeared for the defendant, and the brief had just been delivered to him, and he asked for a postponement on the ground that there would be an attempt to settle the case.

Mr. Close, for the plaintiffs, pointed out that all his witnesses were present, and there was no reason given for the postponement. He was instructed to oppose the application,

Mr. Buchanan suggested that the matter might stand over until later in the day.

Mr. Close said that if the matter was ordered to stand over, he would apply for the costs of the day.

The matter was ordered to stand over until later in the day, and if there was no time to hear it, the case to be set down for July 1, the defendant to pay the costs of the day.

1904

KAISER V. SHENKER AND CO. { June 14th.
" 15th.

Negligence—Damage to property.

This was an action brought by Harry Kaiser against Herman Shenker and Hyman Shenker, trading as Shenker and Co., to recover £784 9s., for negligence in not protecting a gable which fell on the plaintiff's property.

The declaration set out that on the 16th February, 1904, the defendants' premises in Longmarket-street were completely gutted by fire, and owing to the negligence of the defendants, a gable was left unprotected, and it collapsed on the 21st February, and injured the plaintiff's building. In March, 1904, plaintiff discovered that the remaining portion of the building was weakened and shaken, and it was necessary to take it down. Plaintiff had suffered damage to the amount of £784 9s., and he claimed that amount, with costs.

The defendants' plea set out that the gable was blown down by a severe wind on the 21st February, and it was not owing to their negligence that the plaintiff sustained any damage, the amount of which set out by plaintiff they denied.

Mr. T. L. Graham, K.C. (with him Mr. P. Jones), was for the plaintiff, and Mr. McGregor (with him Mr. M. Bisset), was for the defendants.

Harry Kaiser, plaintiff, stated that his building was a two-storied one, and adjoined that of the defendants. He valued his property, which was a well-built one, at £3,150 before the fire. Since the 21st February some of his tenants had left, and he had lost £14 a month in rentals. The fire totally destroyed the roof of the defendants' property, from which sheets of iron were flying about. Next morning he noticed that the gable was not protected in any way, and as a consequence it fell on his property, and destroyed a considerable portion of the building. Some of the tenants were injured, and the police had to take them out. On the 22nd February the Town Council notified him that his property was in a dangerous condition.

[Buchanan, J.: Is the insurance company not liable?]

Mr. Graham: No, my lord. The occurrence took place five days after the fire.

Cross-examined by Mr. McGregor: The day after the fire he saw Mr. Hyman Shenker, and he went over the building. He did not know that the defendants had various people inspecting the building. There were a few cracks in the top of one of the walls after the collapse. It was continually blowing, from the time of the fire up to the morning the gable fell. He did not paint his property to save the cracks in the walls. His house was a substantial one. There were no women living in the house. The rent was paid in advance, but he could not produce any receipts for the amount. The people that lived in the house were highly respectable. In order to place the house as it was before the fire, it would cost £697.

Wm. H. Gray stated he had considerable experience in England as Municipal Engineer, architect, and surveyor. He examined the property after the collapse. The plaintiff's property was in very fair condition for an old building. The damage was caused by the falling of the gable end. It was certainly unsafe to leave the gable unprotected after the fire. He considered it absolutely necessary to take the plaintiff's house down, and rebuild it. He calculated that it would take £697 to renovate the building.

Cross-examined by Mr. McGregor: His son was the agent for the property and he went through Kaiser's property in order to fix the rent before the fire. He saw no cracks in the defendants' wall. He was aware that the existing walls had been used in re-building defendants' property. It would be in the ordinary course for the Town Council to send a building inspector round after a fire. If the plaintiff succeeded he would not have a worse building than his old one.

Re-examined by Mr. Graham: The house must have been built with a good class of material considering the time it was erected.

By Buchanan, J.: The fall of the gable smashed the upstairs room, and from the debris he calculated the weight of the gable that fell. To use up the old material would cost more than purchasing new brickwork. According to his estimate the rebuilt walls would be of better material than the old ones. From his experience as an architect it would cost, roughly speaking, £100 a room to build a house of that description.

James E. Dyke, a builder, said he went over the property last week. He estimated that to put the property in the same condition as before would cost about £668.

Cross-examined: The old material was worthless.

Anthony Martinus de Witt, architect, stated that he had inspected the property

in question. About 40 feet of the gable fell on to plaintiff's building, and 30 feet into the yard. If there had been a fire and the roof had been damaged, on no account should the gable have been left standing as it was. The gable stood broadsides to the south-easter. There were two gables. Witness did not know what became of the other gable. Plaintiff's building had been seriously damaged, and he estimated that it would cost £610 to restore the building. This did not include the front wall and portion of the side wall. If the Municipality insisted on everything being new it would cost about £800. The old material could not be used.

Charles Henry Smith, architect, gave similar evidence. The gable could have been roped so as to make it fall inside. It was unsafe to leave it standing under the circumstances. It would cost, roughly, between £400 and £600 to restore the building to its original condition. Witness had made no detailed estimates, not having taken measurements.

Cross-examined by Mr. McGregor: He had not made an estimate as to the cost of removing the debris. It did not follow that the thicker the wall the better the support the gable had, because when the wall started to rock there were so many tons assisting to overturn it. It was customary to anchor the gables to the roof. There was nothing artistic in anchoring a gable to a roof.

John Mitchelmore, builder and contractor, estimated that it would cost £568 to rebuild the plaintiff's property, which was damaged by the fall of the gable. He contracted for £50 to remove the debris. The old material, to his mind, was useless.

Cross-examined by Mr. McGregor: The brick was originally of a poor style.

John Cook, City Engineer to the Municipality of Cape Town, stated that under the Town Council regulations he had the sole power to determine whether a building should be re-erected on the old foundations. Yesterday afternoon he inspected the building, and he was positive that the back portion of the building would have to come down; but at present, he could not say anything about the front portion.

Cross-examined by Mr. McGregor: The plan did not show quite as much as would have to come down. He could not say whether one of the walls which had to come down had developed the deterioration after the accident.

Harry Dalters, builder and contractor, stated he estimated the cost of re-instanting the building at £566.

Cross-examined by Mr. McGregor: It was not an inferior-built house when it was considered the time it was built.

Frederick Draiby, architect, stated that he examined the property on the 22nd April. The gable ought to have been propped up. He estimated that £593 would replace the house in its

former condition, without going down to the foundations.

Cross-examined by Mr. McGregor: He would say about eight tons of material fell on the plaintiff's property. He knew that only part of the gable came down on the house.

Mr. Graham closed his case.

Mr. McGregor called

Henry Rowe, architect, who stated that he visited the scene of the fire when it was practically out. The following morning he visited the premises professionally. He made a detailed examination of the building, and found no cracks in the walls. When he inspected the gable after the fire, it was perfectly sound. In rebuilding, it would have been unnecessary to demolish the gable. On the day after the gable came down he visited the premises, and found the wind blowing fiercely. He thought that the gable came down through an exceptionally heavy gale of wind. A workmanlike job could be made of the plaintiff's premises for £215, which was about the average amount of the tenders. The building was a dilapidated one, and had it been brought to the notice of the Medical Officer for Health, he would have closed it. The roof had been constructed of second-class material.

Cross-examined by Mr. Graham: A strong sou'-easter was not blowing at the time of the fire. It might have been blowing strongly at Observatory, but not in Cape Town. He called at the fire because it was on his way home. He never thought it necessary to have the gable propped up. He never saw any of the Town Council inspectors at the building. Witness was quite prepared to leave the other gable standing after this gable was blown down. He thought it safe to leave it. The gable was built sufficiently strong to withstand an ordinary south-easter. If the work had to be done according to Mr. Cook's idea, it would cost £250. To raise the walls of a room an extra three feet would cost about £5.

Edward W. Pugh, building inspector, in the employ of the City Corporation, said he went to inspect the property on the day after the fire. He found that the upper story had been gutted, the roof principles charred, and several sheets of iron lying about, which witness ordered to be removed, in order to prevent them from being blown into the street. The walls were not damaged, and the gable was intact. Witness considered the roof and the gable safe after the removal of the iron. The gable must have come down subsequently owing to exceptionally heavy wind. After the one gable fell, the other practically lost its support.

Cross-examined: After the first gable blew down, he thought it necessary to secure the other.

Chas. Henry Edwards, acting building surveyor, in the employ of the Cape Town Corporation, stated that he inspected the premises on the 19th February. Regulation 163 gave the Town Council power to pull down any building that was dangerous. The timbers appeared to give support to the gable, and the danger notice was not issued until after the collapse. The notice was sent because of the collapse of the one gable weakening another, which was swinging in the wind. There were no cracks on the walls of Shenker's buildings.

[Buchanan, J.: If the roof was quite safe why did the gable come down?]

Witness: I cannot say what they did after I left the premises. The supports might have been taken away, or there might have been an over strong wind.

Cross-examined by Mr. Graham: The supports might have been weakened when the iron sheets were taken away. He agreed with Mr. Cook that the walls would have to come down. It was just possible that when the wall was tampered with the whole structure would come down. A good deal more than what appeared on Mr. Rowe's plan would have to come down.

Re-examined by Mr. McGregor: Some of the iron work was quite firm, and only that portion of it that was dangerous to the public was removed. The plaintiff's building was an old one, the stair treads being half worn through. About £70 would cover the extra work required on Mr. Rowe's plan.

George Smith, partner in the firm of F. B. Smith and Sons, building contractors, stated that he examined the plans, specifications, and quantities prepared by Mr. Rowe, and his firm tendered to do the work for £193. Witness inspected the building, and thought that the work specified by Mr. Rowe would be adequate to reinstate the house.

Cross-examined by Mr. Graham: Looking at the plans he could not say exactly what it would cost to do the extra work not provided for by Mr. Rowe, but he thought £20 would cover it.

By Buchanan, J.: His tender was a *bona fide* one.

Herbert Cox, contractor and builder, stated that formerly he was building inspector to the Town Council. Three and a half years ago he was in charge of district 6. He gave an estimate of £185 for the work to Mr. Rowe. He examined the building towards the end of May, and that was before he gave his estimate. Now he would tender to do the work in accordance with the Town Council Regulations for £220.

[Buchanan, J.: Will you tender that in court?]

Yes.

[Buchanan, J.: You had better accept that, Mr. Graham.]

With security, my lord.

H I

Cross-examined by Mr. Graham: The side wall would have to come down, and that was not provided for in Mr. Rowe's plan. The whole thing would not cost more than £220, and he had been successful as a builder. He thought it quite safe to leave the gable unprotected even with the purlins charred, but he did not agree with Mr. Rowe that it would be safe to leave the gable standing with the purlins destroyed.

Hugh Frith, fire loss assessor, stated that he saw Kaiser's house on the morning following the fire. He was there to assess the contents of Shenker's store, and he visited the top story, and saw several iron sheets hanging loose, which he suggested should be removed. Nothing appeared to him to be unsafe except the iron sheeting.

Cross-examined by Mr. Graham: After fires he generally found gables pulled down. He would not say that he took particular notice of the gable. He never worked with Mr. Rowe.

Charles Jas. Robus, carpenter, in the employ of defendant, said he removed the galvanised iron from the roof after the fire. Most of the iron was loose, and no damage was done to the roof in taking it off. On the night the gable fell, the wind was very strong.

Daniel Kennedy, painter, Frederick W. Hardin^o wood carver, and Jacobus J. Myburg, plumber, gave similar evidence.

Hyman Shenker, one of the defendants, said he saw the property just after the fire was extinguished. The Building Inspector of the Corporation instructed witness to have the loose iron taken down, as it was dangerous to the public, and witness accordingly instructed his men to take down the iron. No timber was taken out with the iron, and the purlins were not touched by the men. He would not have left the gable there unless he had believed it was safe. He was advised by the architect and the Town Council inspector that it was safe. On the morning the gable fell the wind was blowing very heavily. After a portion of the first gable fell, witness gave instructions for the rest of it to be pulled down inside the building. The other gable was subsequently taken down.

By Mr. Graham: Everything he was required to do by the Town Council authorities he carried out.

Isaac Shenker, brother of the last witness, confirmed the latter's evidence in certain particulars.

Mr. McGregor closed his case, and counsel were then heard in argument on the facts.

Buchanan, J.: The plaintiff is the owner of a certain building, divided into two houses, situated in Longmarket-street. The defendants own a store adjoining these two houses. The roof of the defendants' store was on the 16th February last destroyed by fire, and

afterwards, on the 21st February, the gable wall, which had been left standing after the fire, fell on the plaintiff's property, and did considerable damage. The declaration alleges that the estimated cost for re-building the premises would be nearly £700, and that in addition the plaintiff has lost £42 in rent, and that the architect's fees for commission and plans would be another £44, making in all the sum of £784, for which action is brought as damages suffered in consequence of the negligence of the defendants. The defendants deny any negligence or default upon their part, and that is the question upon which the whole action hinges. Now, in the matter of negligence, I quite agree with Mr. McGregor's argument that the defendants are not necessarily answerable for every event which may occur, but that the fact of damages resulting must be traced to their negligence. Under the old *lex Aquilia* to which he referred, there must be some act done by a person sought to be charged; but there is another action known to the law—a noxal action—in which damages from a default may be recovered, and that more nearly represents this case. In considering the question whether or not there is any negligence or default on the part of defendants, the evidence shows that the defendants' building—a three-storied building—had the roof entirely destroyed by fire. At each end of the roof was a gable, and after the fire the inspector of the Town Council seeing these gables standing, inspected them for the very purpose of seeing whether they were dangerous or not. The evidence goes to show that when gables stand like this apart from the roof, they are an element of danger. The inspector (Mr. Edwards) did not think when he saw this gable that it was unsafe, as it was still attached to some of the purlins. He gave instructions to defendants to remove the loose iron. He says he does not know what took place in consequence of his instructions. The loose iron was removed by the defendants' servants, principally by Robus, and he says that the men in removing the loose sheets of iron, tried to get some of the purlins off, and that they did remove some of the burnt purlins. It seems to me very probable that even if the gable was safe when inspected by Edwards, it became insecure in consequence of these acts of the defendants' servants. We must bear in mind the facts that this was a three-storied building, that the gables were left exposed to the high winds which usually prevailed at that time of year, and that the gable was tampered with after the fire. If the gable was blown down in consequence of something altogether unusual, something very exceptional, it might be that the defendants' would not be liable, but I see

it has been laid down in an English case that even if damages are done through a storm which is very unusual, but which is not unprecedented, such storm does not come within the category of what is called act of God. If a defendant can show he has provided for every probable contingency, and that notwithstanding through some course which reasonably would not have been anticipated damage resulted, he might not be liable. But it is a matter of common knowledge that south-east winds are very prevalent in February, and that during that month they are usually more severe than at other times of the year. After this gable was blown down, damage was done on the subsequent evening by gusts of wind in other parts of the town, but it is not shown that any damage was done anywhere else on this particular evening. Singularly enough, as soon as this gable was blown down, the same inspector of the Town Council thought that the other gable was unsafe. He saw it was rocking in the wind, and he immediately gave orders for it to be propped up. These two gables were, according to the statement of the witness, some 48 feet apart, and it is suggested that as long as the purlins remained the gables were secure. I do not see how the falling of the one gable could remove the purlins from the other gable at the other end of the building. Yet this one also was found to be so insecure that it had to be propped up. The defendant, no doubt, relied upon their architect and upon the city official, who had inspected this building. But this does not relieve them from liability for leaving an unsafe gable standing. The City Engineer was acting simply in the interests of the public, and though he did not consider that in the interests of the public it was necessary to take any steps, yet unfortunately, the very supports upon which Mr. Edwards relied were in all probability, taken off by the defendants' servants when they removed loose sheets of iron from the roof; and that an ordinary wind afterwards brought the gable down on the plaintiff's property. Under these circumstances, considering the position of the gable, and the two properties, and the manner in which the gable was damaged by fire, and the exposed position of the gables, I think it was the duty of the defendants to have taken steps to secure the gable and to prevent it from falling down into their neighbour's property. Not having done so, they are answerable for the damages resulting. I quite acquit the defendants of having done anything intentional to cause the damage. It is not necessary that the damages should have been caused intentionally to give a right of action. The damage resulted through neglect in not taking proper and reasonable precautions, even though the necessity for these precautions was not brought home to the defendants.

minds. Assuming, therefore, that there was neglect on the part of the defendants, the next question is the amount which plaintiff is entitled to recover. The measure of damage would ordinarily be, what it would cost to replace the house as nearly as possible in the condition in which it was before the accident. As however, the Municipal Regulations require certain improvements, and as new material will take the place of old, and the plaintiff will get a more valuable property in consequence, some allowance should be made for the increased value of the new building as compared with the old one. After analysing the evidence as to the cost of rebuilding, his Lordship came to the conclusion that £350 would be a fair amount to award to plaintiff. Judgment was given for the plaintiff for the amount of £350 and costs.

[Plaintiff's Attorney: C. Bernard;
Defendants' Attorneys: Tredgold,
McIntyre and Bisset.]

ANNEAR V. ANNEAR.

Mr. J. E. R. de Villiers appeared for the applicant. The action was one for restitution of conjugal rights, brought by Helena Augusta Annear against her husband James Charles Annear, failing which, for divorce, with custody of the three children of the marriage and forfeiture of benefits.

Counsel stated that there had been due publication of the *rule nisi* in the "Star," Johannesburg.

Helena Augusta Annear stated that after the marriage she and her husband lived in Johannesburg. Her husband, when he left her in 1891, said he was going to Cape Town. Witness remained in Johannesburg for sixteen months after her husband left her. Witness afterwards came to Paarl, and while there sued her husband for maintenance. Respondent then wired her five pounds, and afterwards sent her other amounts, but she had had no support for herself or children since. Witness last saw him in Simon's Town, but had heard nothing of him since February, 1902.

The Court granted a decree of restitution of conjugal rights, defendant to receive his wife on or before August 1, failing which a decree *nisi* to be granted, returnable on August 18, calling upon the defendant to show cause why divorce should not be granted.

SUPREME COURT

[Before the Chief Justice (the Right Honourable Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1904.
June 16th.

Mr. McGregor moved for the admission of Martinus Fourie as an advocate.

Granted, the oath to be taken before the Resident Magistrate of Potchefstroom.

Mr. W. P. Buchanan moved for the admission as an attorney and notary of Willem Adrian de Klerck.

Granted, the oaths to be taken before the Resident Magistrate of Graaff-Reinet.

GENERAL MOTIONS.

DE JAGER V. DE JAGER.

Mr. Gardiner moved for an order declaring the respondent, Cornelius de Jager, of unsound mind, and for the appointment of a curator of his person and property. Mr. Roux appeared on behalf of the respondent.

Mr. Gardiner called

Dr. Robert Black, medical officer at the Valkenberg Asylum, who stated that the alleged lunatic had been under his care since May 9. Since his admission he had suffered from acute mania and acute excitement. He had been in the asylum on three different occasions. He thought the lunatic might recover within a few months.

[Buchanan, J.: Is he dangerous?]

Witness: I consider he is dangerous to others.

Margaretha de Jager, wife of the respondent, said that the five children of the marriage were under age. Her husband at times was very violent. The farm at Prieska in the joint estate was valued at £2,500. There was only £120 a year coming in to keep herself and the children. She would like Mr. Syman to look after her husband.

[De Villiers, C.J.: When your husband comes back after being detained, does he drink?]

Witness: No, my lord.

What brings it on?—He wants to do business, and he is too weak to do it.

By Mr. Roux: He had been violent to her.

Order granted declaring the defendant of unsound mind, Cornelius Syman appointed as curator of his person and property, costs to come out of the estate.

Ex parte VAN NIEKERK.

Res religiosa—Burial ground.

The Court refused to grant leave on motion to remove the bodies from a certain burial ground and to sell the same.

Mr. M. de Villiers appeared for the applicant, Sir H. Juta, K.C., for the Town Council, and Mr. Howel Jones for the Colonial Government.

Mr. M. de Villiers said that he appeared in May last on behalf of the Dutch congregational community of Rose-street Chapel, to apply for an order authorising the congregation to sell a certain burial ground in Somerset-road, and to acquire with the proceeds other ground in Maitland Cemetery. On that occasion Sir Henry Juta opposed on behalf of the Town Council, and he then suggested that a rule *nisi* should be issued calling on all parties concerned to appear at a further date. The notice had been duly published in the newspapers. Counsel took exception to the Town Council appearing in the matter, as they had no *locus standi*. He could not understand why the Town Council, who really stood in the position of plaintiffs, did not institute an action to declare their rights long ago.

[Buchanan, J.: I don't see how you can object to their appearance after the rule.]

Mr. M. de Villiers said he did not see what the Town Council had got to do with it. The plaintiff was prepared to produce all the books that had been demanded by the other side. Counsel then proceeded to read the affidavit of Frederick Neethling van Niekerk, in his capacity as Dutch Reformed minister of the Rose-street Chapel, which set out that in 1840 the then Governor, Sir George Napier, granted to the pastor of the congregation and to his successors a certain piece of ground on the Somerset-road, for the purpose of burying the dead. In 1886 the congregation enclosed the cemetery with a wall, and had maintained it up to the present time, but owing to the surrounding houses, it had now become a place for the deposit of rubbish. It was resolved by the congregation in April, 1904, to proceed to have the bodies removed and re-buried in the Maitland Cemetery, and that the said ground should be sold, and the proceeds devoted to the purchase of certain ground at Maitland. Petitioner prayed for an order authorising him to have the remains of persons transferred from Somerset-road to Maitland, and to devote the proceeds of the sale of the ground to the erection of a memorial column, and for the purchase of the ground at Maitland.

Sir H. Juta read the affidavit of Mr. Finch, Town Clerk of Cape Town, which set out that the Council were interested in the question of closing all open spaces. In the interests of the public health, it was imperative to prevent the ground in question being built upon. Further, in the interests of the public health, and out of respect to the dead, the Town Council thought if the bodies should be removed that the site in question should be left as an open space. The Town Council prayed that the application should be dismissed, pending the result of any proceedings to be taken in the House of Parliament.

Mr. Howel Jones read the affidavit of the Commissioner of Public Works, which set out that the Government would introduce legislation with regard to the matter.

De Villiers, C.J., said that the whole thing was very vague, as the Court did not know what the real rights of the applicant were. The Court would hear the merits of the case.

Sir H. Juta then proceeded to cross-examine the applicant.

The Rev. Frederick Neethling van Niekerk stated that the Rev. Mr. Vogelgezang died before he was born. From documents it would appear that he died in July, 1859. In 1888 there was a lease entered into between the Ebenezer Congregation and the Home Mission of the Dutch Reformed Church.

[De Villiers, C.J.: Is your object in the cross-examination to show that the applicant is not the lawful successor of the Rev. Casper Vogelgezang?]

Sir H. Juta: Yes, my lord.

Further cross-examined, witness stated that the book containing the names of members of the congregation at the time of the lease was drawn up had got lost.

[De Villiers, C.J.: Is the ground very valuable?]

Witness: Yes, my lord.

[De Villiers, C.J.: My reason for putting the question is to see whether it should be decided on motion.]

Sir H. Juta: I feel it is a difficult position, my lord.

[De Villiers, C.J.: It seems to me to be a matter between the Government and the applicant.]

Sir H. Juta: Then we will have it out with the Government. It is a big question, my lord, and I think it would really not be wise to decide it on motion.

De Villiers, C.J., said it was quite clear that the case could not be decided on motion. There were very important questions raised on which the Court would require to hear evidence. The applicant would have to proceed by action for a declaration of his rights, with leave to the municipality to intervene, costs in the application to be costs in the cause.

MOORE V. THE COLONIAL MEDICAL COUNCIL. { 1904.
June 16th.
July 15th.

Medical Council—Act 34 of 1891
—Order for issue of licence—
Reciprocity.

On an application for an order that a licence to practice as a dentist be issued by the Colonial Medical Council under the 19th section of the Act, it appeared that one of the regulations framed by the Council under the Act provided that dental diplomas recognised by the British Medical Council shall entitle the holders to registration in this Colony.

Held, that in the absence of proof that the applicant's diploma was so recognised or that he held a diploma otherwise recognised by the Colonial Council, he was not entitled to the order.

Another regulation provided that no diploma of a foreign country shall entitle the holder to registration unless equal rights are given in such country to the holder of any British registrable degree, but in the absence of any express authority given by the Act to frame a regulation of this nature, the Court declined to found its decision on this regulation.

This was an application on notice of motion, calling on the respondents to show cause why an order should not be granted in terms of section 19 of the Medical and Pharmacy Act of 1891, authorising the applicant to practise in the Cape Colony as a dentist. The 19th section of the Act provided that where the Council had refused to approve of a diploma the Supreme Court on application might, if they considered that the Council had not adhered to the regulations, after communicating with the Governor, order a licence to be issued to the applicant. The section is a reciprocity regulation, under which no diploma would be granted unless it was shown that the country from which the person came extended equal rights to the holder of a British certificate. The applicant held a certificate from the University of Philadelphia, and the State of Penn-

sylvania extends equal rights to the holders of British certificates.

[De Villiers, C. J.: Do you say that reciprocity is the only test?]

Sir H. Juta (for applicant): No, my lord, it is the only ground the respondent set out.

In his affidavit the petitioner stated that he had a diploma as Doctor of Dental Surgery of the Dental College of Pennsylvania, and had practised in Philadelphia for six years. Before coming to South Africa he was advised by the American Consul in London that other dentists possessing the same diploma had shortly before proceeded to South Africa, and that their diplomas had been recognised. He was also informed to a like effect by a firm having special knowledge of the procedure followed in various countries. He interviewed the secretary of the Colonial Medical Council on arrival here, and was told he could not practise in his own name, but could take a position as assistant. He subsequently took a post as assistant, but was summoned for contravening the Medical and Pharmacy Board Act, and was fined £25. He had tendered his fees to the Colonial Medical Council, but had received a reply that the diploma of the Pennsylvania State could not be recognised. Persons holding the same qualification as he held had been admitted. British diplomas were recognised in Pennsylvania, subject to an examination.

The answering affidavit of the secretary of the Colonial Medical Council, stated that the diploma of the Pennsylvania State was not recognised in the United Kingdom. Since the passing of these regulations only one Pennsylvania surgeon had been admitted, this gentleman having made application before the regulations were passed. The Medical Council contended that there could not be reciprocity, as between the Colony and Pennsylvania, inasmuch as the whole of the United States did not recognise British diplomas. Moreover, persons holding British diplomas were required to pass an examination in Pennsylvania.

To this affidavit were annexed two regulations of the Colonial Medical Council, one providing that only the diplomas recognised in the United Kingdom should be recognised here, and the second stipulating that there should be reciprocity in regards to entries where British and Colonial diplomas were recognised.

A replying affidavit was read to the effect that the United States did not make regulations governing the admission of dentists, etc., but delegated the power to the different States.

After argument

De Villiers, C.J.: The matter appears to be largely in the hands of the Colonial Medical Council, but the Court will give an expression of opinion, and ask the Council to reconsider the mat-

ter. The Court will remit the matter to the Colonial Medical Council with a view to their considering whether the examination mentioned in the applicant's affidavit is of such a nature as to take away reciprocity. If it is not, the Court is of opinion that regulation 10 ought not to stand in the way of applicant's omission if he is in other respects entitled to admission.

[Buchanan, J.: In other words, reciprocity of the State of Pennsylvania is sufficient, without reciprocity of the whole of the United States.]

No order was made as to costs.

De Villiers, C.J., I think that the Council ought to make their regulations much clearer than they are. The whole thing is in a perfect muddle, and it is quite impossible from these regulations to decide who must be admitted and who not. If I take these regulations literally, only dentists from the United Kingdom would be admitted, but I do not suppose that was the object of the Medical Council.

Postea, July 15.

De Villiers, C.J.: This is an application, under the 19th section of Act 34 of 1891, for an order that a licence to practise as a dentist be issued to the applicant. The objection raised by the Medical Council is twofold, namely, that the applicant's qualification is not recognised by the General Medical Council of Great Britain, as required by Regulation No. 1 of the Colonial Medical Council, and that there is no such reciprocity between the United States, where the applicant obtained his diploma, and this colony as is contemplated by Regulation No. 10. The regulations in question were framed under the 20th section of the Act, which empowers the Colonial Council, with the approval of the Governor, to prescribe or define what diplomas or certificates will be recognised by the Council. The section further enacts that no diploma or certificate shall be included by the Council in such regulations which does not furnish, in the opinion of the Council, a sufficient guarantee of the possession by the holder of the requisite knowledge and skill for efficient practice as a medical practitioner or dentist, as the case might be. In order to succeed in the present case, the applicant must satisfy the Court that the Council has not adhered to its lawful regulations. The regulation prescribing that dental diplomas recognised by the British Council should entitle the holder to registration in this colony appears to me to be perfectly regular and within the power of the Council to frame. There is, however, no formal evidence as to whether the British Council would recognise the applicant's diploma, which he obtained from the Pennsylvania Dental College after a four years' course of study at that institution. Copy of a cable from the Agent-General has been pro-

duced by the respondent, to the effect that no Pennsylvania degrees admit to registration in Great Britain. This cable message is, of course, not strictly evidence, but if the information be correct, it would be impossible to hold that the Colonial Council has not adhered to its own lawful regulations. The applicant has stated in his affidavit that other holders of diplomas similar to his have been admitted here, but the fact that the Council has in other cases departed from its regulations would not entitle the applicant to claim that the Council shall admit him in the face of its own regulation. In regard to the want of reciprocity, I do not find any provision in the Act which authorises the Colonial Council to insist upon such reciprocity, even if it is satisfied that the applicant possesses the requisite qualification. I am not, therefore, prepared to decide that Regulation No. 10 is a valid one, but the question must be left open for further consideration. There will be no further order on the present application, but leave is reserved to the applicant to renew his application on production of proof that the British Medical Council would recognise his diploma as sufficient to admit him to registration as a dentist in Great Britain, or that, in other respects, he has the requisite qualification.

[Applicant's Attorneys: Van Zyl and Buissinè; Respondents' Attorneys: Reid and Nephew.]

[Before the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL CASES.

BOARD OF EXECUTORS V. FISHER. { 1904.
June 16th.

Mr. J. E. R. de Villiers moved for provisional sentence on two mortgage bonds for £6,500, with interest, less £268 of interest paid, and for specially hypothecated property to be declared executable.

Granted.

CILLIERS V. VAN DER MERWE.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond, and for specially hypothecated property to be declared executable.

Granted.

TOWNSEND V. SIBBERT AND STEPHAN.

Mr. Gardiner moved for the final sequestration of the defendants' estate.

Mr. Stephan appeared, and asked for a postponement in order to file affidavits to show that the debt was not due by the partnership, but by him (Mr.

Stephan) individually. His estate had already been sequestered.

Buchanan, J., the matter came on a month ago, and defendants had had time to file affidavits. The rule must be made absolute.

GARDINER AND CO. V. MACKIE, YOUNG AND CO.

Mr. P. S. T. Jones moved to make final a provisional order granted for the sequestration of defendants' estate. Granted.

BURDETT V. WIGGETT.

Dr. Greer moved for provisional sentence for £1,000 on a mortgage bond, and for property to be declared executable. Granted.

CUNNINGHAM AND ANOTHER V. SALONIKA.

Mr. W. P. Buchanan moved for a decree of civil imprisonment.

Defendant had made an affidavit in Kimberley, in which he said he had a large family, and had no means.

Mr. Buchanan asked that the case be removed from here to the High Court of Kimberley.

The Court ordered the removal of the case accordingly.

DE SMIDT V. TRUNT.

Mr. W. P. Buchanan moved for the final adjudication of defendant's estate. Granted.

VERSFIELD V. DONOUGH.

Mr. W. P. Buchanan moved for judgment for £350 on a mortgage bond. Granted.

TENNANT V. ZWAIGENHART.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate. Granted.

FORTUIN V. WEINTROB.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate.

Defendant said he was not insolvent. He only wanted time, as he was negotiating with a view to raising a loan.

[Buchanan, J.: What time do you want?]

Defendant: I want six months, my lord.

Subsequently the defendant reduced the period to three months.

[Buchanan, J.: Three months are altogether unreasonable?]

Final sequestration was adjudicated.

HALKS, CAIRD AND CO. V. BOESSEN.

Provisional sentence—Damages.

Damages cannot be set up as a defence against a claim for provisional sentence.

Mr. Gardiner moved for provisional sentence on certain drafts for the sums of £77 19s. 7d. (balance of draft), £114 1s. 7d., £32 10s., £56 3s. 7d., and £116 5s. 6d.

Defendant, who appeared in person, had filed affidavits, in which it was stated that the first draft sued on was given in respect of goods to be supplied by the plaintiffs to defendant. He alleged that part of the goods supplied were of bad quality, and claimed he was entitled to deduct for such bad goods. He had refused to meet drafts for goods in respect of which the other notes were subsequently given owing to the plaintiffs having broken the agreement. Defendant intended to enter a claim for damages against the plaintiffs.

Buchanan, J.: Provisional sentence is prayed upon a number of bills of exchange, which the defendant admits he has accepted, and he admits also that these bills were all accepted for value received. The first of these bills, however, was for invoice on a lot of goods, which, among other things, contained fifty cases of turpentine. The turpentine ordered was best American turpentine of a certain brand. When these goods arrived this was found to be adulterated turpentine, and consequently the defendant refused to pay the amount charged to him on account of this. This is the amount claimed in the first count of the summons. Plaintiffs are represented here by an agent, who, at the time when it was represented to him that the turpentine was bad, accepted payment of the balance of the Bill, deducting the amount of the value of the turpentine. I think that, *prima facie*, without any answer to this, there is a good defence set up by the plaintiff as to this balance of the first draft. As regards the other bills, the defence set up is that there was a breach of the contract between the plaintiff and the defendant, whereby defendant suffered damages. He wishes to set this up against the claim on these documents, but it is a clear principle that damages cannot be set up against liquid documents. If he wishes to set up damages he must do so by action. Provisional sentence will be granted for the sums claimed in the sum-

mons, with the exception of the balance of £77 19s. 7d. on section (a), in regard to which the parties can, if they wish, go into the principal case.

ANDERSON V. KOEN.

Mr. Russell moved for judgment for £3,535 on a bond, and for specially hypothecated property to be declared executable.

Granted.

SMITH AND CO. V. HERMANN.

Mr. Russell moved for provisional sentence on a promissory note for £149 17s. 6d., less £30 5s. 3d., with interest and costs.

Granted.

VAN ZYL V. VAN GERVE.

Mr. D. Buchanan moved for provisional sentence on a promissory note for £250, and for judgment, under Rule 329d, for £92 3s. 3d., for goods sold and delivered.

Granted.

WESSELS V. GAMBA.

Mr. De Waal moved for provisional sentence for £600 on a mortgage bond, and for property specially hypothecated to be declared executable.

Granted.

ILLIQUID ROLL.

DE VILLIERS V. DE KOCK. } 1904.
 } June 16th.

Mr. Close moved, under Rule 329d, for judgment for £33 fs. 6d., for goods sold and delivered.

Granted.

BAM AND OLIFF V. BLOOM.

Mr. Schreiner, K.C., moved for judgment in terms of declaration, by reason of the defendant's default in pleading. The action was one for £500 commission on the sale of certain farms.

Mr. Alexander, for the defendant, moved to purge default, and for leave to plead. Counsel read affidavits in support of the application, in which it was stated that defendant only agreed to pay plaintiffs the commission provided they gave him a guarantee for the payment of the purchase price, which guarantee they had failed to keep. Defendant had been unable to file his plea owing to want of funds.

Mr. Schreiner said that the defendant had not stated anything as to the merits when he applied to plaintiffs to allow the

bar to be removed. It was not until now when he came into court that defendant said anything about the merits. Rule 26 requires an affidavit of merits, and with this rule defendant now complies for the first time. He submitted that defendant must pay all costs, and that he should be put to a date to go to trial.

Mr. Alexander contended that the plaintiff, having compelled the defendant to come into court with this application, should be made to pay the costs of the day.

The Court ordered the removal of the bar on payment by defendant of wasted costs in connection with the bar. The Court directed that the plea be filed on or before Monday next. Costs of the present application to be costs in the cause.

MURRAY AND CO. V. HORSBURNH AND BARRE.

Mr. D. Buchanan moved for judgment for £262 7s. 6d., for goods sold and delivered, with interest and costs of suit.

Granted.

MILBORN, GULLANDER AND CO V. HEMPEL.

Mr. Pittman moved for judgment, under Rule 329d, for £255 10s. 3d., for goods sold and delivered, with interest and costs of suit.

Granted.

VARKEVISSER V. LEWIS.

Dr. Greer moved for judgment, under Rule 329d, for £47 4s. 4d., balance due for goods sold and delivered, with interest and costs of suit.

Granted.

ATKINS V. INGS AND DENHAM.

Mr. Rainsford moved for judgment, under Rule 329d, for £36, rent due, with interest and costs.

Granted.

EATON V. VAN DER SPUY.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, in default of plea, for £1,000, being the balance of the purchase price of certain property, with interest and costs.

Granted.

REHABILITATIONS.

Mr. W. P. Buchanan moved for the rehabilitation of Max Rabinowitz. When the matter was last before the Court the

applicant was ordered to apply again in three months, which had now expired.
Granted.

GENERAL MOTIONS.

Ex parte AUSTEN. { 1904.
June 16th.

Mr. Sutton moved to have a rule *nisi* granted under the Derelict Lands Act made absolute.

Rule made absolute.

Ex parte FALKINER.

Mr. Howel Jones moved for an order authorising the Registrar to pay out of the estate of the applicants' late husband the sum of £70, in order to pay the passage money of her son to South Africa.
Granted.

SCHREIBER V. SCHREIBER.

Mr. Russel moved for an order authorising applicant to sue her husband by edictal citation for restitution of conjugal rights, failing which a decree of divorce, and forfeiture of the benefits under the marriage in community. The respondent had maliciously deserted his wife in September, 1902.

Leave granted, the citation to be returnable September 13, personal service if possible, failing which one publication in the "Gazette," and one in two St. Louis papers, with leave to serve the interdict with notice of trial.

Ex parte VAN AARDT.

Mr. W. P. Buchanan moved for an order allowing the petitioners to subdivide a certain farm, and so hold it in defined instead of undefined shares.

Order granted.

WAR DEPARTMENT V. TABLE BAY HARBOUR BOARD.

Mr. Rainsford moved to have a certain award of the arbitrators made a rule of Court, and costs.

Mr. Close appeared on behalf of the respondent to consent.

Award made a rule of Court.

Ex parte YE MECCA CAFE, LTD.

Mr. Sutton appeared for the liquidators to have the report published as usual.

Order granted, one publication in the "Cape Times."

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

APPEAL.

REX V. RATHBONE. { 1901.
June 20th.

Liquor Law—Evidence—"Trap" —Conspiracy.

This was an appeal from a judgment of the Resident Magistrate of Vryburg, brought by Solomon Rathbone, of Vryburg, the defendant in the Court below. The accused had been fined £10, or one month's imprisonment for a contravention of Act 28 of 1883 in that he sold a bottle of F.C. brandy and a bottle of Cape brandy at a time not authorised by his retail licence, to wit, 9 a.m. on Sunday, the 17th April last. Mr. W. P. Buchanan was for the appellant; Mr. Howel Jones was for the Crown.

The evidence of the principal police witness showed that he went out near to the Vryburg Hotel on the morning in question for the purpose of "trapping" the accused. He sent to the hotel one Philip Kotze and Albertus van Rhyn, who were supplied respectively with a bottle of Cape brandy and F.C. brandy. The licensed hours for Sunday trade were 12 noon to 8 p.m. For the defence a complete denial was given of the story of the police. The principal police witness, Corporal Jacobs, stated that he gave a marked half crown to one of the "traps," and he admitted that this money had not been traced.

Mr. Buchanan contended that the conviction was against the weight of evidence. He submitted that the liquor was either obtained the night before the alleged offence was committed, or it was got from some of the boarders or the cook. It had not been brought home that the liquor was supplied by either the accused or his wife, his brother, or any other responsible servant of the accused. The "traps" themselves were inconsistent in their evidence, and their story lacked due corroboration.

De Villiers, C. J.: The only defence which has been raised was either that there was a conspiracy between the witnesses for the prosecution to procure the conviction of the accused, or that the witnesses for the prosecution were mistaken. As to the theory of a conspiracy all the circumstances of the case tend to show that there was no attempt at conspiracy. A charge against witnesses of conspiracy is a very grave one. It is said that this was a serious charge that was made against the accused, but it would have been much more serious, in

my opinion, on the part of the police corporal if he had made himself a party along with two other persons, to procure evidence against a man who had done him no wrong merely for the purpose of proving a criminal charge against him. The evidence supported the conviction if that evidence were true, and it is impossible for this Court now to say that the evidence was untrue.

Hopley, J., concurred

REX V. BALL.

{ 1904.
{ June 20th.

Review—Appeal—Irregularity of proceedings.

On a summons for a review of proceedings in an inferior Court, it is not competent for the applicant to raise the question, whether upon a fair survey of the evidence the decision ought not to have been in his favour, but the applicant should confine himself to the grounds of review authorized by the law.

This matter came up for review from the Court of the Resident Magistrate of Lysikisiki, and the Chief Magistrate of Eastern Pondoland. Mr. W. P. Buchanan appeared for the applicant; Mr. Howel Jones was for the Crown.

Mr. Buchanan said that the matter really arose in the first instance out of a dispute as to certain huts that the applicant had built, under directions from the Public Works Department. Certain of the huts were to be occupied by the C.M.R. The C.M.R. came on the scene, and took possession. The dispute ranged round two of the huts that the applicant said that the C.M.R. had nothing to do with, but which they insisted upon taking possession of and clearing out the goods that the applicant had there. The upshot was that the applicant came into collision with the C.M.R., and he was subsequently proceeded against on two charges—one of using abusive and insulting language and the other of assaulting a private in the C.M.R. He was convicted by the R.M. On an appeal to the Court of the Chief Magistrate the conviction for using abusive language was quashed. The object of the present application was to have the record of the proceedings certified to this Court.

The appellant did only what he was entitled to do. The property had not been handed over to the C.M.R. and the sergeant seized upon these huts before they had been handed over.

[De Villiers, C.J.: Is this application made by way of appeal or of review?]

On review.

[De Villiers, C.J.: Review can be granted only on the ground of irregularity. Where is the irregularity in this case?]

The charge disclosed no crime.

[De Villiers, C.J.: Under what section was he charged?]

Section 158 of Act 24 of 1886.

[De Villiers, C.J.: Where is the irregularity?]

He was found guilty of assault when the circumstances do not disclose an assault.

[De Villiers, C.J.: You admit that what he did would have been an assault had there been no provocation?]

I go further, and say that what the appellant did did not amount to an assault at all. He was justified in repelling force.

[Hopley, J.: It seems to me that this was a mere civil dispute: why did not the appellant institute a civil action?]

He may not have been in a financial position to do so; but section 64 and 67 of Act 24 of 1886 recognise the right of a man to defend his property.

[De Villiers, C.J.: Has the sentence been confirmed by the Chief Magistrate; because you admit that you have no appeal from the decision of the Chief Magistrate, and that is why you proceed by way of review?]

Yes, I see that difficulty, but I say that the whole procedure was irregular. The Chief Magistrate refused permission to call three witnesses.

[De Villiers, C.J.: The Chief Magistrate could not grant you a roving commission to call three witnesses.]

The appellant had to defend himself, there being no attorney at the place, and the Magistrate refused to grant a postponement to enable us to obtain the services of one; and that is the second ground on which we ask for review. Our third ground is that admissible evidence was excluded.

[De Villiers, C.J.: You say that the record is incorrect?]

Yes, and in the similar case of *Van Ryn v. Cape Licensing Court* (7 Juta, 295) the Court granted review. As to appeal, see section 268 of Act 24 of 1886.

[De Villiers, C.J.: Then why do you not appeal?]

It may have been that the people thought there was no appeal.

Mr. H. Jones (for the Crown) was not heard.

De Villiers, C.J., in giving judgment, said that this was an application to review proceedings in the Court below on the ground of gross irregularity. He had listened very attentively to the argument of the learned counsel for the applicant, but he had been unable to find any instance of gross irregularity. His lordship then passed under review the three grounds for the application which had been cited by counsel. He added, if the applicant had a right to appeal he should appeal, but if he pro-

[Applicant's Attorneys: Syfret, God-
lonton and Low.]

Judgment in terms of the consent paper.

For the defence, Mr. Gardiner called Gideon Brand van Zyl, attorney, who said he acted for the first Mrs. Ashman in the divorce proceedings. Witness advised her to accept £500 and the piano.

inasmuch as the property was mortgaged to this extent.

Henrick R. van Ellewee said he first heard of the bond on the 3rd August. Before that he had no idea of its existence. Witness asked for £8 to pay his expenses to go to Cape Town to cancel the bond, saying he would do whatever was legal. Ashman did not send the £8 to witness's knowledge. Witness refused to sign a power of attorney. Witness became annoyed because the plaintiff sent a postcard to him addressed to the house of people with whom he traded, and so damaged his credit; and he thereupon made up his mind that Ashman would have to pay £40 before he (witness) would do anything. Witness's shop had been closed for a time.

This concluded the evidence, and Mr. De Villiers was heard in argument.

De Villiers, C.J.: It is to be regretted in this case that a simpler course of procedure was not adopted in the first instance, because if a petition had been presented to the Court, there would have been no doubt that upon the facts which had been disclosed, the Court would have made an order calling upon the defendant to show cause why the bond should not be cancelled. It would then be for the defendant to say whether he would oppose the application, and if there had been no opposition, then the sale would have been cancelled in the ordinary course without further expense. But the plaintiff has proceeded by action, and the defendant has defended it, and the question now to be decided upon the question of costs is whether the defendant was not justified in saying that the plaintiff must come into Court to prove his case, and to state all the facts to the Court, and that if the Court then choose to cancel the sale, the Court could do so, but that he should not be a party to it. *Prima facie*, the defendant was not bound to give any consent whatever. He was not a party to the bond. It was the plaintiff's own act to pass this bond, and it was for him to get out of the difficulty as best he could. Moreover, the bond was passed under certain circumstances, which would quite justify any person, and certainly the defendant, in saying that further explanation is required in Court. There is no satisfactory explanation yet as to why the bond was actually passed before any money was paid over to the defendant. I think it is to be regretted that the conveyancer who passed the bond did not give some explanation, but at present there is no explanation why the bond is passed in the Deeds Office, without any money whatever being paid, while the creditor was not in a position at the time to lend any money at all. Well, in such circumstances, the defendant was quite justified in saying: "I refuse to be a party to the cancellation. If the Court wishes to do it, let the Court

do it; but let all the facts be disclosed."

The circumstances under which this bond was passed seem to be extraordinary, and it is quite clear that, but for the existence of this third bond, those who represented the estate of the first wife would never have accepted the amount which they did accept as her share if they had known that this third bond was a purely fictitious bond, and that fact would rather justify the defendant in believing that that bond was fictitious, and that it was merely intended to draw the creditors off the scent as regards the amount which was actually owed by the plaintiff. The facts have been proved now in Court, and they are by no means satisfactory to the plaintiff; but one thing is clear, and that is that the defendant is not entitled to this money, and therefore the Court is quite justified, whether the defendant consents or not, in cancelling the bond. The Court will therefore order the bond to be cancelled; but, upon the question of costs, I am of opinion, as the plaintiff was himself entirely to blame for the position in which he found himself, and as he has asked for costs in his action against the defendants, that the defendant was justified in refusing to give any consent until the requisite proof was given. I think, therefore, that the costs incurred by defendant for the purpose of putting the plaintiff to the proof of his case ought to be borne by the plaintiff. It is his fault, and his fault alone, that the present position has arisen, and therefore he must pay all the costs incurred for the purpose of correcting the bond itself, and of placing it in the position it ought to be. The order of the Court will therefore be that the bond be cancelled, and that the costs be paid by the plaintiff.

Mr. Gardiner asked for costs as between attorney and client.

De Villiers, C.J.: The Court cannot allow the costs. One cannot help saying that there is something to be said that defendant might to some extent have facilitated the proceedings by himself making clear that he consented, provided that certain facts were proved. But he did not do that. As it is, the Court has gone somewhat far in making the plaintiff pay the costs, considering he got his judgment, and the Court cannot go the length of ordering him to pay costs between attorney and client.

Plaintiff was allowed costs as a necessary witness.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Van Zyl and Buissinne.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice HOPLEY]

APPEAL CASES.

HOBDEN V. RISELY AND J. 1904.
MCINTYRE. (June 22nd.

Magistrate's Court — Exceptions
— Misnomer — Summons.

A summons was issued against the defendant in the name of R. and M. without any mention of their Christian names. The defendant excepted to the summons in the Magistrate's Court, and upon the exception being overruled, he tendered the amount claimed which he admitted to be owing to the firm of R. and M., carrying on business as tailors.

Held, that the Magistrate ought to have directed an amendment of the summons, which could not possibly prejudice the defendant, but that the exception was of too technical and trivial a nature to justify the Supreme Court, after what had taken place, in practically setting aside the proceedings.

This was an appeal from a judgment of the A.R.M. of Maclear by which the respondents obtained a verdict against the appellant for £4 ls. for goods sold and delivered. From the record in the Court below it appeared that in May last the present respondents sued the appellant for £4 ls. for goods sold and delivered. The liability was admitted, but the appellant's attorney excepted to the summons on the ground that the full names of the plaintiffs were not inserted in the summons as required by law. The exception was overruled, and judgment was given for the plaintiffs as prayed. The Magistrate, in his reasons, held that the defendant, by making a tender, showed that he knew the nature of the claim he was called upon to answer, and under the circumstances the Court considered the insufficient descrip-

tion of the plaintiffs in the summons as not a fatal objection.

Mr. McGregor (for the appellant): See section 7 of Schedule B to Act 20 of 1856. In this case the rule of the Magistrate's Court was not complied with. The summons does not state who the plaintiffs are. They are supposed to be Riseley and McIntyre, but these names should have been given.

[De Villiers, C.J.: Are they not a firm.]

Even if they are, the names of the parties should have been given.

[De Villiers, C.J.: Have you not cured that defect by your tender?]

No, the Assistant R.M. should not have admitted evidence of tender. *Bridger v. Wills* (4 Juta, 282) is illustrative of my case. It is most essential that the names of the plaintiffs should be on the record, with a view to further proceedings (such for instance, as execution). The A.R.M. seems to have thought that this defect had been cured by amendment of the summons. But there is no evidence of amendment. See *De Stadler v. Morris* (9 Juta, 408), *Lolly v. Gilbert* (1 Menz., 434), *Farmer v. Owen* (1 Menz., 124), as to the necessity of names.

[De Villiers, C.J.: Would there be any danger of your being sued again on this bill?]

I think the whole matter now resolves itself into a question of costs. We have tendered the amount claimed, but we object to the costs, and say that they have been incurred unnecessarily. Then there is some doubt as to the demand having been made. The plaintiff produced his letter book, but *non constat* that the letter was ever sent.

[De Villiers, C.J.: If there was no demand, how came the tender to be made?]

I suppose it was made on the summons. I submit that the A.R.M. should have given judgment for the amount without costs.

[Hopley, J.: Why?]

Because we pleaded tender.

Mr. Gutsche (for the respondent): Substantial justice has been done in the R.M. Court, and I submit that the appeal should be dismissed with costs. The appellant paid an instalment on his debt, and after that did nothing more till a demand was made upon him. We have complied with the terms of section 50 of Schedule B of Act 20 of 1856. The plaintiffs were described sufficiently for the defendant to know who was suing, and the Court has never decided that the names of plaintiffs must be fully set out. All the reported cases bear rather on the names of defendants. As to the demand, the R.M. clearly held that that was sent. *Jones v. Cuurin* (8 Juta, 217). Moreover, no demand was necessary. The goods were bought for cash, and the defendant was at once *in mora*. The Magistrate had a right to decide on what was a sufficient description of the defendants. *Malony v.*

Conradie's Executors (6 C.T.R., 205).

Mr. McGregor (in reply) cited *Derry on Partners to an Action* (p. 170).

De Villiers, C.J.: It is always a difficult matter to deal with cases of this kind, for while, on the one hand, the Court might by allowing exceptions of this kind really do an injustice to the parties, on the other hand, the Court might encourage looseness in the proceedings in the lower courts. In the present case, it appears that substantial justice has been done by the Magistrate. The plaintiffs appear to be a firm of tailors, hosiers, and outfitters at Kokstad. The account served by them shows the name of the firm to be Risely and McIntyre, and that Hobden is indebted to the plaintiffs in the sum mentioned, £4 ls. Upon this account the defendant was sued. The objection taken was that the full names of the plaintiffs are not inserted in the summons as required by law. In strictness, this objection was correct, as there was a misnomer, because the christian names of these two gentlemen ought to have been inserted, and it is greatly to be regretted that the Magistrate did not there and then tell the agent of the plaintiffs to insert the christian names. The question now arises whether after all these proceedings, after the tender by the defendant to the plaintiffs, the Court would be justified in setting aside the proceedings on the ground of this original technical mistake. The 50th section of the Magistrate's Court Act shows that it was never intended by the Legislature that technical objections of this kind should stand in the way of substantial justice. Where there is a misdescription an amendment may be allowed, provided, of course, that the opposite party shall not be prejudiced by reason of such amendment. In the present case the plaintiffs were described by the title by which they are commonly known, and the misnomer would not, at all events, be of such a nature as to justify the Court in setting aside the proceedings. The question has been raised as to whether there had been no letter of demand, and the point is raised whether there ought to be any costs in the case. On the record it appears that the agent for the plaintiffs informed the Court that a demand had been made, and he was prepared to produce the letter-book showing a copy of the letter. Thereupon the agent for the defendant admitted the debt. But for this admission the plaintiffs would, I presume, have proved the demand. The appeal must be dismissed with costs.

Hopley, J., concurred.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Defendants' Attorneys: Zietsman and Bosman.]

HACK V. DREYFUS AND CO. { 1904.
June 22nd.
Oct. 15th.

Company—Power to sue.

This was an appeal from a judgment of the A.R.M. of Maclear, in which he found for the plaintiffs for £102 16s. 3d., the amount of a promissory note.

From the record in the Court below it appeared that the promissory note was signed on the 5th March, 1904, and the defendant was to pay the money to "Dreyfus and Co." on 5th April, 1904. Several exceptions were taken to the summons by the attorney of the defendant, all of which were overruled, but counsel now relied principally on the exceptions that the plaintiff, who was really the manager of the firm, did not set forth any authority to sue, and as the name "Dreyfus and Co." appeared on the note, there was nothing to show that "Dreyfus and Co., Ltd.," were the legal holders of the note.

Mr. McGregor (for appellant): The summons was excepted to as insufficient on the ground that the names were not set out in full, but as the company is a *persona* I do not urge that. Another exception was taken, on the ground that the summons did not state that the company was registered in this Colony, and that the proper officer of the company had not been sued N.O. The promissory note was objected to on the ground that it had not been protested, and that it did not appear that the plaintiff was the holder of the promissory note. I rely chiefly on the first exception scilicet: that there is another on the record to show that Dreyfus and Co., Ltd. were suing. As to proceedings taken by a syndicate, see *Arling v. Belrier Syndicate* (9 Juta 34), particularly the judgment of De Villiers, C.J., as there reported; also *Stoffels v. Mills and Rethman* (5 C.T.R., 29). In that case it was urged that the exception as to power to sue was premature when it was taken *in limine*.

[Hopley, J.: Why cannot a limited liability company sue in its own name?]

It can do so, but it must sue through some person, authorised by the articles of association, or by a resolution of the directors to sue. *Non constat* that Dalrymple had authority to sue. The normal persons to sue would be the directors, but Dalrymple does not describe himself as a director, but as a manager. He may have been only a local manager, and the company (if so disposed), can disclaim him.

[Hopley, J.: Would you wish to have the case remitted in order to ascertain whether he has power to sue?]

I would not object to that point being referred, but it would be a very serious matter to refer back the whole case.

The other substantial point is as to the form of the summons. The summons is too concise, and does not comply with the forms given in Schedule C of Act 20 of 1856. The plaintiffs are Dreyfus and Co., but the promissory note is in favour of Dreyfus and Co. Limited.

[De Villiers, C. J.: Are you prepared to show that Deyfus and Co. are not Dreyfus and Co., Limited?]

There is no indorsement from Dreyfus and Co. to Dreyfus and Co., Ltd.

[De Villiers, C. J.: No indorsement is required if Dreyfus and Co. and Dreyfus and Co., Ltd. are one and the same?]

If the Court is against me on that point I will not attempt to carry the case any further.

Mr. P. S. Jones (for the respondent): Should the manager of the Standard Bank sue there would be no evidence before the Court to show that he is authorised to do so; and so with Dalrymple. The onus is on the appellants to show that he had not power to sue. In any case when the defendant paid Dalrymple he would get his note returned, and that being the case, how could Dreyfus and Co., Ltd. sue again on the same note? I submit that this is a purely technical exception; taken, apparently merely for the purpose of gaining time. The case of *Arling v. Belvoir Syndicate* (9 Juta 34), is not on all fours with the present case, because there the liquidators sued themselves. As to *Stoffels v. Mills* (5 C.T.R. 29), it would seem that there the names of all the directors were set out in full.

Mr. McGregor (in reply), cited *Lindley on the Companies' Act*.

[De Villiers, C.J.: What does our law provide as to the seal of the company?]

See section 14, 57, and 100 of Act 25 of 1892, but I can find nothing about the use of a seal in case of actions. The Act seems to leave the manner of bringing an action to be provided for by the rules of each company.

De Villiers, C.J.: An objection was taken that there is not sufficient proof that Dalrymple, who signed the power, was the proper person to sign that power. It may turn out to be a purely unsubstantial objection. As there may be possibly something in it, the Court will order that further evidence be taken, and the case will be remitted back to the Resident Magistrate to take evidence upon the question as to whether the articles of association of the plaintiff company contain any provision that the manager shall sue on behalf of the company, and whether Dalrymple was duly authorised by the plaintiff company to take proceedings on its behalf, the evidence to be forwarded to the Registrar of this Court. There will be no further argument un-

less the Court thinks it necessary to hear counsel.

Postea (October 15th.)

De Villiers, C.J.: This matter was referred to the Magistrate for further evidence upon one point, and that was as to the power of Dalrymple to represent the firm of Dreyfus and Co., and to sue on their behalf. The Magistrate has taken further evidence, and it has been clearly proved that Dalrymple had the power. Power of attorney was put in in which it was stated that he had been duly authorised by Dreyfus and Co. to bring actions in this colony and elsewhere in South Africa on behalf of the firm of Dreyfus and Co. That matter having been cleared up, the Court will dismiss the appeal, with costs.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Reid and Nephew.]

GENERAL MOTION.

Ex parte BARTHAM AND { 1904.
SON. { June 22nd.

Mr. Schreiner, K.C., moved as a matter of urgency for the amendment of an order calling on the respondents, Campbell, Shearer and Co., to show cause why a certain trade-mark should not be assigned to the petitioners. Petitioners had since learned that the respondent firm in England had become insolvent, and they were not desirous of proceeding against the firm or the trustees of the estate.

Order granted, with costs.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

TRIAL CAUSES.

FOURIE V. FOURIE. { 1904.
{ June 22nd.

Mr. Gardiner moved for judgment by reason of default.

Judgment was granted as prayed.

TREURNICH AND WENTZEL V. ESTATE OF DE VILLIERS.

Funeral expenses—Authority of executor to erect monument.

This was an action brought by Abraham J. Treurnich and Dirk E. Wentzel against Bernardus D. Schut, in his capacity as executor in the estate of De Villiers, to have expunged from the administration and distribution account of

the executor of the estate of the late P. I. de Villiers a certain item, on the ground that it was not properly chargeable to the estate.

The plaintiffs' declaration set forth that defendant is the executor testamentary in the estate of the late Petrus Izaak de Villiers and predeceased spouse, and was sued in his capacity as executor; and the plaintiffs were heirs in the estate in addition to the defendant's wife. Defendant had filed with the Master a distribution account, in which appeared an item as follows:

M. Veenendaal, for tombstones and enclosing graves of the deceased and his predeceased spouse, £51 15s." Plaintiffs alleged that the defendant wrongfully and improperly, contrary to the express wish of the deceased and against the wish of the heirs, had the body of the late P. I. de Villiers buried in a separate grave from that of his predeceased spouse, and next to the grave of his (the defendant's) child, and that thereafter the defendant wrongfully and against the wishes of the heirs, had all the said graves enclosed, and had tombstones erected over them. Plaintiffs further contended that the sum of £51 15s. was in any case an exorbitant one to pay for the enclosures and tombstones, and that the defendant incurred an unnecessary expense in having the same erected. They submitted that the defendant was not justified in so acting, and that the estate was not chargeable with the sum. They therefore prayed that the account might be amended, by expunging the item.

Defendant, in his plea, said that in the lifetime of the late Petrus Izaak de Villiers and his wife, the defendant purchased certain ground at Frenchhoek for the purpose of burying his son, who had died there, and at the request of the late Petrus Izaak de Villiers and his wife, he bought a piece of ground sufficiently large, so that they might be buried, one on each side of their grandson. About a year after the death of the said grandson, Mrs. De Villiers died, and was buried on one side of the said grandson, in pursuance of the arrangement. The defendant took no part in and gave no instructions as to the burial of Mrs. De Villiers. Thereafter the late Petrus Izaak de Villiers gave defendant instructions as to the putting up of tombstones and enclosing the ground with a railing after death. Thereafter Mr. De Villiers died, and was buried on the other side of the grandson, in pursuance of the arrangement. The defendant took no part in and gave no instructions as to the burying of the late Mr. De Villiers, he arriving in time only for the funeral. The plaintiff Treurnich had charged the estate, and had been paid for digging the grave. After the burial, the plaintiffs wished the body of Mr. De Villiers removed, and placed in one grave with his late wife, which

the defendant refused to do, as being contrary to the wishes of the deceased parties. The defendant denied that the sum of £51 15s. was an exorbitant sum for the enclosure and tombstones, and denied that the expense was an unnecessary one, and said, further, that he had the graves enclosed and tombstones erected in accordance with the express wish and instructions of the deceased.

Mr. Burton for plaintiff; Sir H. Juta, K.C. (with him Mr. J. E. R. de Villiers) for defendant.

Buchanan, J., remarked that this was one of the most novel cases that had ever come before the Court.

Mr. Burton: It does seem a curious sort of case, my lord. It comes as near as possible to quarrelling about the bones of one's ancestors.

Buchanan, J., asked as to the relationship of the plaintiffs to the deceased.

Mr. Burton stated that the plaintiffs were sons-in-law, as also was the defendant.

Evidence was then called for the plaintiff, among the witnesses being the manager for Phillip A. Caine, monumental mason, who deposed that a reasonable charge for erecting the stones and putting a rail round the graves would be £37 10s.

For the defence, Julius Bolman, monumental mason, said the charge was a reasonable one. Witness estimated that on a quotation of £51 15s. he would make a profit of about £7. To have done the work under that sum Caine would have to "cut the price."

Other witnesses were called who spoke as to the reasonableness of the price.

Mr. Burton contended that the executor had no authority to put up a tombstone and railings around the grave of the testator. Here, of course, the heirs were quite ready to erect a stone over the grave of their parents, but they objected to Mr. Schut acting in the way he did without having consulted them. The work was not to their liking, and they further contended that it was not worth the money. He submitted that where an executor did a thing which in law he was not authorised to do the heirs were right in objecting to what they considered to be an excessive expenditure.

Sir H. Juta said the plaintiffs in the witness-box had confined their objection to the amount only, and it was not for counsel now to raise the objection that the executor was not authorised. They ratified the action of the executor, and only questioned the amount paid. Counsel quoted Voet (book 11, title 7, sections 7, 13, and 14), with regard to authority to incur burial expenses, and also referred to *Wilson and Others v. Bruton* (12 Snel, page 234.) The heirs had, however, said they were quite willing to have this done, and there was, therefore, no need for the Court to go into the matters of law as though the heirs had ob-

jected to the whole amount. The whole question was the point of the cost.

Buchanan, J.: I have no doubt in this case the legal advisers of the parties did their utmost to prevent this matter coming before the public in this way, but the matter having come into Court, one must deal with the case as it is presented to the Court. The plaintiffs are both sons-in-law of the late Mr. and Mrs. De Villiers, and the defendant is a third son-in-law, and also executor testamentary to the estate of the late Mr. De Villiers. The executor testamentary in winding up the estate of the late Mr. De Villiers, brought up the amount of £51 15s. paid to Mr. Veenendal for tombstones, and enclosing the graves of the deceased and his pre-deceased spouse. The plaintiffs say that the defendant acted contrary to the expressed wishes of Mr. De Villiers, and against the wishes of the heirs in burying Mr. De Villiers in a separate grave from that of his pre-deceased spouse. The evidence shows, however, that in consequence of the death of a grandson—the son of the defendant—in Mr. De Villiers' house, at French Hoek, Mr. De Villiers himself requested that a plot of ground should be bought large enough to hold not only the child's body, but also the body of himself and his spouse. The defendant, therefore, bought a plot of ground large enough for this purpose, and Mr. De Villiers expressed to the defendant the wish that when his turn came he should be buried on one side of his grandchild and his spouse on the other. The defendant did not at the time live at French Hoek; but the plaintiff Treurnich lived there. Mrs. De Villiers died first, and Treurnich had her body placed next to that of the child. When De Villiers died Treurnich had a grave dug at the other side of the child, and directed that the body should be buried there. At this time the plaintiff was at Observatory-road. This, therefore, altogether disposes of the allegation that the defendant had the bodies buried in separate graves, against the wish of the deceased themselves, and against the wishes of the heirs. Here is the plaintiff Treurnich doing the very thing which he complains about the defendant having done. It is true Treurnich afterwards wished to have the body taken up and placed in the grave, which contained the remains of the pre-deceased spouse, but this wish was not carried out. The defendant did not wish it done, and the other plaintiff, Wentzel, did not seem to have strong wishes on the matter. When Mr. De Villiers died it was found that the defendant Schut, who lived at Observatory-road, had been appointed executor testamentary to De Villiers' estate. This seems to have given offence to Treurnich, and no doubt it was to some extent at the bottom of his action. After the funeral the defendant spoke to Treurnich, and

said that he was going to put the matter right; that he was going to put in order the graves, and Treurnich simply said, "Yes; all right." The defendant expended the sum of £51 15s. in enclosing the plot of ground and erecting tombstones at the head of the graves of Mr. and Mrs. De Villiers—a stone over each grave. It would be interesting to go into the question as to how far an executor has authority to erect a monumental stone over the grave of the person to whom he is executor, and to pay for the same out of the estate. It is contended that an executor has no such authority, but that this is a matter which should be left to the heirs, and if the heirs did not care to do so they need not erect any stone to their ancestors. It may be that this is a matter of sentiment in which the heirs, perhaps, have more natural interest than the executor, but at the same time I am not prepared to lay down a hard and fast rule that an executor cannot place a tombstone at the head of the grave of the person to whom he is executor, provided he acts in a reasonable manner. But it is not necessary to decide this, because the plaintiff's declaration says they object to the amount on account of its being exorbitant, and an unnecessary expense. They come into Court and say they have no objection to what has been done. Treurnich says his only objection is that the price is too high. Wentzel does not object, but he says he does not consider the tombstones worth the money. The defendant, who held the same relationship to the deceased, says he certainly considers the amount a reasonable one to pay. In proof of this he says he handed over the administration of the estate to the Paarl Board of Executors, who considered this a fair thing to do. They consider the act of enclosing the ground and erecting a monument a fair thing to do, and the price a fair one, and they paid the amount as agent for the executor. The objection taken by the two plaintiffs that the work done is not worth the money is only supported by their own opinions, and that of the manager of Mr. Caine. The latter has had his information from the plaintiff's, and has only seen a photograph. He has not been to the place, but on the information supplied by the plaintiff's he says his estimate of the value of the work done is £37 10s. Mr. Bolman, on the other hand, who is also a practical man, has been down to the place, and seen the tombstone, and judging from actual knowledge says the price is a fair one to pay. I think on the whole of this case, considering the position of the late Mr. and Mrs. De Villiers, considering their social rank, and the value of the estate, it was by no means an unreasonable thing to do to spend £50 in enclosing the plot in which they were buried and erecting a tombstone. It is not a sum which one would not expect to be spent in connection with

while he was on active service. In April, 1901, he again resumed service of his articles, and served for 121 days under his father, who afterwards left for the Transvaal, and became Master of the High Court.

Mr. Schreiner, K.C. (for the applicant): Rule 212 requires that there should be registration of articles within three months. Here confessedly the articles were not registered till some few days after the expiry of this time. The applicant has served years and years beyond the time prescribed. As to costs against the Law Society, see *ex parte McLeod* (12 C.T.R., 431).

Mr. Graham, K.C. (for the Law Society): We do not object to the admission, but felt bound to come into Court on the matter.

[Buchanan, J.: What do you say, Mr. Schreiner, to the breach of service?]

We are quite willing to make that up, and there are many cases in which a breach of service has been condoned under similar circumstances.

Buchanan, J., said that in this case there was really no objection raised to the admission. One of the objects for which the Law Society was formed was to see that clerks duly served their articles, and duly performed the contract of service that they entered into, and it was quite right in case of any irregularity that the Law Society should bring the facts to the notice of the Court. In this case there seemed to have been two points raised. The first was that there had not been that continuous service which was required by the rules of Court, but when they came to see the cause of the break and the circumstances under which it occurred, there could be no objection by the Court to condoning the want of continuous service. The applicant had served until almost the end of his articles, when he was called out during the recent disturbances in the country. The safety of the State was the highest law, and all other contracts must give way to that. It was a public duty that the applicant was performing, and he was called out, and the Court would, therefore, have no hesitation in condoning the break of continuous service. The other consideration was that it had been the practice for a considerable time past for the Registrar of this Court to require, when the articles were presented to him for enrolment, a certificate from the Law Society that the requirements of the law had been complied with. That was an excellent rule, and he was not inclined to say that it should not be insisted upon in future, but at present it was not a rule of Court, though he thought the Registrar would be quite right in carrying on the practice. In the present case Mr. Bell could be admitted, and an order would be made for his admission.

Mr. W. P. Buchanan moved for the

admission of Jacobus Pietrus Viljoen as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Prieska.

PROVISIONAL ROLL.

HARRIS V. DOYLE. { 1904.
June 23rd.

Mr. W. P. Buchanan moved for provisional sentence on four promissory notes, representing a total of £355, less £15 paid on account.

Mr. Percy Jones applied for the postponement of the matter for a fortnight, owing to the absence of the defendant at Queen's Town. He read an affidavit sworn by a clerk in the defendant's employ, which embodied a telegram from the defendant disputing the claim. Deponent believed there was a good defence to the claim.

Mr. Buchanan read a replying affidavit by the plaintiff, Leah Harris, a widow, of St. George's-street, who stated that the only payment she had received was the £15 with which defendant had been credited. The only goods she had received from the defendant had been in lieu of interest. Counsel objected to a postponement, and said that the plaintiff had been constantly put off by the defendant.

The matter was postponed until the 14th July, costs to abide the result.

ZEEDERBERG AND DUNCAN V. ANDRUSIE.

Mr. Percy Jones moved for the final adjudication of the defendant's estate as insolvent.

Final order granted.

ASPELING V. ALLIE AND AHMED.

Mr. Percy Jones moved for provisional sentence on a mortgage bond for £650, the bond being due by reason of notice: and for interest and property specially hypothecated to be declared executable.

Order granted.

LENNON, LTD. V. LEWIS.

Mr. Close moved for a decree of civil imprisonment upon an unsatisfied judgment for £45 1s. 5d., together with costs.

Order granted.

HARBRODT V. I. AND J. HERMANN.

Mr. Gardiner moved for provisional sentence on four bills of exchange. Counsel put in consent to judgment.

Judgment in terms of consent paper.

DUFFUS AND CO. V. DE VILLIERS.

Mr. Williams moved for provisional sentence on a promissory note for £72.
Order granted.

TEARNAN V. PARR.

Mr. Sutton moved for provisional sentence on a mortgage bond for £100, and for the property specially hypothecated to be declared executable, the bond being due by reason of the non-payment of interest.

Order granted.

ILLIQUID ROLL.

WALLWORK V. ORANGE RIVER { 1904.
IRRIGATION, LTD. { June 23rd.

Mr. Sutton moved for judgment, under Rule 329d, for £240, salary due, etc.
Order granted.

MOORREES V. HOFFMAN.

Mr. Graham, K.C., moved for judgment in default of plea for £585 odd, goods sold and delivered.

Order granted.

PURCELL, YALLOP AND EVERETT V. SEAMAN.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £25 6s. 2d., goods sold and delivered, work, and labour performed, with interest *a tempore morae* and costs.

Order granted.

PURCELL, YALLOP AND EVERETT V. PFAFF.

Mr. Close moved for judgment, under Rule 329d, for £26 12s. 4d., goods sold and delivered, with interest and costs.

Order granted.

GREEN AND SEA POINT MUNICIPALITY V. BOYCE.

Mr. Gardiner moved for judgment, under Rule 329d, for £67 3s. 9d., rates due.

Order granted.

LIBERMAN AND BUIRSKI V. ESTATE KILLIE.

Mr. Alexander moved for judgment, under Rule 329d, for £29 10s. 3d., goods sold and delivered, with interest and costs.

Order granted.

VIMPANY AND CO. V. VAN GERVE.

Mr. Rowson moved for judgment, under Rule 329d, for £49 10s. 2d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

TROLLIP V. ORANGE RIVER IRRIGATION, LTD.

Mr. Sutton moved for judgment, under Rule 329d, for £121 8s. 4d., moneys disbursed and professional services, with interest *a tempore morae*, and costs.

Order granted.

ROBERTSON AND CO. V. I. AND J. HERMANN.

Mr. M. Bisset moved for judgment, under Rule 319, for £33 13s. 8d., with interest *a tempore morae*, and costs.

Order granted.

REHABILITATIONS.

Mr. Alexander moved for the rehabilitation of Max Syrkin, the sequestration having taken place in February, 1893. The trustee's report contained certain unfavourable comments.

Application refused, with leave to be renewed in twelve months.

Mr. Alexander moved for the release of the estate of the late Maria Alida Erasmus from sequestration, the debts having been paid in full.

Granted.

GENERAL MOTIONS.

In re STABLEFORD AND CO. { 1904.
June 23rd.

Mr. Schreiner, K.C. (with him Mr. McGregor), moved as a matter of urgency for the winding-up of this company by an order of Court. The petitioners were Mr. E. R. Syfret and others having claims against the company, which was at present in voluntary liquidation. The petition stated that the company was registered in a capital originally of £1,500, which was increased from time to time to £45,000. The total value of the assets was estimated at £18,600, and it was estimated that the deficiency between assets and liabilities was £9,169 odd. Certain of the property of the company had been attached by an order of the Court upon a bond ceded by one Kidney to one Cowling.

Order granted, winding up the company and appointing the petitioners as provisional liquidators, and a rule granted, returnable 7th July, calling on all persons concerned to show cause why the

provisional liquidators should not be appointed official liquidators, with powers under sections 149 and 151 of the Act, one publication in the "Government Gazette" and one in the "Cape Times."

Ex parte NASIEBA AND OTHERS.

Mr. M. Bisset moved for an order authorising the petitioners in their capacity as executors to raise £200 on mortgage in the interest of a minor.

Order granted.

NICOLAS V. NICOLAS.

Mr. Wilkinson said that this matter was before the Court on the 17th inst., when the plaintiff obtained a decree of divorce against her husband. The defendant was ordered to show cause why the joint estate should not be appraised and one-half of the proceeds handed over to the plaintiff, and for the appointment of two receivers. Counsel now put in a consent paper signed by the parties.

Judgment in terms of the consent paper, costs to be paid out of the joint estate.

Ex parte WOOD.

Mr. Graham, K.C., moved for an order authorising the Registrar of Deeds to pass transfer of certain property at the corner of Newmarket-street and Dorset-street, Cape Town, to one J. Z. Drake, to whom the petitioner had disposed of the ground. The Registrar refused to pass transfer on the ground that the said property was registered in the name of another party. This unfortunately occurred owing to the fact that in the early days the Municipality kept no records of transfers of Municipal property.

Order granted.

Ex parte HANDS.

Mr. P. Jones moved, under section 113 of the English Bankruptcy Rules of Court, for an order seeking the aid of the Natal Courts in recognising the sequestration in the Supreme Court of the Cape Colony of the estate of Mackie, Young and Co. The estate was finally sequestered on the 9th inst., and the petitioner was appointed *curator bonis*. He had been informed that the said Mackie, Young and Co. carried on a business at Durban, the stock of which was valued at about £300, with certain outstanding debts. It was understood that the creditors in Natal were pressing, and it was desirable in the interest of the creditors generally that the assets in Natal should be secured.

Order granted in terms of the usual precedent of the Court.

Ex parte STEINHOBEL.

Mr. Roux moved for an order authorising the petitioner to purchase certain property in the interest of the minors. The Master recommended the purchase.

Order granted in terms of the Master's report.

Ex parte GINSBERG.

Mr. P. Jones moved for an order authorising the Registrar to register a certain ante-nuptial contract entered into between the parties in Germany. The original minute was signed by both parties, but the Registrar refused to register the contract.

Buchanan, J., said he would like to know what the Registrar's objections were, and ordered the matter to stand over until to-morrow morning.

Ex parte WINKELMAN AND ANOTHER.

Mr. W. P. Buchanan moved for an order authorising the sale of certain property in order to invest the proceeds in other landed property.

Order granted.

WINDVOGEL V. BISHOP OF ST. JOHN'S.

Mr. W. P. Buchanan, for the respondent, moved for an order barring the appellant from prosecuting his appeal. There was an affidavit of personal service. The appellant had not proceeded with his appeal within reasonable time.

Order granted.

Ex parte FOUCHE AND OTHERS.

Mr. Sutton moved for an order authorising the Registrar to register certain property at Hanover, in the names of the petitioners.

The matter was ordered to stand over for the Registrar's report.

GOLDER V. HOWES.

Mr. W. P. Buchanan moved for an order authorising the High Sheriff to sell certain property by private treaty. The property had been declared executable by the Supreme Court, and there were three mortgage bonds on it to the extent of £500, £100, and £100. At a meeting of mortgagees, when all three were represented, it was decided that the property should be sold by public auction, with a reserve price of £700. Only £500 was offered. The petitioner, who was the second mortgagee, had received a private offer of £700 for it. The respondent, who is the third mortgagee, it was believed had left the Colony, and

the other bond holders had agreed to the sale of the property by private treaty for £700.

Order granted.

LUMSDEN V. EAST LONDON { 1904.
MUNICIPALITY. { June 23rd.
 " 24th.

This was an application to make absolute a rule interdicting the respondents from selling certain land between Albany-street and Stevenson-street, East London. The petitioner was joined by other property holders in the district, who contended that the piece of land was a street. The affidavit of the petitioner stated that he had improved his property to the extent of £15,000, his plans had been passed by the Municipality, and he would not have gone to this expense if he had thought that there would be any attempt on the part of the Municipality to dispose of the ground. If the sale were permitted, it would be a gross breach of faith with the owners of the adjoining property, and it would be a great danger to the public health, should it cease to be a means of disposing of sanitary matter. Petitioners were always willing to pay a certain sum for the proper construction of a road. The value of the ground to the Municipality was paltry, but to the petitioners, the holders of the adjoining property, it was a very serious item.

The respondent's answering affidavits set out that the piece of ground was vested in the Municipality as vacant common or pasture land, and they were entitled, under the Act of 1880, to dispose of it for money to carry on important public works. Due notice was given of the intention to sell, but there was only one objection within the proper time. The piece of ground was described as vacant, and it had never been shown to the Council to be a road or street. It never could be used as a thoroughfare, and people who used it as means of access to their premises did so without permission. If any of the applicants who purchased lots considered the ground in question to be a street, they had only their own surveys to blame.

Mr. Schreiner, K.C., for applicant; Mr. Graham, K.C., for respondents.

[Buchanan, J.: Did I gather the price of the land from the affidavits?]

Mr. Schreiner: In the respondents' affidavits, they say they can get a good price for it.

Mr. Graham: And the applicants say it is of a paltry value. I might mention that we have been offered £1,100 for it.

[Buchanan, J.: Both attorneys might wire down and get replies at once.]

Mr. Graham said that, according to section 42 of Act 23 of 1880, all property and servitudes vested in the Commis-

sioners, and all unsold erven and Municipal pasture land, was transferred and vested in the Corporation. Under the following section, the Council could dispose of, with the consent of the Governor, any such land, if they gave continuous public notice. All these conditions had been fulfilled by the respondents. Counsel contended that the East London Municipal Council had never in any way mentioned or described the vacant ground as being a road. The first time this land appeared to have been called a road was in 1897, when some purchasers of land adjoining it, in sub-dividing it, called the land in question a road, but without any authority for doing so. The idea that seemed to prevail was that, because this piece of land adjoined two streets, it must itself be a street. With regard to the statement that the ground would interfere with the sanitary arrangements, the Sanitary Inspector had stated that it would not.

[Buchanan, J.: He has not made an affidavit to that effect.]

We have his evidence to that effect. It is peculiar that the other side have not expert evidence in support of their contention. Continuing, counsel stated that it was intended to devote the amount derived from the sale of the land to complete the drainage section between Stevenson-street and North-street. For sanitary purposes, this portion of the town compared favourably with any other part. It was unlikely that the Town Council would allow houses to be erected on this ground unless adequate arrangements were made for drainage.

Mr. Schreiner contended that if the Government had had the facts of the case before them, they never would have given the grant to the Municipality. It was a most significant omission from the minutes of the Council to leave out the lease to the Convent. It could not take place without correspondence with the Government, and here again that correspondence was not put forward. If the Government had had Mr. Murray's diagram before them they would never have decided that the strip of land in question was vacant. Up to a certain time in the correspondence the Act of 1880 was followed, but it was important to note that the Council afterwards adverted to the Act of 1887. Counsel contended that it was municipal land dedicated as a street, and it never could be shown that it was Crown land. If, in 1882, the Court found that the strip of ground was set apart as a lane or thoroughfare, then the applicants were entitled to their rights. The case must be concluded on the broad question whether when the plots were sold when the Convent property was leased in 1882, and when Murray prepared the diagram, this strip of land was dedicated for public use, and, secondly, if that were so, whether it had been used

by persons in the neighbourhood as a lane which they were entitled to use. The applicants were large municipal ratepayers, who had submitted their plans to the Council, and it was difficult to conceive why the latter should come forward now and attempt to sell the land. The Government's consent, counsel contended, was given on imperfect information. He would prefer, if his learned friend would try and bring about a condition of things between the municipality and the ratepayers by which the interests of the latter might be properly represented, and any suggestion his lordship might make would be gladly welcomed by his clients.

[Buchanan, J.: One might fancy a satisfactory arrangement between the parties could be arrived at if a certain payment was made.]

Mr. Graham: Of course, the principle is very important, my lord.

Buchanan, J., said he would like to know what was done at the time of the sale of lot R if there were any records in the Council minutes.

Mr. Schreiner said that he thought there must be some record in the Municipal minutes of the grant to the Council.

Buchanan, J., said that he thought that the ground might be disposed of with a reserve maintaining it as a road or thoroughfare. The case would stand over for further information.

[N.B.—Up to the present date (Dec. 31st, 1904), the further information desired by the Court has not been produced.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

PORTER V. KADER. { 1904.
 { June 24th.

This was an action brought by Philip John Porter, land and commission agent, Claremont, against Abdol Kader, of Cape Town, to recover balance of account for goods sold and delivered, with interest *a tempore morae* and costs.

The plaintiff, in his declaration, said that he sold several quantities of bricks to the defendant, and that he had received £55 on account, leaving an amount still owing of £68 8s. 9d., which sum he claimed.

The defendant, in his plea, said that he had not received all the bricks alleged to have been delivered, and that he disputed the amount claimed.

Mr. J. E. R. de Villiers was for the plaintiff; the defendant was in default.

Formal evidence was called in support of the claim.

The plaintiff, Philip John Porter, land, commission, and estate agent, said that on the 23rd June, 1903, he sold 20,000 bricks to the defendant at £4 per 1,000, and in the course of a day or two received £55 on account. On the 10th July the defendant came and ordered further bricks, and told him to go on delivering until he had sufficient. Witness delivered 42,000 red bricks and 4,000 white bricks. On the 21st October he sent the defendant an account for the balance owing, £68 8s. 9d., but the latter had neglected to pay it. The defendant did not dispute the amount, but said that he did not get all the bricks, and that his foreman had got some.

Judgment was given for the plaintiff, as prayed.

VAN BOOM V. VISSER.

Encroachment—Judgment in default of plea.

This was an action in which Francis Jacobus van Boom, who resides at Somerset West, sought an order compelling the defendant, who also resides at Somerset West, to remove an encroachment, and also damages in the sum of £100. Mr. M. de Villiers appeared for the plaintiff; Mr. Williams was for the defendant, who had been barred from pleading.

Mr. De Villiers said he did not understand the position of the defendant in this case. The defendant had been barred from pleading, and the Court was afterwards moved for removal of the bar, but the application was refused.

Mr. Williams said that the position of the defendant was this, that he had filed a petition embodying certain facts that might be of assistance to the Court in arriving at a decision.

Hopley, J., said that he would like to know what the nature of the case was.

Mr. De Villiers stated that the plaintiff was the registered owner of certain land at Somerset West, and the defendant owned certain adjoining land. The defendant had encroached by a building and garden upon the plaintiff's property to the extent of 300 feet by 13½ at one end, and 18 feet at the other. The plaintiff had erected a fence upon his own boundary, but this had been wilfully and maliciously removed by the defendant. The plaintiff sought an order compelling the defendant to remove his building from the plaintiff's land in so far as the said building encroached thereon, and also payment of £100 damages.

Mr. Williams was about to read the defendant's petition to the Court, when

Hopley, J., interposed, and said that he did not think counsel had any *locus standi*. However, he would read over the petition himself, and see whether there was anything in it that he could take any notice of. The learned judge then read the petition over, and remarked that he did not know that there was anything special in the document.

Mr. De Villiers called evidence in support of the plaintiff's case.

William Millar, clerk in the office of the Registrar of Deeds, produced copy of the transfer.

Hector Mackenzie Shaw, Government surveyor, said that the defendant's house, a single-story building, encroached on the plaintiff's land, but he did not know to what extent exactly.

Francis Jacobus van Boom also gave evidence, and said that he had been offered £900 for the ground, but he could not sell, because he did not know the boundaries at the time. He did not wish to sell now. He wanted to build a further house on his land, but could not. There was at present a good demand for houses at Somerset West.

Mr. De Villiers reminded the Court that the plaintiff asked for damages.

Hopley, J., said that the plaintiff had evidently trespassed on the ground of the Municipality. What did the plaintiff think would be a fair price to pay to the Municipality for the extent to which he had trespassed on the street?

Witness said that there were a lot of houses on the street at the Strand. The village was not right.

[Hopley, J.: Yes, that is what the defendant says.]

Other evidence was also called, the value of the ground encroached upon being estimated at £20 to £25.

Order granted compelling defendant to discontinue the encroachment, save that the defendant should have the alternative of buying for £25 portion of the strip of ground occupied by the building, and also allowing a 3-ft. passage. Damages were also awarded in the sum of £10, with costs of suit, including cost of survey and diagram and plaintiff's witnesses' expenses.

[Plaintiff's Attorney: D. Tennant; Defendant's Attorneys: Walker and Jacobsohn.]

LANGFORD V. MILES, BOYD AND CO.

Sale and purchase—Verbal contract.

This was an action brought by J. H. Langford, outfitter and hosier, Cape Town, against Miles, Boyd and Co., outfitters and jewellers, Cape Town, to recover £70, the purchase price of certain shop fittings and accessories, plaintiff tendering delivery thereof.

The plaintiff, in his declaration, stated that on the 9th May he sold to the defendants for £70, certain fittings and accessories in a shop that he had occupied in Grand Hotel Buildings. The plaintiff had always been ready to give delivery, but defendants refused to pay the sum of £70, or any portion thereof.

The defendants, in their plea, denied the alleged sale, and said that in May, 1904, they hired certain premises in the Grand Hotel Buildings under lease. Negotiations took place for the hire and purchase of certain fittings and accessories belonging to the plaintiff then in the shop, but, as no agreement could be arrived at as to price, no sale was effected. On the 14th May they gave the plaintiff notice that they had hired the shop, and called upon him to remove the fittings and accessories. Plaintiff wrongfully and unlawfully refused to remove the said fittings and accessories, which still remained in the shop at his risk. The defendants prayed that the claim should be dismissed, with costs. In re-convention, they claimed £100 damages.

The plaintiff, in his replication, admitted that notice was given to him to remove the fittings and accessories, and that they remained at the time of the sale and afterwards in the shop, but he said that the defendants had suffered no damage in consequence.

Mr. Uppington appeared for the plaintiff; Mr. W. P. Buchanan (with him Mr. Russell) was for the defendants.

The plaintiff, John Howard Langford, said that for about ten years he had carried on business as a hosier, outfitter, etc. in the Grand Hotel Buildings. He had the shop on lease, the lease expiring on the 15th May. He closed his shop on the 14th April, and he had decided not to renew the lease, on account of the increased rent demanded by the owners. Early in May, Mr. Miles, one of the defendants, called to see the shop, and said that he had taken it, and that he proposed for six or twelve months to carry it on as an outfitter's shop. Witness asked Mr. Miles whether he would require the fittings, but Mr. Miles said his partner, Mr. Boyd, dealt with those matters. Mr. Boyd afterwards called, and offered witness £50 for the fittings. This witness refused, and he agreed to spring £10 on the original price he had named to Mr. Miles (£80). Mr. Boyd did not agree to purchase. Witness sent a letter to the defendants on the 9th May, and on the Monday following saw Mr. Miles, and urged him to come to a decision. He later on saw Mr. Boyd in Adderley-street. Mr. Boyd stopped him, and said he was sorry he had not had time to answer witness's letter, and that he would take the fittings. On the 11th May he wrote to the defendants, pointing out that the sale was prompt cash, but he received no reply. He later on saw Mr. Boyd, who waved his hand and said, "I don't want

your fittings now; they are no use to me." Witness told him that he could not go behind a verbal contract in that way.

Cross-examined by Mr. Buchanan: He had expended altogether about £150 on the fittings. He thought that the fittings were quite worth £70. He had another offer for the fittings of £50.

Herbert Knight, of the Handy House, Grand Hotel Buildings, said he considered that the fittings for the shop as they stood were of the value of £70. In an auction room they would be so much board. He did not include the telephone and electric lighting in his estimate.

Cross-examined by Mr. Buchanan: He would have been prepared to give £70 for the fittings, if he had taken the shop. He usually wrote off 5 per cent. for depreciation of fittings.

Mr. Uppington closed his case.

Benjamin H. Hart, of the Auction and Estates Company, said he valued the fittings and accessories, to be taken over as a going concern, at £32 15s. His estimate did not include the telephone.

By the Court: If the goods were removed, they would fetch less than £20.

Mr. James Boyd, partner in the firm of Miles, Boyd and Co., and one of the defendants, stated his firm carried on business in both Strand and Adderley streets. In the former place they carried on a clothier's and outfitting business, and in the latter a jewellery business. He took over a shop from Mr. Langford on a five years' lease. Witness saw the fittings in the shop, and Mr. Langford asked him to buy them. Witness refused to do so, but as an afterthought inquired what he wanted for them. Langford replied that he would take £80 for them. Witness said he would not give more than £30, and said he was not anxious to take them, as he already had some. The matter ended there. He never promised to take the fixtures. He wrote to Langford, and asked him to remove the fixtures, but he had not done so, and as a result, he had not been able to open his business there.

[Hopley, J.: If you wanted to get in there, why did you not tell him you would remove the fittings, and place them where he authorised?]

The witness replied that he thought it might prejudice his case. Continuing, he said he considered he had lost about £80 on the turnover through not being in possession. He reckoned on making 100 per cent. profit on the sale of English goods.

Cross-examined by Mr. Uppington, witness denied that he had offered £50 for the fixtures. He would have given £30 for them, and have left them in the shop. He had been approached by a Mr. Friedman with regard to sub-letting his premises. He did not know Friedman's Christian name. He had a shop in Hofmeyr Chambers. Witness did not send

Friedman to Mr. Langford about the fittings. Friedman ran after him. Witness did not follow Friedman.

In further cross-examination witness said that if he thought he could make a profit on sub-letting a shop, he would do so. Witness told Friedman that he did not own the fittings, and to apply to Langford. Friedman thought £70 would be too much for fittings.

Mr. Myles, the second partner, in the firm, cross-examined, said he saw Mr. Langford while his partner was away. He told witness that he would sell the fittings, which had cost him £130. Witness said he would leave the matter until the return of his partner. Langford said he would take £80 for them.

Mr. David Meek stated he managed the Strand-street business for the defendants. Langford went in to the shop to see them on the Friday morning. Langford offered to sell the fixtures at £80, but Mr. Boyd said he did not want them. Mr. Friedman wanted to take the place, and interviewed witness at least twenty times about them in the course of a fortnight.

Mr. Robert Stephenson, of the firm of Bell and Stephenson, valued the fixtures, without the telephone, at £30.

By the Court: He did not value them as if he was taking the shop over. He would allow another £5 for that. If he was taking a shop fitted as that one was with new fixtures, it would probably cost £100 or more.

This closed the evidence for the defence, and counsel for the plaintiff argued that the things had been sold, and that the price agreed on was £70, which was the lowest price Langford had agreed to accept. Under those circumstances he contended they should get a decree for the full amount claimed.

Mr. W. P. Buchanan argued for the defence that it was necessary for the plaintiff in his claim to prove that there was a contract between himself and the defendants for the purchase of the fittings. The plaintiff wanted to maintain that there was a verbal agreement, but with business men, such as the plaintiff and defendant, one would think there would be a contract in writing.

Hopley, J., said the plaintiff sued the defendants on a verbal contract of sale made on the 10th May, the articles bought being certain shop fittings in a shop under the Grand Hotel buildings. The defendants denied that the sale took place. Now, in the Colonial law a verbal sale was as binding as a written one, and the Courts had the unpleasant duty to decide in a verbal contract of this sort which side was to be believed. In the present case the whole facts to be decided were, who was to be believed. It was not alleged that Mr. Boyd would not be able to bind his firm to an agreement. Therefore the whole point that was to be decided was, was plaintiff or Mr. Boyd correct in their recollection of the interview that took

place only a short time ago, and ought to be fresh in the memory of both the plaintiff and defendants. And the Court had to consider which was the most likely to be swayed in his evidence, and which of them had acted most consistently throughout. His lordship then reviewed the evidence, and said that in the discussion that took place in Adderley-street the whole case hung. The point was, what happened there. Mr. Boyd said he put plaintiff off with a civil answer by saying he would see his partner. Mr. Langford said that Mr. Boyd said he had forgotten to answer the letter, but that it was all right, he would take the fixtures. If the Court believed Mr. Langford they would have to agree that the fixtures had been sold for £70. It seemed to him that there could not be any difficulty about the recollection of the sale, nor had it been suggested that Mr. Langford was hard of hearing, and mistook the words uttered by Mr. Boyd. In conclusion, he said he had arrived at the conclusion, after hearing the evidence, that the plaintiff had made out his case. He had convinced him that Mr. Boyd did say that he had taken the fixtures, and had taken them for £70. Therefore there must be judgment for the plaintiff for that amount, with costs.

Mr. Uppington inquired if the claim in reconvention was dismissed.

His Lordship replied in the affirmative.

[Plaintiff's Attorneys: Reid and Nephew; Defendants' Attorneys: Hut-ton and Buchanan.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

REVIEW.

REX V. KRIEK.

1904.
{ June 27th.

Master and servant—Hire of mules—Act 15 of 1856.

The accused was charged before a J.P. under Act 15 of 1856 with withholding wages for work done by complainant's mules. No section of the Act was specified. Accused was found guilty and fined. Con-

viction quashed as grossly irregular.

Mr. Justice Hopley said that this case had come before him on review. The accused was charged before a Special Justice of the Peace at Mossel Bay, in the division of Herbertsdale, with contravening the Master and Servants Act—not any specific sub-section, but generally—in that he did wrongfully and unlawfully withhold the wages for the work done by the mules of Berend Kriek. That was the whole of the charge. The evidence stated that the accused took some four mules, belonging to his brother, Berend Kriek, without leave, and there was some disagreement between the brothers as to what would be a fair price to pay for the service of the mules. The brothers did not come to an arrangement, and the accused did not pay what the other thought he should pay, whereupon the owner brought an action against him under the Master and Servants Act. He (the learned judge) did not know by what particular process this was done, but a Special Justice of the Peace found the accused guilty, and fined him 5s. for withholding the wages of these mules, and ordered him to pay 3s. to Berend Kriek, being 1s. 6d. per pair of mules. The conviction was altogether irregular and illegal, and must be quashed.

GENERAL MOTION.

PINN V. ELLIOTT.

Interdict—Rent.

The Court will not grant an interdict to restrain a tenant from removing his goods unless rent be actually due and unpaid.

Mr. Schreiner, K.C., moved, as a matter of urgency, on behalf of the applicant, Alfred Elliott, for the discharge of an interdict restraining him from removing certain goods from a shop in Kloof-street, failing security for rent for the unexpired period of the lease, or in the alternative, for the cancellation of the lease. Mr. Van Zyl appeared for the respondent, Lazarus Pinn.

The affidavit of the applicant, Elliott, stated that he had leased certain premises, a pharmacy in Kloof-road, from the respondent. He had paid all rent due in terms of his lease, and had been interdicted from disposing of his goods upon an application made to this Court by the respondent. He was thus pre-

vented from earning his livelihood, and it was impossible for him to make the money necessary to meet the rent as it fell due, and other obligations as they matured.

For the respondent, affidavits were put in stating that the applicant had been seen, on the 22nd June, removing goods from the shop, and on the following day the shop was closed.

Mr. Schreiner: We are not *in mora*, no rent is due or in arrear. The landlord's hypothec has no force unless rent is due.

[De Villiers, C.J.: An instalment was due on July 1st.]

No rent was due, and we are not bound to leave our goods as security for future rent, *Campbell v. Muller, Smith and Co.* (4 Juta, 335), *Smith v. Dirks* (3 Juta, 142). That case seems to decide that a tenant cannot remove any of his goods during the term of lease unless he gives security; but, see *Greeff v. Pretorius* (12 S.C.R., 104). This goes as far as any case. See also *Board of Executors v. Stigling* (Buch. 1868, p. 25). They now want to attach the very goods by means of which we hope to make profit and to pay rent. Unless there is a clause in the lease to the effect that goods to a certain value must be kept on the premises, a lessor cannot prevent the lessee from removing his goods, *Lazarus v. Dose* (3 Juta 43). No application of this kind has ever been made unless rent was due.

Mr. Van Zyl: We say that the lease runs till 1907, and we say that some rent (viz. £17 10s.), will be due on July 1st, and that we have a right to security for that.

[Hopley, J.: The rent is not due till July 1st, how do you know that they will not have a fresh stock in by that time?]

The hypothec extends to all *bona infecta et illata*; moreover, we had good reason to believe that the respondent meant to close up his shop and conclude his business. In fact, the shop had been closed before our affidavit was drawn.

Mr. Schreiner was not heard in reply.

De Villiers, C.J., said that the Court had already intimated that where an *ex parte* application was made to a judge, the applicant should state every material fact, to enable the judge to arrive at a proper conclusion. In the present case, it appeared to him that the applicant (now respondent) failed to inform the judge before whom the case came as to a very material fact, and that was, that there was really no rent owing at the time when the application was made. The rent had been paid until the 30th June, and on the 1st July the rent to be paid would be rent for the month of July. Looking at the lease, he found that one of the terms was that, "in the event of the lessee failing to pay the rent when due, or after seven days' notice, the lessor shall have the right to cancel the lease." Therefore

the lessor's security was absolute; there was no better security that the man could have, and if these facts had been brought to the notice of the judge, he was satisfied that he would never have made the order. He was of opinion, therefore, the rule must be discharged, with costs.

Hopley, J., said that he concurred. The matter was put before him when he granted the rule, as far as he remembered, as one of urgency, as he believed. When he granted the order, he must say he thought there was rent due at the time. He quite agreed in the present circumstances that the applicant (Pinn) had not shown any reason why these goods should be restrained from being removed, and he thought if he (Pinn) had told him at the time, he should not have granted the rule.

[Applicant's Attorney: G. Trollip; Respondent's Attorneys: Walker and Jacobsohn.]

REX V. MATYOLWENI AND { 1904.
OTHERS. { June 27th.

Evidence — Accomplice — Ordinance 72 of 1830, section 12.

Two prisoners having been convicted of the theft of an ox, gave evidence that the appellants, their fellow prisoners, had been concerned with them in the theft, and the appellants were convicted.

Held, that as there was clear proof that the ox had been stolen, the evidence of the accomplices was sufficient to support the conviction of the appellants.

This was an appeal from a judgment of the Resident Magistrate of Mount Pleasant. The matter arose out of a charge of theft of an ox, which had been preferred against six natives, who, for the purposes of the case, were numbered 1 to 6 inclusive. Numbers 1 and 5 pleaded guilty, and the others pleaded not guilty, but the whole party, except No. 6, were convicted. The present appeal was brought by accused 2, 3, and 4, for whom Mr. Russell appeared; Mr. Howel Jones represented the Crown.

The Magistrate found prisoners No. 2, 3, and 4 guilty, and sentenced each of them to two years, with hard labour, and ordered Nos. 1, 2, 3, 4, and 5 to pay compensation. He was fully convinced that they stole the ox in question.

Mr. Russell (for appellants): The chief evidence against the appellants is that of accomplices. Beyond this there

is only the evidence that prisoner No. 2 said that Nos. 1, 3, and 5 came to his kraal, but said that they had come about grain. Then again a considerable amount of hearsay evidence was introduced, e.g., that of the constable, Dantzie's statement to him was taken down, and does not at all agree with that of Nos. 1 and 5; but when they got into Court they had a different story to tell.

[Hopley, J.: All the evidence says that No. 2 was present.]

Yes, but there again we have the unsupported evidence of accomplices.

[Hopley, J.: What authority have you for saying that a man cannot be convicted on the evidence of accomplices?]

There certainly seems to be some doubt as to the exact amount of corroboration required. See Ord. 72 of 1830, sec. 12, but with that read sec. 48. The only case I can find in which this has been held is *Reg. v. Adams* (4 C.T.R. 122.)

[De Villiers, C.J.: If the evidence of an accomplice must be supported by other evidence which would in itself be sufficient to convict, why admit the evidence of an accomplice at all?]

A man may be convicted on the evidence of an accomplice, but it is quite open to the defence to call the character of the accomplice in question. The English practice goes further than ours. English law, it is true, will uphold a conviction on the evidence of an accomplice, but judges invariably caution juries not to convict on such evidence, and I submit that sec. 48 of Ord. 72 of 1830 binds our Courts to follow the English practice in this respect.

Mr. H. Jones (for the Crown) was not called upon.

De Villiers, C.J.: If the witnesses for the prosecution are to be believed there can be no reasonable doubt as to the guilt of the three prisoners who are known as Nos. 2, 3, and 4. There was clear proof that the crime of theft of the ox had been committed. After two of the prisoners had been convicted they gave their evidence, and, according to the evidence of both, No. 2 was a party to the original plan to kill the ox. The day after the ox had been killed Nos. 3 and 4 came on horseback, and carried it away, and 3 and 4 were the sons of 2. The accomplices gave further evidence of the appellants' guilt, but it is contended that under the proviso to the 12th section of Ord. 72 of 1830 there must be clear proof by evidence other than that of the accomplices that the appellants committed the theft. Such a construction of the proviso would be inconsistent with the rest of the section, which clearly permits of a conviction on the single evidence of accomplices. The proviso merely requires independent proof that the crime or offence charged

was committed by some one. Where, as in *Reg. v. De Kock* (1 Rosc 441), there is no clear and independent proof that a crime or offence was committed at all, the evidence of the accomplices is not sufficient. In the present case, however, there was clear evidence that the ox had been stolen, and the two accomplices had actually been convicted of the crime before they gave their evidence. Even so, it was the duty of the Magistrate to scrutinize their evidence very closely before acting upon it, and this he certainly seems to have done. The 48th section, in my opinion, does not affect the point at all, as there is sufficient evidence here to convict. It is true some hearsay evidence was admitted, but it is not in conflict with the evidence given by the accomplices, and without that hearsay evidence there is sufficient evidence to justify the Magistrate in convicting the prisoners. The appeal must, therefore, be dismissed.

Hopley, J., concurred.

[Appellants' Attorney: G. Trollip.]

MOHAMED V. ISHMAIL.

Master and servant — Wages — Magistrate's jurisdiction.

This was an appeal from a decision of the A.R.M. of Wellington. The appellant was sued for £30, which the respondent set out was due to him for wages, the appellant undertaking to pay it for another man named Hoesen, who had gone insolvent.

From the record in the Court below it appeared that the defendant's attorney excepted to the summons on the ground that the amount was beyond the Magistrate's jurisdiction. The exception was reserved until the evidence was heard. The evidence set out that the defendant took over the business of the plaintiff's master, who was indebted to the plaintiff in £30 for wages, and by doing so it was contended that the defendant was liable. The Magistrate overruled the exception on the grounds that the amount sued for was proved to be for wages. There was no exception that the summons was bad in law or irregular. In giving judgment for the plaintiff, he based his reasoning on facts. The witnesses for the plaintiff had all appearances of being reliable, and the Court believed the best evidence. He held that the Court had jurisdiction, as the amount was for wages due.

Mr. McGregor was for the appellant, and Mr. Uppington was for the respondent.

[De Villiers, C.J.: Under what act has the Magistrate jurisdiction over £20?]

Mr. McGregor: I submit no Act, my lord.

In the course of three separate trials respecting the ownership of certain cattle, M. had made

contradictory statements on oath. His statements at the first and third trials agreed, but were contradicted by his statement at the second trial. He was thereupon tried and convicted in the R.M. Court for perjury committed at the second trial. No evidence was led to show that the statement he then made was false.

Held on appeal, that the perjury had not been proved and the conviction must be quashed.

This was an appeal from a judgment of the Resident Magistrate of Willowdale.

The appellant had been convicted on a charge of perjury. The conviction took place on the 17th May, and the appellant was sentenced to pay a fine of £15, or, in the alternative, to three months' imprisonment, with hard labour.

Mr. Alexander (for the appellant) stated that the criminal charge arose out of curious set of circumstances. In the first instance, the accused's sister, Emily, sued James Mangoba, another brother for certain cattle, which she claimed belonged to her. The accused then gave evidence on behalf of James, and swore the cattle belonged to the defendant, and judgment was given for absolution from the instance. Then James sued the present appellant for certain of these cattle, and on this second trial judgment was given for the plaintiff. On that occasion the accused said that what he had said on the previous occasion was not the truth, and that the cattle really belonged to his sister Emily, and not to James. Thereupon, Emily brought another action against James, and summoned Koli to give evidence. He then said that the evidence he gave on the first occasion was correct, and that his statement at the second trial was false. Criminal proceedings were then instituted for perjury, alleged to have been committed on the second occasion. The appeal was brought on the grounds that the accused was charged with having committed perjury in saying, first, that the cattle belonged to his sister, and, secondly, that the plaintiff, James, had no claim to the said cattle, but that no evidence was led at the trial to show that the cattle did not belong to the sister or that James had a claim. Counsel read the record of evidence, which he contended really showed that if there were perjury at all it was committed on the first and third occasions. There was no evidence corroborating the accused's contradiction. It was necessary, he urged, that the Crown should prove that the cattle did not belong to Emily, and that James had a

claim to the cattle, instead of which the evidence was all directed to show that there had been a contradiction. Such evidence as there was went to show that the occasion on which perjury was alleged to have been committed was really the occasion on which the accused spoke the truth.

Mr. Jones (for the Crown), contended that the accused's statement on the third occasion was a sufficient corroboration to satisfy the requirement of the law that there should be something more than two opposing statements by an accused person.

Buchanan, J.: The appellant was charged before the Magistrate in this case with the crime of perjury in having said that certain cattle which was the subject matter of a suit between them, belonged to his sister, Emily Mangoba. It appears that before the prisoner made this statement, he stated, when his sister sued her brother James for the cattle, that the cattle did not belong to his sister, and that on a subsequent occasion also he again made this statement. On the first occasion he told one story which he corroborated on the third occasion; on the second occasion he contradicted himself, and it is on the statement made on the second occasion that the crime of perjury has been assigned against him. There are certain requirements which have to be complied with before a person can be convicted on a charge of perjury. The old idea was that there must be at least two oaths against one—that is, two witnesses against one—before a charge of perjury can lie, but the law has lately laid down that it is not quite correct to say that two witnesses are necessary, but that there must be something to corroborate one witness in saying that the evidence of another was false, and it has also been clearly laid down that where a prisoner gives two different statements on oath, it is not sufficient to prove the two statements, but that there must be some corroboration that the statement upon which perjury is laid is false. In this case there is no doubt that the prisoner is guilty of perjury, but the question is upon which occasion did he commit perjury? As far as the evidence goes it seems to show that the prisoner committed perjury on the first and third occasions, and that on the occasion when he is alleged to have committed perjury he really spoke the truth. There is a total absence of corroboration to show that the prisoner committed perjury on the second occasion, but it has been very ingeniously argued by counsel for the Crown that the necessary corroboration is supplied by the fact that the prisoner twice on oath told the same story in contradiction to the statement which is said to have been perjured. Now I think all the authorities show that that is not sufficient. The law requires some outside evidence beyond that of the prisoner to show

that he has been speaking a falsehood. I regret in this case that upon a technical ground only we must quash this conviction, because it is clear that perjury was committed, only, unfortunately, as far as the evidence goes, it seems to show that the statement upon which perjury is assigned is the true statement, and that it was upon the other occasions that he commit perjury. For these reasons the appeal must be allowed and the conviction quashed.

Hopley, J., concurred, and said it would only have wanted very slight corroboration indeed to justify the Magistrate in the finding he came to. It might be that this was the proper occasion, but the Crown had to prove it, and they produced no evidence whatever beyond the fact that the accused at two trials made statements contradictory to the one which was alleged to be perjured. The Crown had proved that perjury was committed, but had not proved that it was upon this particular occasion that it was committed.

CRESSY V. SHAW.

Messenger of Court—Attachment of private and of partnership property.

This was an appeal from a judgment of the Resident Magistrate of Richmond, in an action in which the appellant sued Shaw, the Messenger of the Court, for damages, and the amount of a judgment obtained against one Niehoven, plaintiff alleging that the defendant had wrongfully released certain property alleged to belong to Niehoven, which was attached in execution of the judgment.

Mr. Graham, K.C., appeared for the appellant; Mr. Close for the respondent.

From the record in the Court below, it appeared that the writ of attachment against Niehoven's property was placed in the defendant's hands for execution on the 8th April, and that a horse was attached on the 12th. On the 15th, Niehoven surrendered the partnership estate of himself and his brother, and the horse was brought up in the schedules, which had been sworn to in March, as being the property of the partnership, and on this being brought to the notice of the defendant he released the horse. Plaintiff thereupon sued him in the Magistrate's Court, and the Magistrate found that plaintiff had not suffered any damage by reason of the defendant's action, which he held to be in good faith.

After hearing Mr. Graham in argument, the Court dismissed the appeal, with costs.

Buchanan, J.: One Alie Niehoven and his brother carried on farming operations together in partnership. Alie Niehoven bought from the appellant Cressy certain goods for the purposes of these farming

operations. Cressy said he did not know the goods were being bought for the partnership, but that he sold them to Alie only. On the 24th March the two brothers drew up their schedules in surrender of their partnership estate. In these schedules is brought up, as an asset of the partnership, a certain horse. This horse was used in the partnership business and the finding of the Magistrate was that it belonged to the partnership estate. After the schedules were drawn up and sworn to by the debtors, the appellant took out a summons against Alie Niehoven, obtained judgment, and entrusted the defendant Shaw, the Messenger of the Magistrate's Court, with a writ of execution. He informed Shaw that there was a certain horse running at a certain farm about five miles from Richmond, which belonged to Alie Niehoven, and Shaw went out and attached this horse. Appellant clearly knew at this time that the horse was included in the schedules. The messenger attached the horse on the 12th April; on the 14th April, the schedules drawn up on the 24th March were accepted, and the estate declared insolvent. The messenger, as a Master's officer, not as Messenger of the Court, was instructed to attach all property belonging to the estate, which figured in the schedules, and in execution of that duty, he attached this horse as one of the assets of the partnership estate. The appellant complains that the messenger neglected his duty in not selling this horse in execution of his judgment, but I think the Magistrate has found quite correctly that it was not in the power of the Messenger of the Court in executing this writ to sell a horse which belonged to the partnership, and which had been attached by an officer of the Master. I do not think there was any neglect of duty on the part of the messenger, and it is neglect of duty which is the foundation of the claim against the defendant. The Magistrate, having all the facts before him, found that there was no neglect on the part of the messenger. We have had the records and the Magistrate's reasons read, and I must say that in this case I think the Magistrate took a very correct view of the true legal position in deciding in favour of the messenger. I can see no ground for interfering with the decision of the Magistrate, and for saying that the messenger has in any way neglected his duty in this case. The appeal must, therefore, be dismissed, with costs.

Hopley, J., concurred.

MOTION.

ALEXANDER V. MUIR.

Mr. Upington moved on behalf of the defendant for the appointment of a commissioner to take the evidence of defend-

ant on commission at Ceres. It was stated on affidavit that the defendant was suffering from chronic rheumatism, and would not be able to come to Cape Town.

The application was granted, the Resident Magistrate of Ceres being appointed to act as commissioner. Costs to be costs in the cause.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

LABE AND MEYEROWITZ V. { 1904.
June 28th.
PATERSON AND DE HETON. { 29th.
July 8th.

Insolvency—Assignment—Undue preference.

This was an action brought by Labe and Meyerowitz, contractors and builders, Cape Town, against Paterson and De Heton, brokers, Cape Town, for an order requiring the defendants to sign a certain deed of assignment executed by the plaintiff firm for the benefit of their creditors, and to account for and hand over to the nominated assignees all rents received by them in the estate of the plaintiffs.

The plaintiffs' declaration was as follows:

1. The plaintiffs are a firm of contractors and builders, doing business in Cape Town.

2. The defendants are a firm of brokers, also doing business in Cape Town.

3. In or about the month of November last plaintiffs found that their estate was virtually insolvent, their liabilities being mortgage debts to the amount of £10,182 5s. 9d., besides interest thereon to the amount of about £600, and concurrent debts to the amount of £2,997 2s. 9d., and their assets being of the value of £11,460, and that the immediate sequestration of their estate should have to ensue unless some arrangement was arrived at with their creditors.

4. The plaintiffs had and have a substantial interest therein that such arrangement should be arrived at, and also therein that one creditor should not be preferred to another in a manner herein-after mentioned.

5. On the 27th November, 1903, a meeting of creditors of the plaintiffs was held in Cape Town, to take into consideration, together with the plaintiffs, the assignment of the said estate.

6. At that time the plaintiffs were indebted to the defendants in the amount of £125 11s. 6d., being the unpaid balance

of a promissory note for £207 13s. 6d., due 15th December, 1903, and given by the plaintiffs to the defendants in consideration of money advanced to them by the latter. The amount of the note had been reduced to this extent through an arrangement made between the parties thereto that the defendants should collect the rents of certain houses belonging to the plaintiffs as such rents fell due and appropriate the same against the said advance.

7. It was to the knowledge of the defendants represented at the said meeting that defendants were collecting the rents beforementioned and appropriating the same against the said advance, and that they were being unduly preferred above other creditors; and as a matter of fact under the law relating to insolvency it was disadvantageous for creditors other than the defendants to agree to an assignment in case the defendants continued so to act.

8. In consideration of these circumstances it was agreed between the plaintiffs and the said creditors at the said meeting that provided the defendants agreed to such assignment the plaintiffs should make an assignment of their estate for the benefit of their creditors, and it was further agreed that the assignees should be the members of the firm of Chiappini Brothers, consisting of Alexander John Chiappini, Charles du Plessis Chiappini, and Francis William Cubitt Chiappini, the said firm being also a creditor of the said estate, and the said members being willing to be appointed as and to perform the duties of such assignees.

It was moreover resolved that failing the assent of defendants to such assignment the said estate should be sequestrated as insolvent.

9. The defendants thereupon agreed to this assignment, provided that they should be allowed to be employed for reward by the nominated assignees in the letting of the said houses and the collection of rents thereon on behalf of the creditors, pending the realisation of the properties, and that the amounts collected should be handed over to the nominated assignees, and the plaintiffs and the said nominated assignees, with the assent of the said creditors, agreed to the defendants being so employed by the said nominated assignees.

10. A second meeting of creditors being such creditors as had not attended at the first meeting beforementioned was thereafter held in order that the position of the estate might be explained to them, and thereafter all creditors, not including the defendants, signed a deed of assignment dated the 31st day of December, 1903, in due form.

11. The said deed of assignment (as will on reference thereto more fully appear) was substantially to the effect that the plaintiffs, of the first part, ceded and assigned to the before mentioned mem-

ber of the firm Chiappini Brothers of the second part, with the consent of their creditors, of the third part all their assets and all books, accounts, and writings touching the same upon trust, to realise, and after deduction of expenses and preferent debts, to divide the balance ratably amongst concurrent creditors, with power to demand and recover by action all debts, and give acquittance for the same, and to pass transfer, and that the plaintiffs should be thereby released from their debts.

12. In consequence of the agreement of the defendants to the assignment, all the other parties concerned forbore from obtaining the sequestration of the said estate.

13. The deed of assignment was thereafter handed over for signature to the defendants, who retained the same in their possession until the 15th day of January last, when they refused, as they still refuse, to sign the same without assigning any reason for such refusal.

14. The defendants had meanwhile, since the date of the first-mentioned meeting of creditors, in accordance with the agreement in paragraph 9 mentioned, and on the understanding that they should sign the deed of assignment, been allowed by the other parties to such agreement to continue, and they continued, collecting the rents before-mentioned.

15. At the time of their refusal to sign the said deed of assignment, they moreover refused, as they still refuse, to hand over for the benefit of the plaintiffs' creditors the rents received by them, or any part thereof, to the abovementioned nominated assignees; and on the 22nd day of January following they rendered an account to the plaintiffs, in which the liability of the plaintiffs to them purports to have been at the time of such refusal, reduced to the sum of £26 2s. 9d., through the appropriation by them of rents received by them as aforesaid.

16. The plaintiffs and the nominated assignees have at all times been, and are still, willing, in accordance with their agreement with the said defendants, that the defendants should be employed by the nominated assignees for reward to let the said houses as occasion may require, and to collect the rents falling due thereon, on behalf of creditors, pending realisation.

17. The plaintiffs, by virtue of the premises, are entitled to claim that the defendants be forthwith ordered to sign the said deed of assignment, and in default thereof, by way of alternative relief, that the said deed of assignment shall have the same force and effect as if the same had been duly signed by them from the time that the same was handed over to them for signature, and that all rents received by them since the 27th day of Novem-

ber, 1903, and still to be received by them, shall be refunded to the plaintiffs, or the nominated assignees, for the benefit of all creditors, the defendants to receive due reward by way of usual commission thereon, in accordance with the said agreement.

18. The plaintiffs pray: (1) That the defendants be forthwith ordered to sign the said deed of assignment; (2) that the defendants be forthwith ordered to account for and hand over to the said nominated assignees all such rents received by them as aforesaid, for the benefit of the plaintiffs' creditors; (3) such alternative relief as to this Hon. Court may seem meet; and (4) costs of this suit.

The defendants' plea was as follows:

1. The allegations in paragraphs 1, 2, 5, and 6 of the declaration are admitted subject as to paragraph 6 to the next succeeding paragraph hereof.

2. Defendants have no knowledge of and do not admit the allegations in paragraphs 3 and 4.

3. (a) The allegation in paragraph 7 (the relevancy or materiality of which herein defendants do not admit) is denied.

3 (b). Defendants were not present at or bound by proceedings at the said meetings.

3 (c). The rents referred to in paragraphs 5 and 7 were duly and lawfully collected by the defendants under and in terms of an irrevocable power of attorney (hereunto annexed marked "A" to the terms whereof defendants respectfully crave leave to refer) granted by plaintiffs to defendants in February, 1903, in consideration of certain advances to be made, and which in fact were duly made by defendants to plaintiffs, the said power empowering the defendants to collect the rents accruing from the properties mentioned therein, being the rents referred to in the said paragraphs 6 and 7, and to apply the proceeds of the same in payment of plaintiffs' said indebtedness. The said power of attorney has never been withdrawn.

4. Paragraphs 8, 9, and 17 are denied.

5. The defendants at no time agreed to become parties to the assignment mentioned in paragraphs 8 and 9. Defendants admit that it was understood that if they at any time should for reasons thereunto moving agree to such assignment they should be employed by the assignees for reward in and about the letting of the said houses and the collecting of the said rents.

6. Paragraph 10 is admitted, save that defendants deny that all the creditors other than themselves signed the said deed of assignment.

7. As to paragraph 11, defendants respectfully refer this Honourable Court to the said deed for the meaning and effect of such portions thereof, if any, as may be material herein.

8. Paragraph 12 is denied. Defendants never agreed to such assignment nor were they parties to any agreement whereby the action of plaintiffs' creditors was affected.

9. As to paragraph 13, defendants admit that the said deed was handed to them on or about the 10th January, 1904, and returned by them on or about the 15th January with an intimation of their refusal to sign the same, and that they still refuse to sign the same.

10. Paragraph 14 is denied. Defendants duly and lawfully continued to collect the said rents by virtue of the aforesaid power hereto annexed and not otherwise.

11. Paragraph 15 is admitted save that defendants refer to the premises for the circumstances and the power under which and purpose for which they received the said rents and applied the proceeds, and say that the said account as rendered by them was correct.

12. Defendants have no knowledge of the allegations in paragraph 16 save that they again as aforesaid deny the said agreement.

Wherefore the defendants pray that the plaintiffs' claim may be dismissed with costs.

The plaintiffs' replication was general. Mr. M. de Villiers (with him Mr. De Waal) for plaintiffs; Mr. McGregor for defendants.

Alexander John Chiappini, of the firm of Chiappini Bros., Cape Town, said that he remembered a meeting of the plaintiffs' creditors in November last, at which it was represented that the plaintiffs were hopelessly insolvent. The plaintiffs submitted a list of their liabilities, which they could not meet, and said that they had several pressing creditors. Witness's firm were creditors against the estate, and they also represented certain bondholders. About a month later he knew that certain interest was becoming due, and he informed the plaintiffs that unless certain rents were paid to them, they would make the plaintiffs insolvent. At the meeting referred to it was put before the plaintiffs that unless they were prepared to assign their estate, it would have to be sequestrated, and that it would be necessary, in case of assignment, to have the consent of Paterson and De Heton. Paterson and De Heton were communicated with at the meeting, and they asked whether, in the event of an assignment, they would be allowed to continue to collect the rents for account of the assigned estate, and to charge their commission as before, and also whether they would be entitled to brokerage if they got a purchaser for the property. Witness and the other creditors at the meeting agreed to these terms. Mr. Paterson gave a direct reply that he agreed to the assignment, and witness then decided to draw up a deed of assignment.

All the creditors present at the meeting felt that Paterson and De Heton were getting undue preference from that date. They said definitely that in case the defendants did not agree to the assignment, they would petition the Court next day for compulsory sequestration. Witness, in December, sent the deed of assignment to the defendants for their signature, but the deed was returned to him unsigned. It was more beneficial to the creditors that the estate should be assigned, rather than sequestrated. The estate consisted largely of landed property, and in case of a forced sale, the proceeds were not likely to be so good.

By the Court: The whole of the amount due to the defendants was about £200. The estate was valued at from £10,000 to £12,000.

Cross-examined: Nothing was said in the assignment as to all the creditors signing. Paterson and De Heton did not say that witness might send the deed to them if the other creditors all signed. The chief topic at the meeting was as to whether the estate should be assigned or sequestrated. The defendants distinctly agreed to become parties to the assignment. In January he sent a note to the defendants asking them to pay out of the rents £54 interest due to one of the bondholders. The deed was not signed by one creditor, or perhaps two. One of the creditors, Mr. Bensill, obtained judgment in the Court against the plaintiffs. Mr. Jackson, a creditor for £130, did not sign the deed. He was aware that the defendants had sued the plaintiffs on the 9th February of this year in the Magistrate's Court. The case was allowed to go by default. Witness had before that time taken proceedings in the present case; he had placed the matter in the hands of his attorneys immediately after the second meeting of the creditors. He did not see any need to defend the action brought by the defendants. He sent all the creditors a notice to attend the second meeting on the 19th January. At that meeting they decided to give the defendants three days to render an account of the rents collected. He was told by the plaintiffs that a power of attorney had been in existence whereby the defendants were collecting the rents.

Re-examined by Mr. De Villiers: The bond debtors he represented were aware of the assignment. At the meeting no conditions were made by the defendants that all the creditors had to sign.

Petrus Jacobus Bosman said that he acted as chairman at the meeting of creditors. He told those present that he looked upon the position as hopelessly insolvent. Mr. Chiappini thought the best thing to do was to sequester the estate. Witness gave

it as his opinion that, unless the defendants fell in with the other creditors, the best thing to do was to sequester. Mr. De Heton did not show any disposition to join in with the idea, but after a consultation with his partner, the meeting was informed that the defendants were quite willing to fall in with the other creditors in the assignment, on condition that they were allowed to collect the rents, take their commission, and hand over the surplus to Mr. Chiappini every month.

Cross-examined by Mr. McGregor: The conversation was not of a powerful and convincing kind. It was merely pointed out to them, unless they agreed to the assignment, the estate would have to be sequestered. It was a standing rule that small creditors under £10 were paid out in full.

Joshua Kidney said that he was present at the meeting of creditors in November. A certain assignment was proposed, and ultimately the defendants agreed to the assignment.

Cross-examined by Mr. McGregor: There was only the one point at issue, and that was the cessation of the rents. The meeting lasted from 3 to 5 o'clock, but Mr. De Heton did not say much. The defendants never said that they would join in the assignment if all the other creditors did. He was not present at the second meeting.

Joseph Black, another creditor of the plaintiffs, stated that he was present at the meeting, and corroborated the other witnesses as to what took place.

Abraham Meyerowitz, partner in the plaintiff firm, stated that towards the end of 1903 he found that he could not pay his debts, and he went to Mr. Chiappini, and explained the state of affairs. At the meeting in November he understood that it was agreed that the estate should be assigned.

Mr. Chiappini (recalled) said that the second meeting referred to was really not a second meeting, it was merely to settle small accounts with foreign workmen.

Cross-examined by Mr. McGregor: He did not remember either of the defendants asking him if he was a creditor in the estate before he was appointed assignee.

Mr. De Villiers closed his case.

James Peterson, one of the partners in the defendant firm, stated that they received power of attorney from the plaintiffs in February, 1903, in order to collect their debts. In November the plaintiffs owed them £125. At the meeting the affairs of the plaintiff were being discussed. Mr. Chiappini asked him if he would sign the deed of assignment, and he replied that his firm might sign if all the creditors signed. It was agreed by Mr. Chiappini that if they signed the deed of assignment they might continue to take their commission on the rents. That was suggested to witness. He could not say if all the creditors that

day agreed to sign. On several occasions Labe came to his office to get his signature. Each time Labe came he said in reply to questions that every creditor had not signed, and on the last occasion when he came Labe said that everybody wanted to be the last, and witness then said, "Well, there's no reason why we shouldn't be the last." He did not know until after the meeting that Mr. Chiappini was a creditor; in fact, previous to that he had told him that he was not.

Cross-examined by Mr. De Villiers: He did not know that the creditors were determined on sequestration or assignment. He was laid up between the 4th and 15th January, otherwise he would have replied to Mr. Chiappini's letter. During that period he collected some £115 in rent. He could not account for the omission in his pleadings of his assertion that he made it a condition that his firm would only sign if the other creditors did. He replied to Mr. Chiappini's letter of the 16th January, but in his reply there was no mention as to why they did not keep their promise, and sign the deed. He was under the impression that a power of attorney was irrevocable, and that was the reason he went on collecting the rents.

Reginald Charles de Heton stated that he attended the meeting on the 27th November, and afterwards went and fetched his partner.

By the Court: Witness had not in any way committed himself up to the time he went to fetch his partner. Afterwards the conversation was principally between his partner and Mr. Chiappini. He understood the meeting wanted his firm to sign a deed of assignment. Witness thought the reason that his firm was particularly wanted to sign was because they collected the rents.

In reply to counsel for the defence, the witness further stated that when Mr. Chiappini asked Mr. Paterson to sign, the latter said they might sign, if all the other creditors signed. Witness believed it was mentioned that they were getting 5 per cent. commission on the rents. It was suggested that they should continue to collect the rents and retain the commission. Witness and Mr. Paterson did not agree to become parties to the agreement, but said that if all the creditors signed, they might do so also. He recollected a clerk taking the deed to them, and asking them to attend to it. Witness said that his partner was away, and that he was busy, and that when his partner returned, the matter would be attended to. Mr. Chiappini ultimately took the deed away.

Cross-examined: Witness did not think it was said that, unless witness and his partner signed, the estate would be sequestered. The matter of the witness's firm collecting the rents and appropriating them was discussed, He

did not understand that the creditors were dissatisfied.

This closed the evidence for the defence.

Counsel were then heard in argument.

Cur. Adv. Vult.

Postea (July 8th).

Hopley, J.: On the 27th November, 1903, the plaintiffs, who carried on business as contractors and builders in Cape Town, called a meeting of their creditors, and laid before them a statement showing that they were virtually insolvent. Their assets, which they valued at £11,460, consisted almost entirely of immovable property, which was mortgaged for £10,182, and there was a sum of about £600 due on the bonds as interest. The rest of their liabilities amounted to nearly £3,000 to creditors who held no security of any kind, with the exception of the defendants, who held an irrevocable power of attorney from the plaintiffs to collect the rents accruing from some of their immovable properties, and to apply the same in reduction of the liability to them until the whole amount had been paid. This power had been given on the 11th February, 1903, when the debt to the defendants secured by promissory notes was considerably larger, but by the 27th November it had been in this way reduced to £125. The meeting was called by the plaintiffs with a view to getting their creditors to agree to an assignment of their estate to the firm of Chiappini Bros. for the benefit of their creditors, and at that meeting the majority in value of the concurrent creditors were present, including Mr. Alexander Chiappini, of the said firm, who were unsecured creditors for over £500. Besides this interest, he also represented a Mr. Marais, who was a large bondholder in this estate. The interests of the mortgagees were, however, considered to be sufficiently safeguarded, and it was understood that no objections would be raised by any of them; so that the proceedings mainly concerned the unsecured creditors, and were carried on with a view to a fair adjustment of their claims.

It is clear that the unsecured creditors were dissatisfied that the defendants should, by virtue of the exercise of their irrevocable power, obtain a preference over the other concurrent creditors, and I am satisfied that it was the intention of the more influential and important among them—notably of Mr. Chiappini and Mr. Bosman—to force on a compulsory sequestration of the estate if the defendants did not consent to the assignment and abate their claim to receive payment in full, or, at all events, if it is going too far to say that such was their decided intention, I am quite satisfied that they threatened to take that course for the purpose of forcing the defendants to join the general body of creditors in the *pro rata* distribution

that would take place under the assignment, and it may well be that they would have, as they say, taken the extreme step in case the defendants had proved obstinate. At the opening of the meeting, Mr. De Heton alone represented his firm, but when the position was explained to him, as I am sure it was—viz., that the choice lay between compulsory sequestration (which would put an end to the effect of the power held by them) and assignment, and that assignment would not be adopted unless his firm joined the other creditors, and assented thereto—he went out and brought his partner, Mr. Paterson, to the meeting. On his return, the position was made clear, and whatever it was that the defendants then undertook, I am satisfied that they quite understood what they were doing—for the attempt to persuade the Court that business men of the capacity of the defendants did not understand the nature or scope of an assignment, seems to me to be utterly futile. As to what was agreed to, there is a conflict of evidence. The defendants say that when the matter was put to them by Mr. Chiappini and Mr. Bosman, they said that they might agree to an assignment if all the other creditors did so. The two gentlemen in question, however, and Mr. Kidney and Mr. Black all swear that the defendants unequivocally agreed to the assignment, and to sign the deed of assignment when drawn up, only stipulating that they should be allowed to go on collecting the rents on commission, and that they should be paid a commission as brokers if they should introduce purchasers to the assignees for any of the properties, and they add that this was conceded to them. I have no doubt that the latter version is the correct one.

The really important matter under consideration at the meeting was the preference obtained under their power of attorney by the defendants, and it is not conceivable that business men like Messrs. Chiappini and Bosman, and the other creditors present, would have been satisfied with the vague and unsatisfactory undertaking which the defendants contend was the limit of the concession made by them. The meeting ended, and another was called early in December, to lay the matter before some other creditors who had not attended the first meeting. At the second meeting, the defendants were not present, but apparently no opposition was raised to the assignment, and since then Chiappini Bros. have acted as, and have been looked upon by the main body of the creditors as, the assignees of the estate; and all the creditors, with a few exceptions to be hereafter mentioned, have since then foreborne from pressing their rights against the plaintiffs. The defendants were allowed, as had been agreed upon, to go on collecting the rents, and a deed of assignment, tripartite in form, between

the assignors, the assignees, and the consenting creditors, was drawn out in terms of the agreement at the creditors' meetings, which was sent round to the creditors for their signatures. The defendants, however, upon various pretexts, did not sign the deed; but apparently went on appropriating the moneys they received in reduction of the debt due to them until only about £26 of the amount was still outstanding in their books. When called upon by the assignees to account for the moneys so received by them, and to sign the deed as promised, they eventually, towards the end of January, took up the position that as all the creditors had not signed the deed they were not bound by it, and that they were consequently entitled to appropriate the moneys, as they had done, by virtue of their unrevoked power of attorney.

With regard to other creditors who had not signed the deed, it appears that in January Mr. Jackson summoned the present plaintiffs for the sum of £130, in the Magistrate's Court, on a promissory note—but this claim was withdrawn, and one Penkin, who became or was the real holder of this note, has signed the deed of assignment as a creditor for that amount. Another creditor, one Wentzel, sued them in the Magistrate's Court on the 19th January for £20, and recovered judgment for that amount, in execution whereof he attached a few movables of small value, and it was not considered worth while to raise any defence to his claim as in the result it was unimportant. Later on, on the 9th February, when it was obvious that proceedings were about to be instituted against the defendants in the present suit, they sued the plaintiffs in the Magistrate's Court, for £26 odd, the balance, as they alleged, still due to them by the present plaintiffs on the promissory note which they had been reducing in the manner above described. Neither the present plaintiffs nor the assignees took any notice of these proceedings, as there was no movable property upon which execution could be levied, and the defendants got judgment for the amount so claimed by them. These three are the only attempts that have been made to interfere with the working of the assignment, and apparently all the other creditors are content with the arrangement thereunder.

It was argued for the defendants that even if they had made a promise to sign the deed or to agree to the assignment, such arrangement was merely inchoate, and that they were entitled to withdraw therefrom. I cannot take this view. Their undertaking was a matter which the other creditors took seriously, and whereon they shaped their own course of conduct. Their position was affected, their legal remedies were allowed to rest in abeyance, and they had every reason to believe that the defen-

dants were loyally carrying out what they had promised, and were collecting the rents for the joint benefit of them all. Several authorities were quoted, and especially the cases of *J. O. Smith and Co. v. Standard Bank* (Buch., 1868, 253), *Juta, Thooft and Co. v. Glynn* (1 Roscoe, 102), *Hossack v. Lippert* (3 Juta, 272), and *Radcliffe v. Stanford* (4 Juta, 1), and it seems to me that, on the principles laid down in these and other cases on the same lines, the defendants should be held bound by their undertaking. The Court will, therefore, order them to account for all moneys received by them on behalf of the plaintiffs, after the 27th of November, 1903, and to hand over such moneys, less the amounts to which they are entitled, as commission for collecting the same, to the assignees, Messrs. Chiappini Brothers, for the benefit of the creditors of the plaintiffs. The defendants must pay the costs of this action.

Plaintiffs' Attorneys: Dempers and Van Ryneveld; Defendants' Attorney: A. W. Steer.

[Before the Hon. Sir JOHN BUCHANAN.]

LUCKIE V. OMAN. } 1904.
} June 28th.

Mr. Buchanan applied on behalf of the plaintiff for a commission to take evidence in this case.

Mr. M. de Villiers who appeared for the defence, opposed the motion.

Mr. Buchanan said the action was one in which plaintiff claimed £60 from defendant for a theodolite broken by a cow, the property of defendant. Mr. Robert G. Sullivan, who was an important witness in the case, was leaving for Eneland by the mail boat to-day, and the date of his return was uncertain. The facts attending the case were that a cow belonging to defendant, which was of a very vicious nature, was being driven along the road, when it ran into the theodolite and broke it.

Mr. De Villiers handed in the affidavit of Mr. Pearl, an articulated clerk in the employment of Messrs. Friedlander and Du Toit, who stated that, in reply to the allegations, the summons was issued on the 3rd February last, and the pleadings closed on the 7th April. Although the attorneys of the plaintiff were frequently asked to put the case down for trial, they had not done so.

Buchanan, J., granted the application, and made the costs costs in cause. Mr. P. S. Jones was appointed commissioner.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

TRIAL CAUSES.

OSBORNE V. OSBORNE. { 1901.
June 29th.

This was an action brought by Johanna Maria Sophia Osborne, of Salt River, against Edward Osborne, carpenter, Cape Town, for divorce, on the ground of his adultery with divers women, to the plaintiff unknown. Mr. W. P. Buchanan appeared for the plaintiff; the defendant was in default.

Wm. Thomas Birch, Colonial Office, produced duplicate register of the marriage.

Johanna Maria Sophia Osborne (the plaintiff) said she was married to the defendant in 1897, and had lived at Cape Town and Mossel Bay. There were three children of the marriage—two boys and a girl. Her husband had ill-treated her, and had given way to drink. He had been staying out late at night. She had reason to suspect that he had been going to the Locomotive Hotel in company with certain women. She had seen him drinking with a woman there. He had come out arm-in-arm with the woman, and had gone up Durham Avenue. He misconducted himself with the woman in a lane just by. Both her husband and the woman were under the influence of drink. The act was repeated later in the evening. She saw him again on the following night; he was in the company of three women at the Locomotive Hotel. She accused him of committing adultery on the previous night, and he admitted it and asked her forgiveness. He did not live with her afterwards. The defendant was a carpenter, in the employ of the Harbour Board. He had no property. She desired maintenance at the rate of £3 per month per child.

Mrs. Frederick Gie, of Salt River, gave corroborative evidence.

Decree of divorce granted, with costs, plaintiff to have custody of the minor children; defendant to pay £1 per month for the maintenance of each child of the marriage until attaining the age of sixteen years, with leave to the plaintiff to move the Court again for an increase of maintenance.

PIENNAAR V. EXECUTORS { 1901.
TESTAMENTARY ESTATE { June 29th.
SLUITER. " 30th.

Executor—Claims on estate—
Referee—Costs—Act 27 of
1895.

This was an action brought by Petrus Jacobus Pienaar, sen., farmer, Colesberg, against the Board of Executors, Cape Town, as executors testamentary in the estate of the late Herman van Loenen Sluiter, for an account as to certain transactions which plaintiff alleged that he had had with the testator.

Buchanan, J., said that he noticed in the list there were four actions against the defendant estate. Was it intended to take them separately?

Counsel said two of the actions might be consolidated, but as to the others, they would have to be taken separately.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer, residing in the district of Colesberg. The defendants are sued in their capacity as executors testamentary in the estate of the late Herman van Loenen Sluiter, in his lifetime an attorney and farm owner of Colesberg, who died on the 29th August, 1900. Letters of administration were issued to the defendants on the 17th September, 1900.

2. In the year 1896, the plaintiff and the said Sluiter entered into an agreement to trade jointly in horses, cattle, and other stock, and to share equally in the profits of the said joint trade, the plaintiff agreeing to do all the work of buying and selling, and the said Sluiter agreeing to keep the account books, and provide all the capital required for the said joint trade.

3. In pursuance of the said agreement, large numbers of horses, cattle, and other stock were bought and sold from time to time, until the 28th February, 1900, when the plaintiff left this colony, and did not return until April, 1901.

4. No account has ever been rendered to the plaintiff of the profits which accrued from the said joint trade, nor has the plaintiff ever received any payment in respect of his share of the said profits.

5. On or about the 28th December, 1899, the plaintiff, in pursuance of the said agreement, and at the special request of the said Sluiter, proceeded on a journey to Bloemfontein and Johannesburg, in order to collect out-standing debts in connection with the joint trade aforesaid.

6. The plaintiff defrayed his own expenses on the said journey, amounting to the sum of £36 1s., in respect whereof he is entitled to demand from the defendants the sum of £18 0s. 6d., being the share thereof payable by the said Sluiter under the aforesaid agreement.

7. On or about the 1st January, 1897, the said Sluiter employed the plaintiff to act as head overseer of all the farms of the said Sluiter at a salary of £10 per month.

8. The plaintiff duly fulfilled his duties as such overseer from the 1st January, 1897, until the 28th February, 1900, in respect whereof he is entitled to the sum of £380 for salary still remaining unpaid and due to him.

9. Throughout the year 1899, the plaintiff was contractor for the repair of roads to the Divisional Council of Colesberg, and the said Sluiter, from time to time, on behalf of the plaintiff, received payment from the said Divisional Council of several sums of money due to the plaintiff in respect of his work as such contractor.

10. During the period between the 1st July, 1899, and the 30th November, 1899, the sums so received by the said Sluiter amounted to a total of £288 15s., which has not been paid over to the plaintiff; of the sums so received by the said Sluiter before the 1st July, 1899, the plaintiff has received no account of payment.

11. In or about November, 1900, the defendants in their said capacity or their agents wrongfully took and sold certain furniture, the property of the plaintiff, in the house hired by him at Colesberg, and also certain furniture and implements the property of the plaintiff on the farm Droogrequest, altogether of the value of £49 14s.: the proceeds of the sale whereof have not been paid over to the plaintiff.

12. In or about April, 1899, the plaintiff and the defendant mutually agreed that the plaintiff should deliver to the said Sluiter a new buckwagon, and that the said Sluiter should deliver to the plaintiff an old buckwagon and pay to the plaintiff the sum of £30.

13. The said buckwagons were delivered as agreed, but the said sum of £30 has not been paid to the plaintiff.

14. In or about January, 1900, the plaintiff, on account of the insecurity created by the war, deposited for safe keeping with the said Sluiter the sum of £82, which has not yet been repaid to the plaintiff.

15. In or about February, 1900, the plaintiff sold and delivered to the said Sluiter a brown mare, for the sum of £19, which still remains wholly unpaid and due to the plaintiff.

16. On or about the 28th February, 1900, the plaintiff, on leaving this colony, deposited for safe keeping with the said Sluiter two trek oxen, two Scotch carts, and twenty-four kapater goats, the property of the plaintiff, which have not yet been restored to the plaintiff.

Wherefore the plaintiff prays—(a) That the defendants be ordered to render him a true account of the profits of the joint trade referred to in paragraphs 2, 3, and 4 hereof, and to pay to him one-half share

of such profits. (b) The sum of £18 0s. 6d., in respect of paragraph 6 hereof. (c) The sum of £380 in respect of paragraph 8 hereof. (d) In respect of paragraph 10 hereof, the sum of £288 15s., and a true and proper account and payment of the other sums therein referred to. (e) Delivery of the furniture and implements referred to in paragraph 11; or, alternatively, the sum of £49 14s., the value thereof. (f) The sum of £30 in respect of paragraph 13. (g) The sum of £82 in respect of paragraph 14. (h) The sum of £19 in respect of paragraph 15. (i) Delivery of the oxen, Scotch carts, and goats referred to in paragraph 16; or, alternatively, the sum of £66 10s., the value thereof. (k) Interest on the said sums respectively *a tempore morae*. (l) Alternative relief. (m) Costs of suit.

Before pleading to the merits of the plaintiff's declaration, the defendants say:

1. The plaintiff's estate was, on the 1st August 1899, by order of the Hon. Sir J. D. Barry, of the Eastern Districts Court, placed under voluntary sequestration.

2. The plaintiff's estate has not been rehabilitated, nor has the final account and plan of distribution in the said estate been fulfilled.

3. By reason of the premises the rights, if any, which but for the said order of sequestration the plaintiff might have had against the defendants by reason of the matters set forth in the declaration, have become and are vested in the trustee of the plaintiff's estate, other than the right, if any, to such portion of his salary as overseer, as may have accrued since the 1st August, 1899, being portion of claim (c) of the plaintiff's declaration, and the plaintiff is not entitled to maintain any action in respect of such rights, other than the right, if any, to the said portion of the said salary.

Wherefore, save in respect of the said portion of claim (c), the defendants pray that the plaintiff's claim may be dismissed with costs, or, in the alternative, in case this Hon. Court should not grant the above prayer, that such portion of plaintiff's claims as accrued prior to the order of sequestration may be dismissed, with costs. And for a plea to the merits of the plaintiff's declaration, the defendants say:

1. They admit paragraph 1.

2. As to paragraph 2, they admit that the plaintiff and the said Sluiter entered into agreement to trade jointly in stock and to share equally in the profits of the said trade, but they have no knowledge of the date or the terms of the said agreement, and put the plaintiff to the proof thereof.

3. As to paragraph 3, they admit that stock was bought and sold from time to time, in pursuance of the said agreement, but they deny that such purchase and sale continued until the 28th Febru-

ary, 1900, and say that the said agreement was terminated on or before the 27th July 1899. They admit that the plaintiff left this colony in 1900, and returned thereto in 1901.

4. They deny the allegations in section 4, and say that accounts were from time to time rendered, and payments made to the plaintiff by the said Sluiter in respect of the said profits, and that there is nothing due to the plaintiff in respect of the said profits.

5. They say further, in case this Hon. Court should hold that an account is due from them, that they are unable to render such account without having in their possession a certain stock-book, containing a record of stock purchased or sold on behalf of the said joint trade, which book the plaintiff has in his possession or control, and refuses to deliver to them.

6. As to paragraphs 5 and 6, they say that if the plaintiff proceeded on a journey to Bloemfontein and Johannesburg in December, 1899, of which they have no knowledge, they deny that it was in pursuance of the said agreement or to collect debts in connection with the said joint trade, and deny that he is entitled to demand from them any sum in respect of his travelling expenses.

7. As to paragraphs 7 and 8, they deny the allegations therein contained, save that they admit that in terms of an agreement entered into on or about the 27th July, 1899, to which they crave leave to refer when produced at the trial, the plaintiff was employed by the said Sluiter to purchase live-stock at a salary of £10 per month, and say that the said salary was duly paid to the plaintiff by the said Sluiter.

8. As to paragraphs 9 and 10, they say they have no knowledge of the allegations therein contained, and put the plaintiff to the proof thereof.

9. As to paragraph 11, they admit that in or about November, 1900, they took and sold certain furniture in a house hired by plaintiff at Colesberg, and certain furniture and implements on the farm Droogrequest, but they deny that they acted wrongfully, and that the said furniture and implements were the property of the plaintiff, and say that they belonged to the estate of the late Sluiter. They admit that they have not paid over the proceeds to the plaintiff.

10. They have no knowledge of the allegations in paragraphs 12 and 13, and put the plaintiff to the proof thereof.

11. As to paragraph 14, they admit that in or about January, 1900, the plaintiff handed over to the said Sluiter the sum of £82, but they deny that it was deposited for safe-keeping. They say that the said sum was paid to the said Sluiter by the plaintiff on account of the plaintiff's indebtedness to him, and that the said Sluiter in proving his debt against

the plaintiff's estate, as hereinafter set forth, credited the plaintiff with the payment of the said sum.

12. They have no knowledge of the allegations in paragraphs 15 and 16, and put the plaintiff to the proof thereof.

13. They say further that the said Sluiter at the second meeting in the estate of the plaintiff proved debts amounting in all, after deducting any amounts, which fell to be credited to the plaintiff by the said Sluiter, to £596 0s. 8d., for particulars whereof the defendants crave leave to refer to the proofs of debt when produced at the trial, and that the said proofs were admitted and have not been expunged.

They crave leave to set off the said amount against such amount, if any, which this Honourable Court may find to be due by them to the plaintiff, and with which the plaintiff has not already been credited by the said Sluiter in the said proofs. They say that the said amount of £596 0s. 8d. exceeds the amount of the claims whereof they have no knowledge, as hereinbefore set forth.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

The replication of the plaintiff was general.

Mr. Graham, K.C. (with him Mr. J. E. R. de Villiers) for the plaintiff; Sir H. Juta, K.C. (with him Mr. Gardiner) for defendant.

Mr. Graham intimated that he did not think they would trouble the Court with the claim for £18 expenses of journey to Pretoria. He also applied for an amendment of the replication to the effect that the plaintiff had been rehabilitated by order of this Court.

Sir H. Juta raised no objection, and the alteration was allowed.

Petrus Jacobus Pienaar, speculator, Colesberg (the plaintiff), said he knew the late Mr. Sluiter for many years. He had joint speculations in horses and cattle with Mr. Sluiter, commencing, he believed, in 1896. These continued until witness left the Colony in 1900. Witness became insolvent in 1899, but he continued his speculations until February, 1900, when he left the Colony with the Boers. In December, 1901, he was sentenced for trading with the enemy; he and Mr. Sluiter went to Pretoria with some stock, which they sold to the Boers, 403 hammels and 16 oxen. When the Boers left the Colony in February, 1900, witness went with them; he subsequently surrendered at Komatie Poort. He handed his stock-book to Sluiter when he left for the Transvaal, and had never seen it since.

Sir H. Juta took a formal objection to evidence being led as to any transaction prior to the insolvency.

Mr. Graham said that it would be very difficult to explain what happened after the insolvency without referring to what took place before.

Buchanan, J., said that perhaps it

would be quite fair to lead evidence which would make the transaction after the insolvency more clear.

Witness (continuing) said he was overseer of Sluiter's farm between 1897 and 1900, receiving a salary of £10 a month. Sluiter never paid him any salary. He had power of attorney granted by Sluiter, but it was now lost, as it was taken when the British came on his farm. He received another power of attorney from Sluiter upon his (Mr. Pienaar's) return from the Transvaal. Before the war, he was a road contractor of the Divisional Council of Colesberg, of which Mr. Sluiter was secretary. Sluiter paid him by cheque, witness endorsed the cheques, and Sluiter kept them. He continued to be road contractor after his insolvency, and amounts became due which were retained by Mr. Sluiter. He obtained leave to trade again in October, 1899, from the trustee (Mr. Davis); he was also allowed to retain certain of his furniture. Certain parlour furniture was sold by auction, and was bought in for witness by his brother John. When he left with the Boers in February, 1900, he had this furniture, and that which had been allowed him by his creditors. He valued the furniture sold by auction during his absence in the Transvaal at about £49. In 1899, before his insolvency, the transaction as to the wagon took place. When he left for the Transvaal he gave Sluiter £70 for safe-keeping, money he had received for forage which he had sold. He also paid Sluiter £12 10s., with which he was to be credited. In February, 1900, he bought a brown mare from his nephew; he sold the animal to Mr. Sluiter for £19, for which he had never been paid. When he went with the Boers, he left on the farm a Scotch cart, and certain oxen and goats, of the total value of £66 10s. 6d. He produced inventories of his furniture at Colesberg and Droogerequest at the time he left for the Transvaal. He returned to Colesberg in March, 1901, and saw his attorney (Mr. Davis) with reference to proceeding against the estate. He waited until his treason trial, and was sentenced to twelve months' imprisonment. On the 8th December, 1902, he returned to Colesberg, after undergoing imprisonment.

[Buchanan, J.: When did Sluiter die?] In August, 1900.

Witness (continuing his evidence) said that in April, 1901, he instructed his attorneys to write to the Board of Executors. At that time the Board returned a counter-claim for £4,000 as executors of Sluiter's estate. After undergoing his imprisonment, he instructed his attorneys in December, 1902, to again write to the Board of Executors. Considerable correspondence ensued between his attorneys and Mr. Roos, secretary of the Board of Executors. He had an interview in March, 1903, with Mr. Roos in Cape

Town, but they could not arrive at a settlement. Subsequently he was asked to forward to the Board of Executors solemn declarations with reference to his own and his children's claims. These were sent, and further delay took place. When the Boers came on his farm, there were 157 horses and 42 head of cattle, belonging to Mr. Sluiter and himself. The Boers took 36 horses, and paid Sluiter for nine, at £20 each. They first took nine, and paid for them, and a month after they took 27 more, and gave Sluiter a "good-for." Oxen were sold for £15 to the Boers; this money also was paid to Sluiter.

Cross-examined by Sir H. Juta: He had seen the books containing the accounts. The special account, he knew, showed £600 to the bad; they had then 100 horses and 142 head of cattle. The Boers took the horses in November, 1899. They had 127 horses in February, 1900. He did not know what then became of the horses. Some of the horses were sold at Modderfontein after Mr. Sluiter's death. Witness was not there. He sold a number of horses to Homan; the special account got credit for that purchase of Homan's. Homan still owed some money; witness did not know how much, but he could ascertain from the special account. Homan disputed the account, and said that he did not receive the horses alleged. Roughly, he should say Homan paid £180. That was not in the account. Witness had a private account. He did not know whether in February he owed £30 3s. 5d. He had not been able to see the account. He received no salary for his services as overseer. When he became insolvent, he did not claim for the salary, although the amount due was £180. He first discovered that the salary was not paid to him from the books of the Board of Executors. In July, 1899, he entered into an agreement to give his services in connection with the joint speculations. He was at that time intending to surrender his estate. He obtained leave to trade in September of that year, and the agreement then dropped. Witness drew large sums of money on the speculations. He did not go on the brown horse with the Boers. He had never borne arms with the Boers. He was not with the Boers. He was convicted of selling hammals and oxen to the Boers, but on all the other charges he was acquitted.

By the Court: The agreement under which he was to receive £10 a month for services in the joint speculations was only a "blind," until he obtained leave to trade from his creditors.

Wm. Ernest Davis, attorney and secretary of the Divisional Council, Colesberg, said that he was trustee in the insolvent estate of Pienaar. He knew that there had been joint speculations

by Pienaar and Sluiter. The men were on very friendly terms. He produced the Council's ledger, showing cheques drawn by Mr. Sluiter (as secretary of the Divisional Council), in favour of Mr. Pienaar, amounting to £288 15s., between the 14th July, 1899, and the 29th November, 1899. As trustee, he gave Pienaar leave to trade in September, 1899. He knew that Mr. Pienaar had been overseer of Mr. Sluiter's farms, and that he was to receive a salary of £10 a month. In April, 1901, Pienaar was lodged in gaol on his return from the Transvaal, and was released about a month afterwards. He then consulted witness as to writing to the Board of Executors. Witness, as trustee of Pienaar's estate, had an action against Mr. Dirk Slater. A settlement was arrived at, by which Dirk Slater was to pay the administrative expenses, and so on. That agreement was not fulfilled. He had understood that it had been paid, but he now believed it had not.

Cross-examined by Sir H. Juta: He gave the plaintiff leave to trade at the suggestion of Mr. Sluiter, who was the principal creditor. He did not report to the third meeting of creditors. He informed the creditors individually. There was no record of the fact in the minutes.

Johannes Jacobus Lichter, farmer, residing in the district of Colesberg, stated that he was appointed as sub-manager over a farm by the plaintiff in 1893, and Mr. Sluiter confirmed his appointment. Up to February, 1900, Pienaar was overseer on the farms. During that month the plaintiff fled up to the Transvaal, and joined the Boers. On instructions he received from Sluiter, he took over the plaintiff's furniture. The furniture was disposed of at the sale of Sluiter's estate. Mr. Clements, the auctioneer who was acting for the estate, was informed that the furniture belonged to Pienaar. In June, 1900, he brought eight oxen to Modderfontein, two of which belonged to Pienaar. The oxen were also sold in the estate.

Cross-examined by Sir H. Juta: He brought the oxen from Rietvlei, but he could not say how they got there. Mr. Sluiter spoke to him in April, and told him to keep the furniture safe for Pienaar. He could not explain why he made an entry in the book on the 1st April after an entry in June.

Re-examined by Mr. Graham: He handed the list to Mr. Pienaar a couple of weeks after the latter came back from the Transvaal.

Petrus Jacobus Pienaar, jun., stated that he was in the employ of plaintiff, who was his uncle. His uncle, up to the time he left for the Transvaal, was overseer for Mr. Sluiter. In February, 1900, he sold his uncle a brown mare, which was re-sold to Mr.

Sluiter. His uncle had three Scotch carts, one of which was drawn by the two black oxen to Rietvlei. In 1900 he saw the plaintiff superintending the shearing at Modderfontein.

Cross-examined by Sir H. Juta: He could not give a list of the furniture at Droogrequest. Witness took the mare from the English. He did not "steal" it, he "took" it. He shot the trooper in a fight, and took his horse. He did not murder the soldier, he killed him in a fair fight. He joined the Boers in November, and they were fighting all over the place, but in February he was in the house at Droogrequest, where he saw the furniture.

A coloured boy, in the employ of the plaintiff, stated that he was in Mr. Sluiter's employ during the war, and was there when the English troops came into Colesberg. The day before the English arrived Mr. Sluiter told him to bring the horse out of the plaintiff's stable, and put it on the farm at Droogrequest. The British troops took possession of the mare. The previous Monday the plaintiff handed him over 24 goats, which Mr. Sluiter sold with his own stock. On Mr. Sluiter's instructions he sent two loads of the plaintiff's furniture to Modderfontein.

Cross-examined by Sir H. Juta: In February, 1900, when the Boers left Colesberg, witness was left in charge of the stock at Droogrequest, and he understood that the lot belonged to Mr. Sluiter.

Re-examined by Mr. Graham: He did not know who was the owner of the goats Mr. Pienaar handed over to him.

This closed the evidence for the plaintiff.

Johannes Roos, secretary of the Board of Executors, who were the executors in the estate of Sluiter, stated that Mr. Pienaar was given access to the books in March last. There was no single item that was objected to. The only question which the plaintiff raised was an item of a debt by Homan, but the latter repudiated any liability.

Cross-examined by Mr. Graham: Witness's attorneys wrote that after going through the books of the deceased they found that the plaintiff was indebted to the estate in the sum of £4,218, and he came that letter to be written on the strength of a letter he saw from Clements to Pienaar. The moment the plaintiff came back from the Transvaal he wrote about the account, and when he was released from Tokai he called on witness again, and subsequently he wrote that the stock-book, which was missing, had been handed over to Sluiter.

Gordon Clements stated that he was bookkeeper for Sluiter up to the time of his death. Pienaar kept a stock-book, but it was not among Sluiter's papers when witness returned in April, 1900. At no time when he was there was there any entry of £10 a month to Pienaar, but

Pienaar was on the farm with Mr. Sluiter. On the compensation claim, £514 19s. 2d. was recovered for stock, and that should have gone to the joint account. He did not know of anything sold in the estate of Sluiter belonging to Pienaar.

Cross-examined by Mr. Graham: He knew that Pienaar and Sluiter had been speculating for years on a joint estate. If the plaintiff said that he was getting £10 a month for being overseer, witness thought it very likely to be the truth.

Re-examined by Sir H. Juta: Everything sold passed through the books.

H. Jacobus Sluiter said that he remembered going to a sale on the plaintiff's farm. He saw certain stock on the farm, which was pointed out as belonging to the late Mr. Sluiter. He went to a sale at the farm Vosloo, Rietvlei; he counted the stock on behalf of his late cousin. The stock was brought into the kraals. The sheep, horses, and cattle that they counted were taken to another farm, and sold subsequently at Modderfontein.

Mr. Clements, the auctioneer (re-called) said that no protest was entered when he sold the furniture in the estate of the late Mr. Sluiter.

This concluded the evidence, and counsel was heard in argument upon the facts.

Mr. Graham contended that it had been clearly shown on all hands that there had been a joint speculation between the plaintiff and the late Mr. Sluiter, and he urged that the plaintiff was clearly entitled to a debate of the partnership account. As to the suggestion that the account should be debated at Colesberg, he said his clients agreed that there might be partisanship in such a small place, and they would consent, if an account were submitted to them, to the debate taking place in Cape Town. Claim (b) for £18 expenses of a journey to Pretoria, they abandoned. As to the claim for salary as overseer of the late Mr. Sluiter's farm, he submitted that he would be entitled to salary after his insolvency, from August, 1899, for seven months, at £10 a month. The plaintiff had also shown that he was clearly entitled to judgment under prayer (g) for the moneys due to him as road contractor of the Colesberg Divisional Council. He submitted that they had conclusively proved their claim for delivery of furniture, or its value, £49 14s. In regard to (f), that part of the claim was abandoned. The defendants admitted that they had received £82 10s. from the plaintiff for safe custody. He contended that the plaintiff had clearly proved the claim (i) for delivery of oxen, carts, etc., or in the alternative, for £66 10s., their value.

Sir H. Juta pointed out that when this summons was issued, plaintiff was an unrehabilitated insolvent, and consequently it was impossible for the

defendants to counter-claim. Therefore, if the plaintiff was entitled to credit on the trading account, and owed something on the private account, then those amounts would be adjusted as between each other. The plaintiff only got leave to trade in the middle of September, 1899, and he would be entitled to nothing as proceeds from trade prior to that date. Any such proceeds earned prior to insolvency would be the moneys of the creditors. It seemed to him that there would be three questions to be decided: (1) What rights the insolvent acquired up to the time he got leave to trade, and what afterwards? (2) What was the amount itself to be brought into the account? (3) The question of the private account, which could not now be ignored? In regard to the account, it was clear that there would have to be a reference, hence he would not address the Court at length on that subject.

Buchanan, J., said that some direction would have to be given to the referee on disputed points.

Sir H. Juta said that, in regard to the sale of stock, it was evident that the plaintiff would have a claim against the compensation paid by the Imperial Government for property taken belonging to the joint estate. Under the Act 27 of 1895, it was the duty of the plaintiff to supply the executors with proof of his claim, and none of this evidence, which was adduced in court, was sent up with his declaration. He submitted that it would be the duty of the referee to ascertain what the exact amount was. Plaintiff had not supplied any proofs to the executors. There was nothing ever said at any of the sales to show that the plaintiff had any rights in the property offered. The two disputed points were: (1) Whether the £240 which Mr. Clements said ought to belong to the agency account did belong to it, and whether he had proof of that at present, and (2) what amount of the stock which belonged to the agency account at the time that Pienaar left Colesberg were actually sold in the estate, and of which the estate had received the money. As to the claim for salary as overseer, he thought the evidence of the plaintiff himself showed that he was entitled to nothing before his insolvency, otherwise he would have brought up the item in his schedules in insolvency. This claim for salary he submitted could not be entertained for a moment. As to the claim (d), Divisional Council payments, counsel contended that it was clear the plaintiff had got credit for every penny under this head. Counsel submitted that no proof had been given as to the other parts of the claim. If anything was due on account of the furniture, it was very small indeed.

Mr. Graham, having been heard in reply,

Buchanan, J.: In this case the plaintiff and the late Mr. Sluiter were on very

friendly terms, both socially and in business. They began transactions together as far back as 1896. On the 1st August, 1899, the plaintiff surrendered his estate; in August, 1900, Mr. Sluiter died. The action now is brought against Sluiter's executors, and I must say at the outset that it was certainly, under the circumstances disclosed in this case, the duty of the executors to put the plaintiff to proof of the claims, which he had made. The executors would not have been justified in paying these claims without full and thorough investigation of the accounts between the parties. The plaintiff claimed first an account of the transactions between the parties since 1896. But it is clear that all transactions between the parties and all claims that the plaintiff had against Sluiter, were on his sequestration vested in his trustee, and Pienaar cannot now sue for them. Plaintiff's claims must be limited to transactions after the date of sequestration. The insolvent did not get leave to trade until some time in September, but under the 49th section of the Insolvent Ordinance anything that an insolvent earns by his own labour is protected. If these claims did not arise out of the insolvent's own personal work, it might be necessary either to join the trustee or to bar the insolvent from recovering before he got leave to trade. In this case it is unnecessary to go beyond the date of the insolvency. But in passing, I must remark that the trustee's action in giving to the insolvent leave to trade seems most irregular. Trustees must remember that they are officers of the Court, and must act as officials should act. In this case, without any authorisation from the creditors, the trustee gave leave to trade. He never reported his having done so to the creditors, or asked their ratification. However, the conduct of the trustee will not be dealt with as affecting the plaintiff in this case. His lordship proceeded to review various aspects of the plaintiff's claim, and said that the order of the Court, in brief, would be as follows: Mr. Maynard Nash is appointed as referee, before whom the parties will debate the accounts between the parties of all transactions, which took place after the 1st August, 1899. Sluiter's books of special and individual accounts to be taken as the basis upon which the debate is to be had; under claim (a), the amount received as compensation from the Imperial Government, and the proceeds of any stock received by the estate, which the referee shall decide to be derived from the stock belonging to the joint venture to be credited; claims (b) and (f) not to be taken into consideration; under claim (c) plaintiff to be allowed £70; under claim (d), so much of the amount received from the Divisional Council since 1st August, 1899, to be taken into account, as the same appears in Mr. Sluiter's books; under claims (e) and (i), such

amounts as may be traced by the referee as having been received by Sluiter's estate from the sale of the property therein mentioned; claim (g) to be taken into account; as to claim (h), interest not to be reckoned on either side. Referee to report to the Court as soon as he reasonably can, when judgment will be given.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

TRIAL CAUSES.

PIENAR V. ESTATE { 1904.
SLUITER. { June 30th.

Executor—Claims on estate.

This was an action brought by Hercules David Pienaar against the Board of Executors, Cape Town, in their capacity as executors testamentary of the estate of the late Herman van Loenen Sluiter, for the recovery of the sums of £53 2s. 6d., £60, and £45 over certain transactions in sheep.

The declaration was as follows: The plaintiff is a speculator, residing in Johannesburg, Transvaal; the defendants are sued in their capacity as executors testamentary in the estate of the late Herman van Loenen Sluiter, of Colesberg, who died on the 29th August, 1900. In or about April, 1899, Pietrus Jacobus Pienaar, sen., of Colesberg, on behalf of plaintiff, sold and delivered to the said Sluiter at Ventersfontein, Colesberg, 85 ewes, the property of the plaintiff, for the sum of £53 2s. 6d., which remains wholly unpaid and due to the plaintiff. In or about April, 1900, the said Sluiter, on behalf of the plaintiff, sold to one Alexander Robertson and Edward McMillan Little, for the sum of £60 sterling, 48 hamel sheep, the property of the plaintiff, then at pasture on the farm Rietvlei, Steynsburg. The said sum of £60 was duly paid to the said Sluiter, but still remains wholly unpaid and due to the plaintiff. In or about August, 1900, the said Sluiter, on behalf of the plaintiff, sold to the said Robertson and Little 36 hamel sheep, the property of the plaintiff, which were then

pastured on the farm Rietvlei, Steynsburg, for the sum of £45. The said sum of £45 was duly paid to the defendants in their said capacity, but remain wholly unpaid and due to the plaintiff. Wherefore the plaintiff prays: (a) Judgment in the sum of £53 2s. 6d., £60, and £45 respectively; (b) interest *a tempore mora*; (c) alternative relief; (d) costs of suit.

The defendants' plea was as follows: They admit paragraph 1. As to paragraphs 2, 3, 4, and 5, they have no knowledge as to the allegations therein contained, and put the plaintiff to the proof thereof. As to paragraph 6, they admit that a certain sum of £45 was paid to them by one Little for certain sheep sold to him by the said Sluiter, and that they have not paid the said sum to the plaintiff, but they have no knowledge that the said sheep were the property of the plaintiff, and put him to the proof thereof. They say, further, that the plaintiff, though called upon to do so, has failed and neglected to furnish them with sufficient information and proof of his claims to enable them to admit the said claims. Wherefore, they submit to the judgment of this Hon. Court on the plaintiff's claims, but pray for costs of suit.

Mr. Graham, K.C. (with him Mr. J. E. R. de Villiers) for plaintiff; Sir H. Juta, K.C. (with him Mr. Gardiner) for defendants.

Hercules David Pienaar, plaintiff, stated that he left Colesberg for the Transvaal in 1896, and at that time he left his sheep in charge of his brother on the farm at Droogrequest. At the beginning of 1899 he authorised his brother to sell 600 sheep. He had never been paid for any of his sheep.

Cross-examined by Sir H. Juta: He supplied no proof to the executors, as required by the Ordinance.

Petrus Jacobus Pienaar, brother of the plaintiff, stated that he sold 100 sheep in 1899. The declaration was made before his attorney, who had been written to by Mr. Roos. Eighty-five sheep were sold to Mr. Sluiter for 12s. 6d. each. On his return from the Transvaal, in 1901, he identified 23 of the sheep by his brother's mark. He never received any request for further information from the executors. The stock book from Rietvlei was kept by Johannes Pienaar. In June there was an entry of 120 sheep. There was a further entry in the book about which he had some conversation with his brother.

Cross-examined by Sir H. Juta: He never showed the book produced to Mr. Roos. He had the book with him, but when Mr. Roos could not come to a settlement he kept the book. According to his statement in the insolvency examination in 1898 he had only 160 sheep belonging to his brother. He had a bad time of it from 1896 to 1897, when he lost 600 sheep from drought. If Mr. Sluiter bought the sheep it was unlikely, in wit-

ness's opinion, that it would appear in his books.

Johannes J. Luttig said he was sub-manager for Mr. Sluiter in 1899, at Rietvlei, when he received certain sheep from Mr. Pienaar, from Droogrequest. This was in March, 1899. About 85 ewes and 20 lambs were received. The sheep bore Hercules Pienaar's mark. Sluiter asked him whether the sheep he had bought from Mr. Pienaar had arrived, and said, if they had they should go with the other sheep. At the Modderfontein sale he saw some of the sheep in question being offered. At a subsequent sale at Rietvlei in August, 1900, he saw certain sheep sold to Mr. Little that had Mr. Pienaar's mark.

Johannes Jacobus Pienaar, of Steynsburg, formerly manager for Mr. Sluiter, at Rietvlei; Pieter Badenhorst, farmer, Colesberg; and Edward MacMillan, farmer, Orange River Colony, also gave evidence for the plaintiff.

Johannes E. N. Roos, secretary of the Board of Executors, said he had the books of the estate, and he could find no account of Herklaas Pienaar. He found two amounts paid over to the executors by Little for sheep—£84 and £50. It was collected by the executors.

Cross-examined by Mr. Graham: He had examined the book to see whether Little had a folio.

This concluded the evidence, and counsel addressed the Court in argument on the facts.

Buchanan, J.: The plaintiff claims three amounts, viz., £53 2s. 6d. for 85 ewes, £60 for 48 hammels, and £45 for 36 sheep. The first question to decide is, has the plaintiff proved the contract and these sales alleged in the declaration? If this had been an ordinary case his Lordship thought the Court might have been justified in giving absolute from the instance, but as it is a case of executors being sued, having an estate to deal with, and the estate had to be wound up. His Lordship said he had carefully analysed the evidence to see if he could now settle the matter in dispute. The question whether a contract was entered into between plaintiff and Sluiter depends upon the evidence of the plaintiff's brother Jacobus. No fraud has been alleged, and he was not going to say that there has been any fraud proved in this case, but he was bound to say that where the case depends upon the recollection only of Jacobus Pienaar he could not accept his statement. After dealing with the corroborative evidence, he would give judgment for the plaintiff for £53 2s. 6d. for 85 sheep, and for £23 for the sheep sold to Little. On the question of costs, looking at the circumstances, and especially the inaccuracies in the declaration sent in by the plaintiff, which forced the executors to come into Court. His Lordship thought this was a case which was intended to come

under section 9, of Act No. 27, 1895, which provided that it should be competent for the Court while adjudging in favour of a claimant against an estate, to decline to grant such claimant his costs in case the Court should deem that the information given by the claimant to the executor was insufficient, and that this executor acted with prudence and discretion in contesting the claim. Judgment would be given for the plaintiff for £76 2s. 6d., but there would be no order as to costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Van Zyl and Buissinné.]

SECOND DIVISION.

[Before the Hon Mr. Justice HOPLEY.]

PROVISIONAL ROLL.

ROBERTS V. HERMAN. { 1904.
{ June 30th.

Mr. P. S. T. Jones applied for provisional sentence on a promissory note for the sum of £100, and provisional sentence, under Rule 329d, for £26, for goods sold and delivered. The application was granted.

SYFRET, GODLONTON AND LOW V. HARRIS.

Mr. Gutche applied for provisional sentence on a promissory note for £100, and judgment, under Rule 329d, for £80 13s. 11d., for goods sold and delivered. Granted.

LONDON AND LANCASHIRE FIRE INSURANCE COMPANY V. ANDREWS.

Mr. Russell applied for provisional sentence on a dishonoured cheque for £108, and also judgment, under Rule 329d, for £33 13s. 8d., balance due to plaintiffs in respect of insurance received by defendant on behalf of plaintiff. Granted.

GORDON, MITCHELL AND CO. V. RAWBONE.

Mr. Sutton, on behalf of plaintiffs, applied for the final adjudication of the defendants' estate. Application granted.

NATIONAL BANK OF SOUTH AFRICA V. POLICANSKY, EPSTEIN AND WOOLFF.

Mr. Jones applied for provisional sentence on a promissory note for £400.

Counsel stated that Woolff had since been absolved, and therefore only asked for an order against the other defendants.

The application was granted.

AFRICAN JOB BUYING CO. V. PHILLIPS

Dr. Greer applied for the final adjudication of the defendant's estate. Granted.

ROTES V. VENTER AND NAUDE.

Mr. Buchanan applied for provisional sentence on a promissory note for £100, with interest at 6 per cent.

The application was granted.

LUCKOFF V. HERMAN.

Mr. De Waal applied for provisional sentence on a cheque for £22. Application granted.

ILLIQUID ROLL.

CRAFFORD V. FOURIE. { 1904.
{ June 30th.

Mr. Bissett applied for judgment, under Rule 329d, for a sum of £2,700, less £1,500, amount due for certain land, and that the plaintiff be allowed to take over a mortgage bond for £2,000. Application granted.

GRILL V. LUCKOL.

Mr. Burton applied for sentence, under Rule 329d, for £60, amount due to plaintiff for work and labour performed. ed.

Granted.

PRETORIUS AND CO. V. SOCKEL AND MELEKOR.

Mr. Roux applied, under Rule 329d, for sentence, for £26 2s. 7d., with interest.

Application granted.

BENNETT AND BAKER V. BARRY.

Mr. Alexander applied, under Rule 329d, for judgment for £157 10s. 8d., with costs.

The defendant appeared, and offered to pay 10s. per month.

The Court made an order for 10s. per month. Applicants to have leave to move the Court again should respondent's means improve.

FARMERS' CO-OPERATIVE CO. V. ROBERTS.

Mr. Russell applied, under Rule 329d, for £25, being 5s. per share upon shares issued to defendant.

Granted.

AURET V. DAVIDSON.

Mr. Russell applied, under Rule 329d, for judgment for £141 15s. 9d., being half the net profits of a business carried on at Queen's Town.

The application was granted.

"CAPE TIMES," LTD. V. HERMAN.

Mr. Rainsford applied for judgment, under Rule 329d, for £650, for goods sold and delivered.

Granted.

SMITH V. YUDELMAN.

Mr. De Waal applied, under Rule 329d, for judgment for £216, for goods sold and delivered.

Granted.

MARQUARD V. FEINBERG.

Mr. De Waal applied for judgment under Rule 329d, for £26 9s. 10d., for goods sold and delivered.

Granted.

GENERAL MOTIONS.

LORENTZ V. LORENTZ. { 1904.
June 30th.

Mr. Russell, on behalf of the plaintiff, applied for a decree of divorce. The plaintiff was resident in Holland. The parties were married in Holland, and came to South Africa. They returned to Holland, where the defendant deserted plaintiff, and had not since returned. She sued him in the Court here and got an order for the restitution of conjugal rights by the 1st June, but he had not returned. Counsel now applied for a decree of divorce, with costs.

The application was granted.

MUIR V. ALEXANDER.

Mr. Close, on behalf of plaintiff, applied for attachment against the defendant for contempt of Court.

Mr. Alexander for defendant.

Mr. Close said an order was given by the Court for the recovery of certain papers, which had not been complied with.

Mr. Alexander raised the technical point that the notice applied for the attachment of the defendant's solicitors, and not for the defendant.

The Court granted the application, but stayed execution until Monday next, to allow the defendant to comply with the order of Court.

ELIASON V. ELIASON.

Mr. Alexander, on behalf of the plaintiff, applied for an order to sue the defendant *in forma pauperis*, and also by edictal citation, for restitution of conjugal rights, failing which, a decree of divorce. He said the plaintiff, who was present in court, was too poor to conduct the proceedings herself.

The plaintiff stated she was married to the defendant, who was a Swedish sailor, in 1894. Two years afterwards he sent her on a holiday, and when she returned home, she found he had gone. She had not heard from him since. She was too poor to sue him in the ordinary manner.

Hopley, J., granted the application, and said that, as the defendant seemed to be a wanderer, they would allow him a lengthy return day. He fixed it for November 14.

Ex parte GINSBERG.

Mr. Jones applied for an order authorising the registration of a certain antenuptial contract, entered into in Germany in March, 1904.

The application was granted.

Ex parte DE BLEQUEY.

Mr. Buchanan, who appeared for the applicant, said he was a minor, and a carpenter by trade. The Master had a certain sum of money, which was left to him. He had recently been supporting his mother and sisters. He wished now to start business as a butcher, and for that purpose wished to get the money he was entitled to (£106). He had been promised plenty of support in his venture.

The Master's report stated that the applicant would be unable to carry on a remunerative business in the manner he started with the capital at his disposal, and therefore he did not recommend handing over the money.

Hopley, J., inquired what the age of the applicant was.

Mr. Buchanan replied that he was 20 years and 6 months.

Hopley, J., said he thought they might as well let the applicant have the money. He would be entitled to it in six months.

ESTATE CLAASSENS V. FOURIE AND OTHERS.

Mr. Buchanan applied for leave to change the venue of the trial of this

case to the Oudtshoorn Circuit Court. The applicant's affidavit stated that, owing to the illness of one of the witnesses, who would be unable to stand the strain of a journey to Cape Town, he had made the application.

Mr. Close, on behalf of the defendant, opposed, and read an affidavit made by defendant, in which he stated that if the case should be tried at the Circuit Court at Oudtshoorn, it would not be heard until September or October, and would entail big expense, as witnesses had been subpoenaed from the Transkei to Cape Town, and they would have to be brought down to Oudtshoorn later on. The case was set down for hearing at Cape Town for Wednesday next.

Mr. Buchanan said all the parties were resident in the Oudtshoorn and George districts. The claim was only for £70, and no important legal point was concerned. It was partly a question as to the construction of an agreement.

Hopley, J., said he thought there was very little business at either Mossel Bay or Oudtshoorn, and therefore the hearing of the case would not be long delayed.

The application was granted, trial being removed to Mossel Bay, the costs being reserved.

VAN DER MERWE V. COLONIAL GOVERNMENT.

Mr. W. P. Schreiner, K.C. (with him Mr. Howel Jones, K.C.), applied on behalf of defendants for the postponement of this trial. He explained that the action was a claim for salary and allowances due. The plaintiff was a scab inspector, and was suspended during the recent war. He claimed between £300 and £400. Mr. W. G. Davidson, the chief of the plaintiff's department, had gone to England, and would not return until August 24. He was an important witness in the case, consequently the case could not be proceeded with.

Mr. Close, who appeared for applicant, said he did not oppose the postponement of the trial, if the defendants agreed to pay the costs entailed thereby.

Mr. Schreiner said they had offered before the case came into court to let the costs be costs in the cause, but the plaintiff would not agree to that. The plaintiff acknowledged that Mr. Davidson was an important witness. If the plaintiff intended to press the costs against his client, then he (Mr. Schreiner) would press them against him.

Mr. Close said the case closed in April last, and the Government had had plenty of time to apply for a postponement if they wanted it.

Hopley, J.: Why did you wait to put the case down for trial until Davidson had left the country?

Mr. Close: We did not know he was leaving.

The case was put down for trial for August 30.

Ex parte MOODY.

1904.
June 30th.
July 15th.

Marriage — Deceased brother's widow—Act 40 of 1892.

A man may not marry his deceased brother's widow.

Mr. W. P. Schreiner, K.C., applied for an order authorising the issue of a special marriage licence. He explained that the applicant lived at Somerset East. His brother, Jacob Moody, died some years ago, and left a widow and one child. The child died six months afterwards. The widow had since remained single, and was now desirous of marrying applicant. They had applied to the Acting Resident Magistrate, but he refused to grant the licence, as he held the marriage would be contrary to law.

Hopley, J., said the law allowed a man to marry the sister of his deceased wife, but it did not say anything about a man marrying his brother's widow.

Mr. Schreiner, K.C. (for applicant). In the case of *Mills v. The Acting R.M. (Cape)*, (11 C.T.R., 438), the Court held that a nephew may marry his aunt, provided that the relationship between them be that of affinity only. In this case the applicant asks for an order authorising the Magistrate to issue a special licence for his marriage with the widow of his deceased brother. Now, a deceased wife's sister and a deceased brother's wife are both related to the surviving husband of the wife's sister and to the wife of the deceased brother respectively in precisely the same degree of affinity. Section 2 of Act 40 of 1892 not only sanctions marriage with a deceased wife's sister, "provided such sister be not the widow of a deceased brother of such widower," but also allows the widower "to marry any female related to him in any more remote degree of affinity than the sister of his deceased wife, save and except any ancestor of, or descendant from such deceased wife."

Cur. Adv. Vult.

Postea (July 15th).

De Villiers, C.J., read the judgment of Mr. Justice Hopley in this matter: In this case Mr. Daniel Moody, of Chunise, in the district of Victoria East, asks for an order authorising the Magistrate of King William's Town to grant a special licence for his marriage with Rose Margaret Moody, who is the widow of the petitioner's deceased

brother. The petitioner is a bachelor, and it is urged on his behalf that the Court should interpret the 2nd section of Act 40, 1892, as sanctioning such marriage, which, under the common law, it is admitted would be illegal. That section is as follows: "It shall be lawful for any widower to marry the sister of his deceased wife, provided such sister be not the widow of a deceased brother of such widower, etc." It was argued that there was no reason or justice in not construing this to mean that it should be equally lawful for any widow to marry the brother of her deceased husband. But nothing would have been easier than for the Legislature to have said so if such had been their intention. They, however, specially prohibit a widower from marrying his deceased brother's wife, if she were also his deceased's wife's sister, and I can see no social or physiological reason applying in his case that would not equally apply in the case of a bachelor brother. Why should a widower be allowed to marry any sister of his deceased wife except his deceased brother's widow? Simply, it seems to me, because she had been his brother's wife. I think the Legislature intended to retain the common law prohibiting a widow from marrying her deceased husband's brother, and, in my opinion, this petition should be refused.

[Applicant's Attorneys: Syfret, God-lonton and Low.]

Ex parte THE TUTORS DATIVE IN THE ESTATE OF THE LATE GEORGE FIGOTT MOODIE.

Mr. Struben applied for an order authorising the payment of certain money. He stated that £4,000 was left to the applicant and his brother. The brother who was dead had received his share, and the applicant, who was studying for an engineer, required some money to proceed with his studies.

An order in accordance with the terms of the application was made.

Ex parte LOMBARD.

Mr. Alexander, for the applicant, applied for leave to amend a certain transfer. He explained that the applicant, who was a widow, was married in community of property. When her husband died, he left her sole heiress as long as she remained a widow, and on condition that she was not allowed to mortgage or alienate the property. In 1897 the executors passed transfer of all the land to her. As she married in community of property, she was entitled to half the property, and wished to mortgage that,

but as all the land had been passed in transfer to her, she could not now do so. Therefore she applied for permission to amend the transfer.

The application was granted.

SYME v. COLONIAL GOVERNMENT.

Mr. J. T. Molteno moved upon notice of motion to have a certain award of the arbitrators made a rule of Court.

Mr. Howel Jones consented on behalf of the Government.

Award made a rule of Court, the respondents to pay the costs of the application.

BLIGNAULT v. WAPENAAAR AND OTHERS.

Mr. Burton moved to have an award of arbitrators made a rule of Court, with costs.

Order granted.

MARTENS v. MARTENS.

Dr. Greer moved for leave to sue the defendant for restitution of conjugal rights, failing which a decree of divorce. The defendant left her husband in February, 1904, and refused to return to him. It was believed she was at present resident in Edenburg, O.R.C.

Leave granted, intendit to be served with notice of trial, returnable August 1.

Ex parte MANN.

Mr. De Waal moved for an order authorising the Registrar of Deeds to cancel a certain bond, the payment of which was not disputed.

Order granted.

APPENDIX.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the *South African Breweries, Limited, v. Hodgson*, from the Supreme Court of the Cape of Good Hope; delivered the 18th May, 1904.

Present at the Hearing:

The Lord Chancellor.

Lord Lidley.

Lord Kinross.

Sir Arthur Wilson.

[Delivered by Lord Lindley.]

The plaintiffs in this action seek to recover from the defendant, who is the executor of a Mr. Martienssen, a sum of £1,250. The claim is based upon a contract dated 4th April, 1899, and made between Martienssen and the plaintiffs.

Martienssen was the owner of an extensive brewery business in the Cape Colony, and was entitled to a brewery and several houses, hotels, and stores, which the plaintiff Company agreed to buy of him. One of these hotels was the Princess Royal Hotel, which Martienssen had agreed to buy from one Flanagan. The agreement for the purchase of this property by Martienssen is dated the 15th February, 1899. The transfer was to be given and taken on 1st July, 1899. The purchase money was £9,500, which was to be paid as follows: £2,500 on the 1st July, and £7,500, with interest at 6 per cent., from that date was to be secured. Possession was to be given as a licensed premises, and as then licensed, on the 15th March, 1899.

Shortly after this agreement was signed, viz., on the 23rd February, 1899, Martienssen offered this hotel to a person named Corlett, on the following terms: "A goodwill £1,500 to be paid on taking possession, a rental of £30 a month." This rental was to be increased if Corlett took some cottages and stores, and he was to sign the usual agreement relating to the purchase of Colonial beers, etc. What is called "goodwill" in the document would in this country be called a "premium." Corlett verbally accepted the offer so made, but the premium was reduced to £1,250. It will be observed that although this was an offer to grant a lease of the Princess Royal Hotel for a premium and a monthly rent, the duration of the lease was not specified. Moreover, no time was mentioned for delivery of possession or for payment of the premium. Corlett did not obtain any lease until after the 4th April, nor did he enter into possession until after that date. In the meantime Flanagan was in possession of the Royal Hotel, and he held the license of it, but

subject to his agreement to transfer it to Martienssen as already mentioned. The £1,250 which Corlett was to pay was plainly not payable by him to Martienssen before he agreed to sell the property to the plaintiff Company. This is an important fact to remember, as one of the main controversies in the case turns upon it.

The conveyance of the 4th April, 1899, was based upon a less formal agreement entered into between the plaintiff Company and Martienssen by their respective brokers, and dated 1st March, 1899. There is no discrepancy between the two documents; but the broker's document shows what is not so plain from the formal conveyance, viz., what outstanding debts had been valued at that date. A knowledge of this circumstance throws considerable light on the meaning of one passage in the conveyance.

The formal conveyance is set out on pages 5 to 7 of the Record. As already stated, it is dated 4th April, 1899. It conveys to the plaintiff Company in general terms, Martienssen's brewery business in the Colony with the stock-in-trade, outstanding debts, land, and houses; then follow particulars, and these include the Princess Royal Hotel. "at present under option to the sellers." Then come the following clauses:

"(a) The plant, stock-in-trade, and goodwill, including all outstanding debts, assets, and rights appertaining to the business, at present carried on by the sellers, of every nature and description.

"(1) And generally all the tied houses belonging to the sellers' business as breweries, including the stock-in-trade of such supported or tied houses, the goodwill thereof, and all rights appertaining to the leases and options to purchase.

"(2) The purchase price shall be the sum of £75,000 sterling, payable as to £10,000 in cash on signing this agreement, and as to the balance of £65,000 upon the passing of transfer of the land and the taking possession of the premises and business.

"(3) The sellers shall be entitled to remain in possession of the premises, and to carry on the business until the 31st July, 1899, on their own account and on their own behalf, and shall pay interest at the rate of five per cent. per annum from the date 4th April, 1899, upon the £10,000, until the business be taken over by the purchasing Company.

"(4) The sum of £65,000, referred to above, is subject to adjustment upon the following lines:

"In arriving at this figure the plant and stock-in-trade have been put in at £7,500, and the good outstanding debts at £8,000. If it should be found that these figures are not correct when the property and business is taken over, then the purchase price shall be amended accordingly.

"(5) The sellers shall guarantee all good outstanding book debts and be re-

sponsible for them, six months being allowed to the purchasing Company for the collection thereof.

"(6.) Should there be any variance or dispute between the parties to this agreement regarding the value of any plant or stock-in-trade, or with reference to any outstanding debts, such dispute shall be referred to arbitration under the Act of 1898, if not adjusted before the 31st August, 1899.

"(7.) The sellers shall carry on the business until the 31st July, 1899, with due regard to the handing over thereof as a going concern to the purchasing Company on the 1st August, 1899; and they further undertake and bind themselves not to engage in or be interested in, directly or indirectly, any brewery or any similar business within this Colony of the Cape of Good Hope, and promise and undertake to use their influence and their best endeavours towards advancing the interests of the purchasing Company and the securing to the said Company to its fullest extent the goodwill of their business.

"(9.) Seeing that the purchasing Company has agreed to pay over the sum of £10,000 on account of the purchase consideration, the sellers, as an earnest on their behalf, do hereby cede to the purchasing Company all their rights in, to, and under an agreement dated the 15th February, 1899, with one John Flanagan, regarding the purchase of certain block of buildings comprising the 'Princess Royal' Hotel, with all accessories, and do hereby dispose thereof to the said purchasing Company for the amount aforesaid and authorise the said Company to take transfer thereof into its own name as soon as shall be convenient."

Then follows the witnessing part with this—

"Addendum.

"(Clause 9 of this Agreement is not intended to cast upon the purchasing Company the onus of paying Flanagan the £9,500 due to him, but required that this liability be discharged by the said sellers (Martienssen) and the purchasing Company be at liberty to take transfer from the said Martienssen simultaneously with the passing of transfer into his name of the 'Princess Royal' property, without payment of any further sum than the £10,000 already deposited."

The short effect of this document appears to their Lordships to be as follows: First, the plaintiff Company acquired all the property described in the document, including all Martienssen's interest in the Princess Royal Hotel, which again included all his interest in the lease arranged to be given to Corlett. But Martienssen was to pay Flanagan. Secondly, the Company were to pay for all the property so acquired £75,000, but as the pro-

perty was not to be handed over at once, and the stock-in-trade and business debts would vary, £15,500, part of this sum, was to be subject to adjustment on completion. In other words £59,500, i.e., £75,000, less £15,500, was the price fixed for everything except what was liable to fluctuation, and £15,500 was an estimate left open to be adjusted when the fluctuating assets were actually taken over. The £15,500 was arrived at in this way: the plant and stock-in-trade had been valued by the brokers on the 1st March at £7,500, and the "outstanding book debts" at £8,000. These sums are mentioned in the conveyance, but the expression "outstanding debts" is used, and this possibly may have a wider meaning than "outstanding book debts." It appears, however, to their Lordships that the fixed premium of £1,250, which Corlett was to pay to Martienssen, cannot be regarded as an outstanding debt of the same class as those left open to adjustment. It was included in the general words of the conveyance "all rights appertaining to the leases and options of purchase," and was part of the non-fluctuating property taken over, and was not included in the fluctuating assets left open to future adjustment.

Shortly after the conveyance of 4th April, 1899, viz., on the 8th April, Martienssen granted Corlett a lease of the Princess Royal hotel and a few days later Corlett paid him £400 cash on account of the £1,250 premium, and gave him promissory notes for £850 in payment of the balance.

In May, 1899, the Company and Martienssen were desirous of expediting the completion of their purchase in order to prevent any breach in the continuity of the business taken over by the Company. Mr. Chidell on behalf of the Company, and Mr. Hodgson on behalf of Martienssen, met to adjust the stock-in-trade and outstanding debts.

A list was prepared by Hodgson, and Corlett's premium of £850 was inserted in it, and Chidell, misunderstanding the state of affairs, wrote Martienssen's name against this entry in order to indicate that the Company would not take this sum over. The consequence was that this sum was omitted from the schedules annexed to the formal agreement of 16th June, 1899, signed by Chidell for the Company, and by another gentleman for Martienssen, and specifying what outstanding debts and loans were to be taken over by the Company, and what was to be paid for them.

This mode of dealing with the premium has created the difficulty which has led to this litigation. The final adjustment was made on the footing of the agreement of the 16th June, 1899. The defendants contend that the Company rejected this item of £850, and are now trying to obtain the premium

without paying for it. The Company contend that there was a manifest blunder in putting this premium into the list of items requiring adjustment, and that the blunder ought not to have the effect of depriving the Company of their right to the premium. The first view commended itself to the Supreme Court in the Colony, but their Lordships are unable to adopt it.

The evidence of Chidell and Hodgson satisfies their Lordships that both parties made a mistake in treating the unpaid balance of Corlett's premium as an outstanding debt with which they had to deal. In their Lordships' view they had nothing to do with it. The premium of £1,250 would properly appear in a list of the Company's assets; but the unpaid balance of £850 had no place in a list of the items left for adjustment. It was properly left out of the schedules to the agreement of the 16th June, 1899, although Chidell's reasons for leaving it out were attributable to the mistake already noticed. The mistake was a mutual mistake and does not affect the rights of the parties under the conveyance of 4th April, 1899.

It only remains to consider what ought now to be done. The premium passed by the conveyance, but Martienssen never received more than £400 on account of it. The balance, as already stated, was secured by promissory notes. It is stated in the appellants' case that in the middle of 1900 Martienssen brought an action against Corlett on these notes, and that the action stood over to enable Corlett to recover the amount from one Gourlay, to whom he had assigned the lease. The respondent states in his case that Corlett recovered judgment against Gourlay for £750, and Martienssen claimed this and it was paid into Court. Martienssen has since died, and the respondent is his executor. Their Lordships have no further information about the unpaid balance of the premium in question in these proceedings. All, therefore, that their Lordships can do is humbly to advise His Majesty to allow the Appeal and to reverse the judgment of the Supreme Court, so far as it relates to this premium of £1,250, and to order the defendant to pay the costs of the action up to and including the trial thereof, as far as it relates to this premium, and there must be the usual set off of costs; and to declare that under and by virtue of the conveyance of the 4th April, 1899, Martienssen became a trustee for the Company of the premium of £1,250, payable by Corlett under his lease of the 8th April, 1899, and became accountable to the plaintiff Company for

all sums received in respect of such premium and of interest thereon as and when received by him, and with this declaration to remit the action to the Supreme Court, with liberty to both parties to make such application to that Court or to take such other proceedings as they may be advised.

Their Lordships will therefore humbly give this advice to His Majesty, and the respondent must pay the costs of this Appeal.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of the Attorney-General for the Cape of Good Hope for special leave to appeal to His Majesty in Council in the matter of *Rex v. Lowe*, from the Supreme Court of the Cape of Good Hope; delivered the 8th June 1904.

Present:

The Lord Chancellor.
Lord Macnaghten.
Lord Davey.
Lord Robertson.
Sir Arthur Wilson.

[Delivered by the Lord Chancellor.]

Their lordships are of opinion that this is not a case in which there should be leave to appeal.

Their Lordships are asked, in the exercise of their constitutional function, to advise His Majesty, under the terms of Section 51 of the Charter of Justice for the Colony, to admit an appeal from a "judgment or determination" of the Supreme Court with a view to the same being reversed, corrected, or varied. There has, however, been no "judgment or determination" in this case which can be, or which indeed is sought to be, either reversed, corrected, or varied. It is admitted by the petitioner that the judgment of the Supreme Court is to stand, and the object of the petition is to have an abstract point of law which did not arise in the case, and never ought to have been reserved at all, determined now by way of appeal. It would be extremely inconvenient, and wholly unprecedented, to pick out of a trial some observation of the learned Judge, and to ask to have an appeal upon it, although the facts at the trial, and the determination of the trial, did not raise the question at all.

Their Lordships will therefore humbly advise His Majesty that the petition ought to be dismissed.

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice KOTZE]

P. J. PIENAAR, JUN., v. { 1901.
ESTATE SLUITER. July 1st.
MARTHA M. PIENAAR v. { .. 2nd.
ESTATE SLUITER.

Cattle—Illegal sale by messenger.

For the purposes of trial, these actions were consolidated. Already two actions, brought by the Pienaar family—P. J. Pienaar, sen., and his brother, who belong to the Colesberg district—against the estate of the late Herman van Leonen Sluiter, had been disposed of. In the present action the plaintiffs were Petrus Jacobus Pienaar's son and daughter—Petrus Jacobus and Martha Maria—and the defendants, as before, were the Board of Executors, Cape Town, in their capacity of executors testamentary in the estate Sluiter.

The declarations in the respective actions set out that in February, 1900, and at all times material to the action, the two plaintiffs were joint and equal owners of certain thirty-eight head of cattle, then pastured on the farm Droogrequest, district of Colesberg. Plaintiffs' father left the Colony on the 28th February, 1900, and did not return until April, 1901. On leaving he placed the said cattle in the charge of one Fortuin Erens, a native herd, by whom the cattle were shortly afterwards removed to the adjoining farm, Groenfontein, by reason of scarcity of water at Droogrequest. Thereafter, in September, 1900, plaintiffs' mother, Susannah Maria Pienaar, sold six of the cattle to one S. Smit for £40. Thereafter the defendants or their agents wrongfully demanded from plaintiffs' mother the said

sum, representing to her that the said six head of cattle so sold by her were the property of the said Sluiter. Plaintiffs and their mother were misled and intimidated by the said demand, and, in the absence of the father, the mother paid to the defendants, on behalf of the plaintiffs, the said sum of £40. The payment was made by the plaintiffs' mother through her agent, one Norval Hobkirk. In September or October, 1900, defendants unlawfully took possession of the remainder of the said cattle, to wit, thirty-two, then pastured on the farm Groenfontein, and removed the same to the farm Modderfontein, had then sold by public auction as an asset in the estate of Sluiter, and had retained the proceeds of the sale. The plaintiffs, in their respective declarations, prayed for judgment in the sum of £20 each, on account of the payment made by their mother of £40 to the defendants; the sum of £192 each, the value of the plaintiffs' shares in the said thirty-two head of cattle; interest *a tempore moræ*; alternative relief; costs of suit. An additional claim was made Jacobus, in respect of a brown pony, which was his property. This animal, was wrongfully taken possession of by the defendants or their agents, and had been sold to some person unknown, and the proceeds of the sale had been retained by the defendants. Plaintiff prayed for delivery of the said pony or, alternatively, the said sum of £20, the value thereof.

The defendants, in their plea, said that they did not know whether the plaintiffs owned any cattle; they admitted that plaintiffs' father was absent from the Colony between 1900 and 1901; they had no knowledge of the alleged handing over of cattle to Fortuin Erens; they admitted the sale to Smit for £40 by plaintiffs' mother of the six cattle in question, but said that the cattle belonged to the estate of Sluiter; they admitted having demanded the £40 and having received it, but denied hav-

ing acted wrongfully; they admitted taking possession of thirty-two head of cattle on Groenfontein and selling them, but said that the cattle belonged to the estate Sluiter; they denied the allegation as to taking possession of and sell a horse belonging to the plaintiff, P. J. Pienaar, jun.; and they prayed, in each of their pleas, that the claim may be dismissed with costs.

The replication was general.

Mr. Graham, K.C. (with him Mr. J. E. R. de Villiers) for plaintiffs; Sir H. Juta, K.C. (with him Mr. Gardiner) for defendants.

Petrus Jacobus Pienaar, of Colesberg, said he was the father of the two plaintiffs in this case. On the 28th February, 1900, he left for the Transvaal, returning in March or April, 1901. He was sentenced to twelve months' imprisonment for trading with the Boers. Sluiter was also concerned in the sale of stock to the Boers, but he died before proceedings could be taken against him. Witness farmed at Droogrequest. He had three children—Martha (23), Petrus Jacobus (21), and a minor. He knew the cattle he was claiming for his children. His daughter got a heifer from her uncle on her birthday; his son got a mare and a heifer from witness's father. Witness exchanged the mare for a heifer. The herd witness was now claiming for his children was raised from the three heifers he had described. It had been his habit to sell any oxen that were bred, and replace them with heifers. Witness had had a separate mark for the cattle of his son and daughter. In 1894, however, he had all the cattle dealt with by one mark. His son and daughter had thirty-eight cattle when witness left for the Transvaal. He handed them over to Fortuin Erens, a boy, who was working for Mr. Sluiter. He also handed over Mr. Sluiter's stock to the boy, who was at Droogrequest. Fortuin stayed at Colesberg, and had been in the employ of Mr. Sluiter for some years. It was arranged between witness and Mr. Sluiter that the cattle should be handed over in this way. Witness bought a dark chestnut pony from Mr. Kemper at Colesberg for the partnership account. He handed Kemper a good-for for £4. Witness kept the pony in his stable for a few days, and then he went out to Modderfontein, one of the farms he managed for Mr. Sluiter. He found that all the riding horses on the farm had been taken by the Imperial forces, and he said he would send one of his son's riding horses to the farm, and give him the chestnut pony. The pony was in poor condition. Mr. Sluiter consented to this arrangement. The riding horse, a brown gelding, was worth £20. This took place in February, 1900, about a fortnight before he left for the Transvaal.

Cross-examined by Sir H. Juta: He knew that his son had been charged

with the theft of the pony. Witness was not present at the trial. His son stated at the trial that his father had promised him a pony when he was commandeered by the Boers. Witness in February, 1900, owed his son two horses. He had sold one to another man, and he had sent the other over to Modderfontein. The cattle belonging to his children in December, 1898, numbered thirty or forty head. His intention had been to equally divide the stock between his two children. His daughter bought a piano for £75 in December, 1898. Witness paid for the instrument out of the proceeds of cattle sales. The £75 was the daughter's half share of the proceeds; the son's share he invested in other heifers. Witness had a bad time during his farming life. His oxen became diseased. When witness surrendered his estate he had only four oxen, three cows, and two calves. He had lost heavily by disease amongst his cattle and by drought.

Re-examined: As far as he knew, his creditors had received 20s. in the £, with interest. If the Board of Executors had not been paid, they would be paid.

By the Court: The money in discharge of his debts was to be paid by Dirk Sluiter, who had bought the farm Droogrequest.

Fortuin Erens, now in the employ of P. J. Pienaar, said that during the war he was in Mr. Sluiter's employ. Mr. Pienaar handed to him some cattle belonging to himself and the late Mr. Sluiter. He also spoke to the sale of the cows to Smith. He said that the riding horse in question was brought to the farm Modderfontein. Witness heard that the horse afterwards died at Groenfontein.

Johannes Jacobus Petrus Luttig stated that he had received furniture from Droogrequest, and also cattle after Mr. Pienaar fled to the Transvaal. Some of the cows belonged to Mr. Pienaar's children.

Cross-examined by Sir H. Juta: He knew the children's cattle by their distinctive mark. The last time he saw the cattle previous to 1900 was 1895. When he left the farm in 1895 he could not say how many cattle the children had. Rinderpest was very bad in 1897, but although he was only two hours from Droogrequest he could not say if it was very bad there. He was present at the sale, but he did not raise any protest.

Adam Norval Hopkirk stated he was a farmer, near Colesberg, and knew Mr. Pienaar, sen., prior to his insolvency. He had often been to the farm Droogrequest. He saw several cattle there which belonged to Mr. Pienaar's children.

By the Court: He knew they belonged to the children, because he made inquiries. He was present at a sale of cows during the war, and while Mr. Pienaar was in the Transvaal

the mother of the plaintiff sold the cows to Mr. Smidt. Witness was to receive the money and to deliver the cows at the farm Grootefontein. There were three cows, which were sold for £40. One of the cows was one that he had seen on the farm Droogrequest, and which belonged to the children. Each of the cows had a calf. Witness handed the money to Mrs. Pienaar, and subsequently he handed it to Mr. Hofman, who was bookkeeper to the Board of Executors. That was a few days after he gave Mrs. Pienaar the money. He advised her to hand it back. Mr. Hofman told Mrs. Pienaar that if she did not hand the money back he would make further investigations into the matter. She refused to do so, but eventually witness persuaded her to do so. Witness was present at the Modderfontein sale, and saw some of the cattle, the property of the children, being sold. When Mr. Pienaar returned, witness told him what had occurred. Witness lent the money to Mr. Pienaar to purchase a piano for Miss Pienaar. He paid it back in small instalments. Witness knew that Mr. Pienaar purchased cattle for his children prior to his insolvency.

Cross-examined by Sir H. Juta: Witness stated he made a statement to defendant's attorney, in which he stated that Mrs. Pienaar said the cattle belonged to her husband. He meant they belonged to the children. He told the attorney that he advised Mrs. Pienaar to return the money and wait until Mr. Pienaar came back, when he could recover it from the estate. It was prior to 1897 that Mr. Pienaar purchased the cattle for his children. Witness was engaged to Miss Pienaar, but it was broken off before the war.

William Ernest Gordon Davis, examined, stated he was an attorney, and resided at Colesberg. Mr. Pienaar and Mr. Sluiter were on very friendly terms. Witness was appointed trustee in the insolvent estate of Mr. Pienaar, sen. All the cattle taken up to Modderfontein were sold. Mr. Pienaar consulted witness about the case.

P. J. Pienaar, jun., in reply to Mr. Graham, stated he was 21 years of age, and was still at Bloemfontein College. He and his sister owned cattle, which were running on Droogrequest. Witness did not take any interest in January. At the outbreak of the war he and his sister had about 30 or 40 cattle between them. They had them after his father's insolvency. All the cattle were at Droogrequest when they went to the Transvaal. Witness was on commando about three weeks.

Cross-examined by Sir Henry Juta: Witness said his cattle were marked, so were his sister's.

Jaanje, a servant boy in the employment of the late Mr. Sluiter, stated he had charge of the cattle, and ten of them belonged to Mr. Pienaar's chil-

dren. At the time Sluiter's cattle were sold, they were mixed up with them.

Givcet Waterboor, a shepherd in the employ of the plaintiff, stated he went to the Transvaal with his master, and remained with him to the end of the war. His master had 38 head of cattle grazing with Sluiter's.

In reply to Sir Henry Juta, witness stated he could not count. His master told him there were 38 cattle belonging to the "young baas." He could not say how many of these Miss Pienaar owned. The plaintiff had no cattle. During the rinderpest, a number of the cattle died.

Pieter Jacobus Pienaar, jun., cousin to plaintiff, stated he went to live at Droogrequest about three years before the war, which was prior to Mr. Pienaar's insolvency. He saw the cattle on the farm before he and Mr. Pienaar went to the Transvaal.

Cross-examined by Sir Henry Juta: The cattle belonged to the Pienaar juniors. There were between 30 and 40 before the war.

Miss Pienaar, one of the plaintiffs, stated she was living at Droogrequest up to the outbreak of the war. She and her brother had cattle there. Her father had charge of them. She believed they were on the farm after his insolvency. Witness's father bought a piano for her. The money for it was derived from the sale of her cattle at Malmesbury.

Cross-examined by Sir H. Juta: She did not know how many cattle were sold at Malmesbury. She did not know the value of cattle.

Re-examined by Mr. Graham: Witness had been at a boarding school for a considerable time, and consequently did not know much about farming.

Mr. Graham closed his case.

James Edward Bradfield stated he had a list of the prices of stock sold at Modderfontein, and the average price was between £9 5s. and £9 10s.

Karl Clements stated he was an auctioneer, and sold the stock at Modderfontein. He advertised it extensively. No objection was raised to the sale of stock.

Cross-examined by Mr. Graham: All sorts of stock were sold. Cows in calf were sold at £13 each. This was during martial law, when it was difficult to get permits. Mrs. Pienaar would have had difficulty in doing so. Witness was bookkeeper to the late Mr. Sluiter for fourteen years. Mr. Pienaar and Mr. Sluiter were on very good terms. Witness could not identify the cattle sold at Modderfontein.

Sir H. Juta closed his case, and counsel were heard in argument on the facts.

Cur. Adv. Vult.
Postea (July 2nd.

Kotzé, J., said that he thought that the Board of Executors had acted wisely in putting the plaintiffs to the proof of their claim. The plaintiffs had accordingly come into Court and submitted evidence in support of their claim for the value of certain 32 head of cattle, which they say belong to them, and were sold in the estate of the late Mr. Sluiter, and for the return of £40, being the price of certain six head of cattle sold, which were claimed by the estate of Sluiter, and for the value of a certain house, put down at the sum of £20. Looking at the case as a whole, he thought that his judgment ought to be for the plaintiffs. Had the evidence of Mr. Pienaar, sen., the father of the two plaintiffs, stood alone, it would not have been altogether satisfactory to his mind, because they had the very important circumstance that when he surrendered his estate in August, 1899, he said that he only had four oxen and three cows remaining, and that forty out of seventy head of cattle had died on account of rinderpest and lung-sickness. It seemed somewhat strange that the stock of the two plaintiffs should have increased to the number of 38 about the year 1899, and should have escaped the ravages of rinderpest and lung-sickness, and, therefore, if that evidence of Mr. Pienaar stood alone, he should have been very slow in acting upon it. But his evidence was confirmed materially by other witnesses. The father had stated that he left for the Transvaal in 1900, and before he left he called Fortuin Erens to the farm Droogrequest, and handed over to him 38 head of cattle, and stated that these 38 belonged to his children. Mr. Pienaar also says that he informed Mr. Sluiter of the fact. Fortuin Erens, although he personally had no knowledge whatever as to whether the children had cattle of their own, and how they were marked, said that Pienaar told him that the cattle belonged to the children. It had been said that Fortuin Erens's statement was not reliable, because he made two contradictory statements, but I accept his evidence, because, if he came to bolster up a statement of Mr. Pienaar, the father, he would not have made the statement that Mr. Slater told him that the cattle belonged to him. There is also the evidence of Mr. Luttig, which shows that Mr. Sluiter was anxious to protect Pienaar's property in his absence in the Transvaal, and of Mr. Hobkerk, who said that he was aware that the cattle on Droogrequest belonged to the children, and he was also positive that some of the cattle was sold at the sale at Modderfontein. I can see no reason to doubt the evidence for the plaintiffs, and the Court must give judgment for them. Taking the average of £9 10s.

from the venous roll, the plaintiffs would be entitled to £304, together with the sum of £40, the value of the six head of cattle, and £11 to the male plaintiff, being the sworn value of the pony. Although the executors have acted wisely in putting the plaintiffs to the proof of their claim, I am not prepared to say that this is a case where the plaintiffs should be wholly deprived of their costs, and under the circumstances of the case, the plaintiffs will be entitled to their costs.

[Plaintiffs' Attorneys: Syfret, Godlonton and Low; Defendants' Attorneys: Van Zyl and Buissinné.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MAISEL BROS. V. ARONSTAIN. { 1904.
{ July 1st.

Foreign Company—Jurisdiction.

Mr. M. de Villiers moved to have a certain interdict discharged.

Mr. Alexander appeared on behalf of the respondent to oppose.

Counsel having been heard in argument,

Hopley, J.: The applicant in this case is either manager or sole managing director of a certain alleged company, Maisel Bros. and Co., Ltd., registered, it is said, under the Imperial Acts, but certainly not registered or domiciled in this colony. He has been for a very short time residing in this country, and certainly he has not established himself in a firm way of business, so as to make it possible to say that he has an established business in this country. He has not been here long, and during that time he has become involved with the present respondent in an action against him. I have been looking at the pleadings to a limited extent, and I gather that while the plaintiff sues both Maisel and the company, after getting leave to sue them by edictal citation, the defendant's plea is that he never dealt on his own behalf, but on behalf of the company. This company is really a foreign company. The only question is whether the Court has jurisdiction over the company, without attaching some goods. I don't know that everything was set before the Judge in Chambers in the first instance, but I do not think any important material was left out. The fact that there was this partnership was before him, and the allegation was that it was a foreign company, and that the man who represented the company was a person of uncertain domicile. I do not think that I should

accede to the present application, because more facts may come out at the trial, and moreover, I do not think that any inconvenience will result to the parties from maintaining the order. Of course, if the plaintiff was such a person as the present applicant would like to make out, he might make away with the property; but in the hands of the bank there can be no particular harm to the present applicant. The application will be refused with costs; but the matter should be brought to a conclusion without further delay, and the applicant will be ordered to file his rejoinder forthwith, so that the plaintiff may set down the case for trial this term.

IRWIN V. THOMSON.

Mr. P. Jones moved for leave to attach certain furniture, or the proceeds of a certain sale, in order to found jurisdiction on a debt for £36 6s. 1d. and £10 13s.

Rule nisi restraining the Cape Auctions Company, or any other persons, into whose hands it might come, from parting with the proceeds of the sale of the furniture of the respondent pending an action to be forthwith instituted by the applicant against William Thomson, with leave to sue by edictal citation, personal service to be effected, the process returnable on the 1st August.

FINDLAY AND CO. V. HEMPELL.

This was an action to recover £33 2s. 10d. and £12 16s., for goods sold and delivered and for work and labour done. The matter had been postponed, in view of a settlement. The settlement had not been effected.

Mr. Close for plaintiffs; Defendant in default.

Charles Ernest Dunnott, manager of the hardware department of Messrs. Findlay and Co. deposed that the defendant arranged for certain goods to be sent out to the electric light works at Claremont. The firm was merely to supply the panneling, but when witness heard that the defendant had not properly fixed up the work, witness went out and had it done through a sub-contractor.

Judgment was granted as prayed.

MCKENZIE V. TABLE BAY HARBOUR BOARD.	{	1904.
		July 4th.
		" 5th.
		Aug. 29th.

Dock agent—Purchase of plant by Harbour Board.

This was an action brought by A. R. McKenzie, of Cape Town,

against the Table Bay Harbour Board, to recover certain sums alleged to be due on the transfer of the landing and delivery business at the Docks from the plaintiff to the Board.

The plaintiff's declaration was as follows:

1. The plaintiff was, at the dates hereinafter mentioned, carrying on the business of a dock agent and of landing, shipping, and delivering cargo at the Alfred Docks, Cape Town. The defendant is the Table Bay Harbour Board.

2. Prior to and in the month of October, 1901, the defendant resolved to take over and perform all the duties of dock agents and the landing, shipping, and delivery of cargo at the Docks, Cape Town, and it was agreed between the parties that the defendant would buy and the plaintiff sell the whole of the plaintiff's plant, including that which was already landed and in use in this colony, that which was on indent and that which was in course of construction, and the parties agreed that the plant already landed and in use should be paid for at a valuation, and that the plant on indent and in course of construction should be paid for on arrival here and on completion. An inventory of the plant landed and in use was drawn up and the defendant paid the plaintiff therefor.

3. There were at the said time two road locomotives on indent and five Colonial box trailers in course of construction. The said locomotives have been landed and delivered, the trailers have been constructed and delivered all to defendant. The price of the former is £1,831 4s. 5d., and of the latter £362 10s. or £2,193 14s. 5d. in all.

4. At the aforementioned date the plaintiff was engaged in the landing and delivery of certain cargoes, and the plaintiff proposed that he should be allowed to complete the said deliveries in order to facilitate the delivery and the adjustment of claims by consignees and others in respect thereto, but the defendant refused the said offer, and thereupon it was agreed between the parties that on and from the 14th of October, 1901, the plaintiff should cease to act as dock agent and to land and deliver goods, and that the defendant should take over and perform the same, and that the defendant should become responsible for all liabilities in connection with cargo for which the plaintiff had been appointed dock agent, and in regard to which the plaintiff had already had the handling, whether the same had been partially delivered by the plaintiff and completed by the defendant or otherwise.

5. Liabilities to the extent of £3,544 7s. 4d. have been incurred and paid by the plaintiff in respect of the matters set forth in paragraph 4 hereof, and under and by virtue of the agreement in the said paragraph set forth the defendant is liable to the plaintiff for the amount thereof (copy of particulars thereof is

hereunto annexed). Of this amount the defendant has admitted liability for £684 6s. 2d., but has not paid same.

6. All things have happened, all times have elapsed, and all conditions have been fulfilled entitling the plaintiff to the two sums of £2,193 14s. 5d. and £3,544 7s. 4d.; but the defendant, though requested so to do, refuses to pay the same or any part thereof.

Wherefore, the plaintiff claims: (a) Payment of the two sums of £2,193 14s. 5d. and £3,544 7s. 4d., with interest *a tempore morae*. (b) Alternative relief. (c) Costs of suit.

The defendant's plea was:

1. The defendant admits paragraph 1 of the declaration.

2. On the 13th October, 1901, the defendant took in hand the landing, shipping, and delivery of cargo at the Docks, Cape Town, and with that object in view agreed with the plaintiff to purchase and take over, and did purchase and take over, all the horses, mules, harnesses, wagons, carts, buggies, trailers, traction engines, donkey engines, tugs, lighters, machinery, tarpaulins, coal bags, and all other plant and articles used by him in connection with his business as a dock agent, and a deed of submission to arbitration was executed between the parties to determine the price to be paid by the defendant.

3. The price was so determined and paid and included a sum of £362 10s. for certain Colonial box trailers, which include the box trailers referred to in paragraph 3 of the declaration.

4. As to the two road locomotives referred to in the said paragraph, they were never taken over or purchased by the Harbour Board, and the Board does not intend to purchase them. An offer was made in July, 1903, to purchase them, but the offer was not accepted and is no longer open.

5. Save as aforesaid the defendant denies the allegations in paragraphs 2 and 3 of the declaration.

6. Up to and including the 12th October the plaintiff was engaged in the landing and delivering of cargoes, and the plaintiff proposed that he should be allowed to complete the said deliveries in order to facilitate the delivery and the adjustment of claims by consignees and others in respect thereto, but the defendant refused the said offer.

7. Save as aforesaid the defendant does not admit the allegations in paragraph 4, and says that no agreement was entered into in the terms therein alleged; and the defendant specially denies that any contract such as is contemplated by the Act No. 36 of 1896, section 30, sub-section (c) was entered into relative to the matters alleged in that paragraph so as legally to bind the Board, which has no power to contract save in so far as it is authorised by the said Act.

8. The Board was willing after refusing the plaintiff's offer, referred to in para-

graph 6, to accept responsibility and answer claims for any loss or damage to goods landed from certain ships, the discharge of which the plaintiff had commenced before the 15th October, 1901, and subsequently the Board completed on or after the 15th October, 1901, in so far as such loss or damage was found to be not caused during the time when the plaintiff was effecting discharge, and in so far as the amount of such loss or damage should be reported and recommended for payment to the Board by one J. E. P. Close, to whom the Board entrusted the inquiry as to the amount, if any, to be paid to the plaintiff in respect of such claims for loss or damage which he might be called upon to pay and might have paid.

9. The said Close instituted and held a full and comprehensive inquiry into various claims against the Board or the plaintiff made by sundry merchants, including all such claims as aforesaid which were advanced or communicated by the plaintiff or on his behalf and including all the claims amounting to £4,628 16s. 4d., now claimed in the declaration, and the said Close thereafter reported to the Board and recommended that the Board should accept liability to a certain extent in respect of certain of the said claims, and should pay to the plaintiff the sum of £684 6s. 2d., which amount the defendant tenders to pay together with taxed costs to this date. The plaintiff has had full particulars of the details comprising the sum of £684 6s. 2d.

10. The Board has never agreed to pay and refuses to pay to the plaintiff any greater sum than the said sum of £684 6s. 2d., with taxed costs aforesaid.

11. Save as aforesaid the defendant denies the allegations in paragraphs 5 and 6 of the declaration, specially denying that the plaintiff has incurred or paid liabilities to the extent alleged, and specially denying that the Board agreed at any time to pay to the plaintiff such sums as he might pay to claimants, or any sum other than those for which the Board after inquiry as aforesaid accepted the responsibility.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

Sir H. Juta, K.C. (with him Mr. W. P. Buchanan), for the plaintiff. Mr. Schreiner, K.C. (with him Mr. Sutton), for defendant.

Sir H. Juta said that, in the replication, exception was taken to such of the paragraphs in the plea as referred to a report and recommendation of one J. E. P. Close, on the ground that the references were embarrassing, irrelevant, and bad in law. There was no allegation that it was an agreement between the Board and the plaintiff, that they on the plaintiff's side were bound by anything that Mr. Close reported or recommended. There was no allegation of any such contract or agree-

ment, consequently what the Board may have done or may have been willing to do in regard to Mr. Close's report could affect the plaintiff. He therefore submitted that the report and recommendation were not relevant to the case, and could not be brought in in order to try and fix the plaintiff with any liability.

Mr. Schreiner said that his learned friend was quite right in saying that they (the defendants) did not admit the alleged agreement, which was set out in paragraph 4 of the declaration; they wholly denied that agreement, and said there was no such agreement. There was a sum of £684 that the Board were willing to pay to McKenzie, and had been willing to pay as a result of Mr. Close's investigation into the measure of liability which the Board should accept and recognise in relation to certain goods. It was not a tender upon the plaintiff's agreement at all; but simply a tender of the sum which the Board were advised by Mr. Close they should pay to certain persons who had claims upon Mr. McKenzie. He thought it would be quite premature until his lordship had heard the evidence to decide whether the report of Mr. Close was embarrassing.

Sir H. Juta having been heard in reply.

Hopley, J. said that he did not think that any embarrassment arose in the matter, and the exception could not be upheld.

Evidence was then called.

Andrew R. McKenzie (the plaintiff) said that in 1901 he was carrying on business as landing, shipping, and delivery agent in Cape Town. The Harbour Board determined to take over the work. He had several interviews with the Board in regard to the matter, and finally the Board intimated that they would take over such portion of his plant as they thought would be suitable for the work. Mr. Wiener was chairman of the Board at that time. Mr. Wiener said that they would take over everything the plaintiff had connected with the dock work, both on the land, water, under indent, and what they were finishing at their different places; and what they (the Board) did not require, they would dispose of, so as to relieve plaintiff. "They were giving us," said Mr. McKenzie, "nothing for the goodwill of the business, which I had carried on for thirty odd years." Mr. Wiener, as the mouthpiece of the Board, made this communication to him after the Board had deliberated in private. Witness had six locomotives under indent; the engines commenced arriving in the latter part of October, 1901, and went on each month. He used one of the locomotives himself, the Board took one for use, and they had others about the Docks lying for use. In July, 1903, there were three engines

at the Docks, and one in his (witness's) yard. He subsequently received an offer from the General Manager for certain engines lying at the Docks. Witness told Mr. Mellish (representing the Board) that they could have the engines; the Board ultimately agreed to take a 10-h.p. engine and a 6-h.p. engine. He afterwards saw the General Manager about the cheque in 1903, and he asked Mr. Heenan to take over the other engines. Mr. Heenan said he had no money. The other engines had been lying at the Docks since they were landed, and were still there in their cases. The Board had debited witness with rent, but he had paid nothing. Witness had attempted to sell the engines, but he had not taken over liability. He treated the Board as gentlemen when he first went to them. The Board kicked him clean out of the Docks. The engines were under indent on the 28th May, 1901. Rather than come to law, he would have sold the engines at a reduction. Unfortunately, Municipal regulations were made in regard to the weight and use of the engines; the regulations prohibited the use of one of the engines which was fitted with a jib to enable her to remove packages at the Docks. Engines of that type were used in the town before the regulations came into force. As to the trailers in dispute, the arbitrators branded the box trailers just as they did other things. A man also went round on behalf of the Harbour Board, and painted the letters "T.B.H.B." on everything belonging to A. R. McKenzie and Co. that he could lay his hands on, no matter what it was or where it was. Witness had a contract with the Railway Department, and wagons used for that work came under the attention of the painter. The wagons had never been taken into account by the Harbour Board. Correspondence ensued, and two men went round and put on a third mark. There were five box trailers in construction at that time; these trailers had not been branded by the arbitrators. No receipts were given by the Harbour Board for anything that the arbitrators took over. On the 14th October, 1901, some of the ships had been partially discharged. The war was proceeding at the time, and the Docks were very congested and great confusion prevailed. Goods were moved to various places by the Board, and some were found six months afterwards. It was arranged at first that witness's firm should work till the end of December, and then all at once the Board decided to take over the work immediately, on Monday morning, the 14th October. When they left the business on Saturday night, they left everything just in the same position as if they themselves had been continuing on Monday morning, instead of the Har-

bour Board. They had a claim from Mr. Wiener; this was compromised. He had settled with Mr. Wiener for the amounts he was now claiming. The usual practice when he was with the Harbour Board was that when potatoes were condemned by the Harbour Board officials, they had them put into a lighter, taken into sea, and thrown overboard. The claim of Philip Bros. for £684 was exactly on all fours with all the rest.

Cross-examined by Mr. Schreiner: His current arrangement at the beginning was that it might terminate annually at the end of the 31st December. On the 24th August the Board, by a majority of one, decided to work the cartage department. The Harbour Board, through Mr. Wiener, said that they agreed to take over all the goods under indent and all the plant coming forward. He denied it point-blank that Mr. Wiener said that they would take it over if it were suitable. He had tried himself to sell the engines, and he never tried to make the Board pay for the storage of the plant. He would not swear that there were not ten or twelve trailers under construction for the Board. He never had a single claim against the Board; it was plant right through. He was bound to pay Strasburger the greater part of the £1,000 claimed. Witness signed the deeds of arbitration. A lot of things that were not in the arbitration award were painted. The box trailers in course of construction were not stamped. Witness met a full meeting of the Harbour Board early in October. Other dock agents were present. The meeting was called to decide what would be done with the goods at the Docks.

Re-examined: When approached by the Harbour Board to retire, witness refused to do so. None of the goods that were dumped down in the store were removed after the 14th October.

L. Wiener stated that at the time of the negotiations with Mr. McKenzie, he was chairman of the Harbour Board. Mr. Underwood was superintendent. There were several meetings between the Board and the dock agents. At one meeting in October, the General Manager of the Harbour Board gave a list of certain plant they would take over. The dock agents wanted it all taken over. As a decision could not be arrived at, the agents were asked to retire, and the Board decided, after discussing the matter, to take over all the plant at a valuation that would be arrived at. They were then called in, and the matter agreed to. The agreement was reduced to writing and signed. McKenzie mentioned that he had some material on order, and said he was being treated rather badly. The question as to the delivery of goods by the Harbour Board was then discussed.

Cross-examined by Mr. Schreiner: He thought it was the bounden duty of the Board under the agreement to take over all goods ordered by Mr. McKenzie prior to the Board taking the work over. Witness was chairman of the Harbour Board meeting the day the dock agents attended the meeting. As a result of that meeting, arbitrators were appointed. If the minutes stated that the agents withdrew, and did not return, it was not correct.

Mr. Schreiner: How can you, as chairman of that meeting, sign the minutes when you knew that they were not correct? Is that business?

Witness: What was done was business. Continuing, a document was drawn up, and the terms were agreed to. Witness was not quite clear as to whether the document was drawn up at the meeting or not. No stock was taken before the things were taken over. Witness did not take any steps to have that done. It was the duty of the officials of the Harbour Board to do so. The work at the Docks at the time was in a state of chaos. The decision of the Board to take over the work was rushed against the wishes of a few members of the Board.

The course of action in those days was that the Port Captain rushed a ship into the Docks. He felt sorry for the ship's captain, and rushed all the cargo off and rushed the ship out again. In order to manage delivery, the agents had to get more plant. Goods in hospital meant goods that were damaged or "sick." Witness knew nothing about the advertisement that appeared in the newspapers. The proposal that McKenzie should finish the vessels discharging was never acted on. Witness did not agree to be responsible for all liabilities in which the plaintiff was concerned, but the sequence would be that.

Re-examined: That would be the sequence, because at a moment's notice the Board undertook the delivery of thousands of packages, and how could they prove their non-liability? Witness sent in a claim to McKenzie for shortage of delivery of goods. The account had been settled between them.

To the Court: If it was proved that plaintiff had overpaid witness, he would be glad to refund it.

Joseph William Herbert stated he was a member of the Harbour Board in 1901. He recollected the meeting between the members of the Harbour Board and the dock agents. The former, first of all, offered to take over the plant belonging to the agents. The agents left the room, and were called back, and the final conclusion was that the Harbour Board would take over all the plant landed and on the water, and also that indented for. Witness was quite clear on that point. Witness did not recollect a meeting of the Finance Com-

mittee, when it was decided to take over from McKenzie the material for dock work only. The Board had to satisfy itself that the goods were on indent at the time the work was taken over. The state of things at the Docks at that time were chaotic. Witness computed that there were 30,000 tons of goods to be delivered. Hundreds of tons of material were stolen. Witness lost 400 bales of hay in one night. The military just took everything they wished at the time. Mr. Underwood consequently had a difficult task. It was decided at a meeting of the Board to leave everything in his hands, as he came out as an expert. Underwood undertook to deliver all the goods on McKenzie's account. The minutes did not account for what was done.

[Hopley, J.: How is that?]

I believe it was caused through pressure of work. We had meetings of the Board nearly every day.

[Hopley, J.: That is all the more reason why you should have proper minutes.]

The agreement was that the Board should deliver all cargo prior to October 14, on account of the agent, and accept all claims. The Board had paid numbers of claims since.

[Hopley, J.: On what principle did you accept responsibility for other people's negligence?]

That I can't say. The Board did very many foolish things. The majority of McKenzie's staff were taken over by the Board.

Cross-examined by Mr. Schreiner: Witness went over the minutes to ascertain a certain letter written from Mr. Robb to Underwood. Witness looked over them cursorily to freshen his memory. Witness was a member of the Finance Committee. Witness objected to the Board taking over the work. Had they complied with his wishes, they would have been better off, as subsequent results showed. It may have startled witness to hear that stock had not been taken, but did not injure his health. He had not then got over the effects of the Harbour Board taking over the work. He thought Mr. Underwood would have made every arrangement. Witness was aware that the military had control of the Docks at the time. Mr. Underwood could not have stopped them working to take stock. Witness lost the hay in 1902, which was after the Board took over the work. The loss of goods was worse after the Board took the delivery over. There was theft during McKenzie's time, but it was not very great. Anterior to the Board taking over the work, they would not have returns of the missing goods. The organisation of the Docks was worse after the Harbour Board took up the work.

Re-examined: He did not know of the letter until it was read to him by Mr.

Reid. The goods on the water were to be taken by the Harbour Board at cost price, invoice price, not on valuation.

Warren B. Sexton, joint managing director of McKenzie and Co., Ltd., said that before the company was formed he looked after the claims department of Mr. McKenzie's business. After the Board took over, McKenzies continued to act as stevedores. When the Board took over, a large number of ships were partially discharged, others had been delivered, and some were lying at the docks. Witness went to Mr. Underwood to try to arrange about delivery of the rest of the goods. They had a considerable discussion. For McKenzie's, he proposed to finish what they had already begun, but Mr. Underwood thought that would lead to conflict, with two sets of men at the docks. He also made another proposition as regarded tallies, but Mr. Underwood said they would take over the whole lot, in fact, he did not want McKenzie's about the docks at all. The final result was that Mr. Underwood took the responsibility for all ships discharging, or to be discharged. Witness gave instructions for the whole of the tickets, records, and so on to be handed over to the Table Bay Harbour Board. They handed over to the Harbour Board everything that was necessary for the delivery of the goods. Witness told Mr. Underwood that it would be very difficult to adjust all the claims, and that it would be better that McKenzie's should finish what they had begun, but Mr. Underwood dissented, and said that the Harbour Board wanted to take all over. Witness afterwards saw the general manager, Mr. Heenan, and asked him to take over all the traction engines on hand. It seemed to be understood that whatever engines Mr. Heenan wanted he was entitled to take over at cost price; witness regarded them as part of the plant to be taken over by the Harbour Board. Mr. Heenan said that he would only take the lighter engines; he could not take the heavier ones, as they were too heavy for their purpose and against the city regulations. Witness simply understood that the Board would take them over at cost price as part of the arrangement. Mr. Heenan took over two engines.

Cross-examined by Mr. Schreiner: There were three engines in the docks at that time. He had not the details as to the arrival of the engines. He had not the indents in his possession. He did not know whether the big engine that was shipped by the S.S. Gascon was built according to specification of May 5, 1902. He could not say whether the specification was the indent. Witness did not tell Mr. Heenan that the Board were bound to take over the engines. Mr. McKenzie afterwards went and told Mr. Heenan that the Board were under an obligation to take the engines under indent. Witness was present at the time.

The engines were stacked at the Docks, and a rent had been charged. After the Board took over, McKenzies did not continue to deliver goods, as far as witness's knowledge went. He knew there was a conference between Mr. Close and Mr. Cowell (representing Mr. McKenzie), and that the claims were under investigation.

William Beattie said that in 1901 he was manager for McKenzie at the Docks, and he was now with McKenzie and Co., Limited. He remembered Mr. Underwood being at the Docks, and his taking over the whole working of the Docks on behalf of the Harbour Board. Mr. Underwood said that he would take the responsibility of the whole thing.

Cross-examined by Mr. Schreiner: He knew nothing of the capabilities of the engines coming forward.

Henry Montgomery, in the employ of McKenzie and Co., when the Harbour Board took over the contract, said that he remembered the box trailers, some of which generally wanted repairing.

William Henry Cowell stated that the engines indented were ordered from London in connection with the carrying on of their business in the Docks. There was some trouble at the time of shipping the engines, but, ultimately, they were shipped after a deal of trouble.

Cross-examined by Mr. Schreiner: He was certain that one of the engines arrived at the beginning of August, and the others at the end of August.

Sir Henry Juta said he would close his case subject to his being allowed at a later stage to call witnesses to prove details of claims.

This course was agreed to.

The first witness called for the defence was

J. W. Jagger, M.L.A., who stated that in 1901 he was a member of the Harbour Board. He took considerable interest in the changes that took place. He was present at the meeting of the Board when a resolution was adopted by a majority of one to take over the dock agents' duties. At that meeting the amount of plant to be taken over was not discussed. Mr. Underwood was selected by Mr. Hammersley-Heenan as traffic manager at the Docks, and brought out from England for that purpose. He commenced his duties not long before this time. A roving commission was not given to Mr. Underwood; everything he contemplated had to be submitted in writing to the Board. On the 9th September a proposal was received from plaintiff to sell his plant for £98,500, and on the 12th it was resolved to proceed to arbitration as to the plant that was to be taken over by the Board. The minutes recording the resolutions were absolutely correct.

Mr. Schreiner: At that time was an unrecorded communication made by

Mr. Wiener, the chairman of the Harbour Board, to the dock agents, to the effect that all their plant under indent would be taken over?

Witness: I heard Mr. Wiener say so in the witness-box yesterday, and I believe he was quite conscientious in doing so; but he was absolutely wrong. At the meeting of the Finance Committee, it was never said by members that the Board should take over the plant on indent, because at that time the Board had already promised to take it over. There was no reservation in any shape or form. The Board never gave any pledge or considered itself pledged to take over the plant that was coming forward. If there had been any such pledge I would have remembered it. When matters like the one under consideration were brought under the notice of the Board, they were always taken on their merits. There was no such record in the minutes of such an agreement as that alleged by the plaintiff. It was never mentioned at any meetings of the Board that Mr. Underwood had made such an agreement on behalf of the Board. There was no reference in the minutes as to taking over the plant, or any reference to accept responsibility on behalf of the plaintiff. To do so would be against the general policy of the Board. Witness ceased to be a member of the Harbour Board in September, 1903. Witness remembered Mr. Close being appointed to investigate the scheme between Mr. McKenzie and the Board. If ships had been cleared and had left the Docks before the Harbour Board took over the work, they would certainly repudiate any claims that might be made against them.

Cross-examined by Sir H. Juta: If McKenzie had refused to sell his plant it would be awkward for the Harbour Board. He only sold the plant he was using at the time. They required a lot more at the Docks. They took his offers into consideration, and used what they could of the plant that was coming forward. They did not want to take it all over, because they did not want to buy a pig in a poke. They could have seen what was coming out by consulting the indents. It took a considerable time to get plant out from England. Everything that was in use at the time had to be taken over. He could not say if they took over plant in course of construction. The Board did not go into details, that was left to their officials. He could not say if the Harbour Board under the agreement were to take over engines that were unpacked. Arrangements had to be made for dealing with cargo that was partly discharged or partly delivered up to the 14th October. That was left to the Board's officers. That decision was arrived at on October 4. The Board did not give Underwood a "free hand," but advised him to facilitate work as much

as possible. Witness did not find in the minutes any report from Underwood consequent upon those instructions. He had a free hand as regarded details. They were not so anxious to get McKenzie out, as to get the new system into order. The Board made no arrangement with the Dock agents as to liability with regard to claims. He did not recollect it being discussed at the Board.

Sir H. Juta: Do you contradict the statement made by Mr. Wiener that McKenzie attended the meeting of the Harbour Board and discussed that point?

Witness: Certainly I do. Such an important matter as that would be put on the minutes.

Re-examined by Mr. Schreiner: If there was any question as to the Board accepting liability, the secretary would have reported it to the Board.

Frank Robb stated he was secretary and Assistant General Manager of the Harbour Board. In 1901 he was only secretary. There were long discussions as to the advisability of the Board taking over the delivery work. It was eventually decided to do so. It had been the idea to have the delivery work done by a contractor, but none of the tenders received were satisfactory. McKenzie offered his plant for £98,500. On the 12th September, on the motion of Mr. Price, it was agreed to proceed to arbitration on the amount to be allowed for the plant. The Dock agents were present at a special meeting of the Board on the 13th. The minutes were carefully kept throughout. The chief clerk used to attend the meetings with witness, and take notes. He drafted out the minutes and copies of them were sent to the commissioners, who confirmed them at the next meeting. The arbitrators met, and witness wrote their findings to McKenzie, and McKenzie was paid out in full, in the following January. Witness did not offer any evidence with regard to the engines at the Docks, or the box-trailers. Pursuant to the arbitrators award they paid for seven box trailers in course of construction. He knew nothing about a claim for five new box trailers. On the 11th October he wrote to Underwood, and handed the letter to Sexton, but there was nothing in the letter excepting instructions with regard to vessels then discharging. In writing that letter he had no idea of conferring authority on Underwood in regard to goods landed or vessels partly discharged.

Cross-examined by Sir H. Juta: There was a deal of discussion when the dock agents met the Board in September. The Board decided to take over what would be of service, but when the dock agents were present, the plaintiff objected, and said: "Well, gentlemen, if that's what you are going to do, I have nothing to sell you," and then it was ultimately decided to take over everything that the dock agents were using. There was no discussion about

taking over plant in course of construction, but there was no minute authorising the valuator to value such. He was acting in the spirit of the resolution when he gave authority to include things in the course of construction. There was a letter from the plaintiff on the 18th October asking the Board if they would take over the plant that was coming forward. He did not know why Mr. Sexton should go to him and intimate that a traction-engine was coming forward. The Board was wanting plant, and they were extremely anxious to buy it if it were suitable. He could not say what use a dock agent could make of plant that he had specially ordered for dock work, if he were giving such work up. According to the minute of the 1st September, the plaintiff must have handed in invoices. Witness would not write a letter and say that the Board wished a certain thing done without the Board's authority, but when he wrote to Underwood on the 11th October, "the Board would be glad," etc., it was merely an expression of opinion. He could not say why, when Underwood wrote asking for authority, he did not refer him to the minute of the Board on the 4th October. McKenzie kept some of the plant for the Government contract. The Board took over all the plant for dock work.

How, if you had taken all the plant, could you expect these dock agents to go on delivering from the depositing stores?—They could have arranged with us, or they could have hired carts or used their own wagons, as McKenzie's did.

Robert Henry Hammersley-Heenan, general manager and engineer-in-chief of the Table Bay Harbour Board, said that he submitted a memorandum at the request of several private members of the Board on the question of taking over delivery. Mr. Underwood was the manager of the traffic department up to November, 1901, when witness was appointed general manager. Mr. Underwood resigned when he became aware of witness's appointment. Witness was present at the Board meeting at which the dock agents attended. The impression then conveyed to witness's mind was that it was the intention of the Board to take over all the dock agents' plant used legitimately in dock work. Witness acted as arbitrator in connection with all the engineering plants. It was never suggested to witness by McKenzie that the Board had to take over the engines due to arrive, but witness and his brother arbitrator agreed to take over duplicate parts of engines which were then ready for the use of the port. Nothing was said to witness from McKenzie's side as to engines being ordered which the Board would have to take over. It was not the case that any pressure was brought

to bear on witness to take over these engines. He had no recollection of anything being said on the matter until the letter of the 24th July. The following day Mr. Sexton came to see witness, and said, "We have three engines in the Docks; we can't let you have the two you want; but we will let you have one, and another engine which we have running on the streets." Witness wanted two ten-horse-power engines, which were the biggest engines the Town Council would then permit to go on the streets. Mr. Sexton told him that the reason he could not have the two engines asked for was because one was already under offer. Eventually witness took one of these two engines, and secured another in town. A few days later Mr. Sexton and Mr. McKenzie came to his office, and made a similar statement. Witness had no recollection of their ever having stated to him that they considered it was the Board's duty to take over the engines. The street plant trailers and so on—was not good; but the Board took it, the bargain being that they should take over the whole plant. It never came to witness's knowledge that any arrangement had been made between the Board and McKenzie's that the former should take over all McKenzie's liabilities. In February, 1902, the Board appointed Mr. Close to investigate claims against the Board which could not be settled by the ordinary staff.

Cross-examined by Sir H. Juta: He could not recollect if he was consulted as to whether the Board required the engines. It would be Mr. Underwood's duty to say whether the engines were required or not. The Board at that time would not buy new engines without consulting him, but with regard to those imported by plaintiff, he could not say what they would do. He remembered the meeting at which McKenzie offered to sell his plant, and when Mr. Jagger said he advocated purchasing only what was necessary for the work, Mr. McKenzie declined to sell anything. He understood that the resolve to take over the plant included everything in course of construction for dock work. He could not say how it came about that McKenzie handed in invoices for plant on the water. They would not know that there was a shortage in stock until it was all cleared away. It would be a difficult thing to say if cargo had been partly delivered by McKenzie and partly by the Harbour Board, and any portion was lost, as to whether they were lost by McKenzie or the Harbour Board. If the "tallies" were properly kept it would be possible, but would be difficult.

John King, of Durbanville, examined by Mr. Schreiner, said he was a partner in the firm of King Bros. He was one of the arbitrators between McKenzie

and the Harbour Board. He was a nominee of the Harbour Board. Witness was accompanied by Mr. Penny, and gave his decision in favour of the Harbour Board paying £12,000. Mr. McKenzie did not go round with them, but his representative, Mr. Boyd, did so, and got everything "marshalled" for inspection. There were seven box trailers in course of construction, which he also valued. There were also box trailers which were finished, and he valued them at £72 10s. each. He valued all the box trailers at the same price.

Henry de Smidt stated he was a member of the Harbour Board between April, 1901, and August, 1902. Mr. Underwood was appointed before he (witness) took office. He recollected the decision of the Board to do the delivery work themselves. He was not present at the meeting at which Mr. Underwood said that Mr. McKenzie had agreed to hand over the delivery work. He did not recollect deputing to Mr. Wiener the right to settle with Mr. McKenzie with regard to the claims to be paid. Witness was chairman of the meeting of the Harbour Board on the 11th October. Witness considered the minutes of the various meetings were well kept—rather too elaborately, he thought. Before the taking over of the work from McKenzie he found the most complex accounts in existence.

Cross-examined by Sir H. Juta: The Board took over the work on the 14th October, but he could give no information as to the individual claims before that date.

Captain Lee, Dock Superintendent in 1902, stated that he had seen the warrant in connection with the engines that arrived in August, 1902. There was never any intimation to him from the plaintiff that the engines were for the Harbour Board. McKenzie and Co. instructed him to store the engines on the spare ground pending further advice.

Cross-examined by Sir H. Juta: He could not say whether certain duplicate parts of engines were stored at the docks.

Herbert Penny, Chief Inspector of the Table Bay Harbour Board, stated that he accompanied the arbitrators on their work. From the book that he kept the award of £12,000 was made out. Two of the trailers were shown, and the arbitrators decided that they were equally worth £72 10s. with the other working trailers. He was positive that seven trailers, and seven only, were mentioned that were in the course of construction.

Joseph Brodie McGregor, outdoor superintendent at the Docks, stated that in 1901 he was chief wharfinger. On October 11 he was summoned to Mr. Underwood's office to meet Mr. Sexton and Mr. Beattie, to

advise as to the proposal to take over Mr. McKenzie's business of dock agent. It was arranged that the plaintiffs should finish the ships that they were discharging—this to include discharging to the stores as well as stevedoring—with the exception of the Clan McIntyre, which arrived on the 9th, and had only just begun to discharge. Nothing was said about taking over all liabilities. All the plaintiffs' books were not handed over to the Board; their cargo delivery books and receipts were not handed over. If they had been, witness would have known of it. Mr. Sexton was incorrect in stating that witness was opposed to the plaintiffs' men continuing to discharge.

Cross-examined by Sir H. Juta: The services of some of the tally clerks were transferred to the Board, with all their documents and books. The Board had not a record of the amount of stuff which the plaintiffs had handled in the ships, the discharge of which the Board completed.

Re-examined by Mr. Schreiner: Mr. McKenzie had still got heavy contracts with the military, and he continued to occupy his office at the Docks. He was not driven out of the Docks, as had been suggested, but continued to discharge certain vessels.

By Hopley, J.: The actual delivery was performed by the Board, because the Board had taken over the plaintiffs' plant.

Mr. J. E. P. Close stated that in 1902 he was appointed to investigate a very large number of claims made both by the Board on McKenzie's, and by McKenzie's on the Board. The outcome of the discussions and consultations which witness had with Mr. Cowell was that the sum of £4,500 odd was given in favour of McKenzie. The total amount involved on both sides was £50,000. This amount included the present claims for short delivery, which they agreed to put on one side. He repeatedly asked for all claims that McKenzie's had to be filed. During the whole of the time no claim was made by the plaintiffs in respect of the engines. The first that witness heard about this matter was when Mr. Reid handed him the declaration in this case. Two accounts were filed for two and five new trailers respectively, dated July, 1902. This claim was hotly contested between witness and Mr. Cowell. In the account initiated by Mr. Cowell, these items appeared under the head "Accounts disallowed, and disallowances accepted by McKenzie and Co." Witness said that it was impossible for him to pass that account, which was a clear double charge. Witness actually disallowed claims for over £4,000 for amounts which had previously been paid to McKenzie, one item alone amounting to £2,295.

Knowles Stanley Wood, clerk in the

employment of Mr. Close, stated that he checked all items in the claim with Mr. Cowell, and it was distinctly understood that the account was full and complete. Witness, in further evidence, corroborated the statements made by Mr. Close.

Mr. Schreiner closed his case, and counsel were heard in argument on the facts.

Cur. Adr. Vult.

Postea (August 29).

The Court gave judgment for the defendants with costs.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller; Defendants' Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

PROVISIONAL ROLL.

GARDINER AND CO. V. { 1904.
MACKIE AND YOUNG. { July 7th.

Mr. Alexander asked for an order for the final sequestration of the defendant's estate, a provisional order having been granted on June 20.

Granted

MALMESBURY BOARD OF EXECUTORS V.
VAN DER SPUY.

Mr. Pittman moved for provisional sentence on a mortgage bond for £2,400, and interest at the rate of 6 per cent., for £4 12s., premiums paid on a certain insurance policy, and for certain property to be declared executable.

Granted.

LOGIE V. VORSTER AND ANOTHER.

Mr. Russell moved for provisional sentence on a promissory note for £194 18s. 6d., value received, with interest and costs.

Order granted.

LOGIE V. VORSTER.

Mr. Russell applied for provisional sentence on two promissory notes for the sums of £42 15s. 6d. and £291 5s. 10d., with interest and costs.

Granted.

PRICE BROS. V. WESSELS BROS. AND ANOTHER.

Mr. Roux moved for provisional sentence on two promissory notes for £1,639 15s. 6d. and £1,447 17s., with interest at 10 per cent. and costs.
Granted.

KOBBLER BROS. V. DELFORT.

Mr. De Waal asked for the discharge of a provisional order of sequestration granted by Mr. Justice Hopley.
The provisional order was discharged, as prayed.

ESTATE OF WILMOT V. ESTATE OF SAYERS.

Mr. Alexander applied for provisional sentence on a mortgage bond for £1,000, with interest. Counsel said that the certificate of administration was being prepared, but had not been put in.

Buchanan, J., said he must point out the irregularity in not producing letters of administration. He wished practitioners to understand that this would be put a stop to, and that these irregular applications would not be granted in future.

LYONS V. GREENLAND.

Mr. Close applied for provisional sentence on a promissory note for £193 15s., less £125 paid on account.

Provisional sentence granted.

WHITE V. FOTHERINGHAM.

Mr. Bisset applied for provisional sentence for £350, with interest and costs, and for property specially hypothecated to be declared executable.

Granted.

HUDSON, VREDE AND CO. V. RENCK.

Mr. Bisset applied for the provisional order of sequestration granted by the Chief Justice be made final.

Granted.

WHITE, RYAN AND CO. V. COHEN.

Mr. Close applied for final sequestration of the defendant's estate. The provisional order was granted on June 20.

Estate finally sequestrated.

CLOSE AND ROOS V. J. D. HENDRICKS AND J. D. S. HENDRICKS.

Mr. Close asked for final sequestration of the defendant's estate. Provisional sequestration was granted on June 23.
Granted.

VAN DER BYL AND CO. V. CASSIEM.

Dr. Krauze moved for a final order of sequestration of the defendant's estate. The provisional order was granted on June 21.

Granted.

ILLIQUID ROLL.

IMPERIAL COLD STORAGE { 1904.
V. EPSTEIN. { July 7th.

Mr. Upington moved for judgment, under Rule 329d, for £327 10s. 8d., for goods sold and delivered, with interest and costs.
Granted.

BRITISH SOUTH AFRICAN ASPHALTE CO. V. EPSTEIN.

Mr. Molteno moved for judgment, under Rule 329d, for £42 19s. 7d., less £15, paid on account, for goods supplied.
Granted.

ARGUS PRINTING CO. V. PEACEY

Mr. Molteno moved, under Rule 329d, for judgment for £30 7s. 9d. for goods sold and delivered, with interest *a tempore morae* and costs of suit.
Granted.

IMPERIAL COLD STORAGE CO. V. DIETHELM.

Mr. Upington moved, under Rule 329d, for judgment for £375 for goods sold and delivered, with interest and costs.

Granted.

S.A. MILLING CO. V. MILLER.

Mr. Russell applied for judgment, under Rule 319, for £100 against defendant as surety.

Defendant appeared, and stated that two securities were given, and he was only liable for his proportion.

Counsel said he was not instructed on this point.

The matter was ordered to stand over until the 14th inst. for further information.

STEYTLER V. VENTER AND NAUDE.

Mr. Roux applied, under Rule 329d, for judgment for £71 16s. 9d., balance of account due, with interest and costs.
Granted.

JEFFERY V. I. AND J. HERMANN.

Mr. Struben moved for judgment for £82, with interest and costs.
Granted.

HUTT V. MELEKOV AND SOCKEL.

Mr. Russell applied, under Rule 329d, for an order for the transfer of a certain piece of ground purchased from defendant, plaintiff having paid for the ground, and tendered the money for transfer expenses.

Granted.

GENERAL MOTIONS.

Ex parte CLOSE AND { 1904.
OTHERS. { July 7th.

Mr. McGregor moved to make absolute a rule *nisi* granted by the Court calling on respondents to show cause why applicants should not be appointed liquidators.

Rule made absolute.

Ex parte MOUAT.

Mr. Russell moved for leave to pass transfer of certain property. It appeared that one of the trustees appointed in 1884 was now in England, and his address could not be ascertained.

Granted.

Ex parte PAULING.

Mr. Joubert applied for an order for the appointment of Mr. W. A. Currey as trustee under an ante-nuptial contract entered into in 1890.

Granted.

Ex parte VAN DER VYVER.

Mr. Struben moved for authority to raise a mortgage of £500 on certain property belonging to minors. Counsel said the Master's report was not entirely favourable.

Buchanan, J., said there was money in the guardian's fund to the amount of about £450, and it seemed to him it would be better to take that money than to raise a mortgage. The matter would be referred back to the Master, with power to act if satisfied it was for the benefit of the minors.

SHACKELL V. SHACKELL.

This was an application by Lucy E. Shackell against her husband, J. H. Shackell, for the custody of the two minor children.

Mr. Burton, for petitioner, said she was the defendant in an action in the Transvaal for divorce. The Court dismissed the action for divorce, but granted leave to apply for an order for separation, the parties, if possible, to come to an amicable arrangement as

to the custody of the children. On January 20, 1904, the husband left Kimberley, taking the children with him. Through her solicitors applicant sent a registered letter to respondent at Cape Town saying that she was willing that he should have the custody of the girl if she should have the boy. The husband, not having employment, was not in a position to support them, while applicant was earning an income of £30 per month as a dressmaker. There was immediate danger that the husband, who was talking of taking the children to Australia, would leave the country, and applicant therefore asked for an interdict against the husband restraining him from taking the children out of the jurisdiction of the Court until an action could be brought in respect of their custody.

An interdict was granted restraining respondent from removing the children out of the jurisdiction of the Court, the interdict to be dissolved on August 31, unless applicant took action.

Ex parte "YE MECCA CAFE," LTD.

Mr. Struben moved for confirmation of the liquidator's report. The liquidator stated that in his opinion the failure of the company was due to gross mismanagement and neglect.

Buchanan, J.: I suppose if any creditor likes to take action on that he can do so.

Order granted.

Ex parte LUYT.

Mr. Russell moved for an order declaring one Fatima Gabil, a minor, entitled to certain money in the hands of the Master, and for leave to pay part of the money to a third person to defray the cost of the maintenance of the minor. The Master recommended that the money be applied to the maintenance of the minor, and that he be authorised to pay a sum less than that asked for to the person who maintained the minor.

Order granted in terms of Master's report.

Ex parte THE ESTATE OF VAN COLLER.

Mr. Russell moved for confirmation of partition of certain properties. The Master reported favourably.

Granted.

Ex parte PROUDFOOT.

Mr. Russell moved for an order authorising the Registrar of Deeds to cancel the entry of a certain bond. The Registrar recommended that a rule in the usual terms be granted.

Rule granted in terms of the Registrar's report, the Registrar being authorised to cancel the Bond if no objection were made.

Ex parte THE STAR AERATED WATER FACTORY.

Mr. Gardiner moved for a rule *nisi* operating as an interdict restraining the vendor of the business from parting with certain promissory notes, given in respect of the purchase price by applicants, pending action to be brought by applicants in respect of certain goods not delivered.

His Lordship said the applicants would be amply protected by setting off this claim against the last of these promissory notes, but it was not right that the applicants should come with this application just as the first of the notes was maturing.

A rule *nisi* was granted interdicting respondent from parting with the third and fourth of the notes pending action to be forthwith instituted.

STEER V. CHETTY.

Mr. Russell moved for leave to sue by edictal citation, and to attach certain goods, consisting of two rings, eight small jewels, and a gold watch, to found jurisdiction.

Application granted, personal service to be effected, the citation being returnable on the 15th August.

Ex parte THE APPLICATION OF NANGO HASNIEM.

Dr. Greer moved for an order compelling the Acting Resident Magistrate of Cape Town, to issue a writ of execution on a judgment given by him in a case in which the applicant summoned one Dala. Applicant alleged that the Magistrate gave judgment for him, and at the end of the notes of evidence entered: "Judgment for plaintiff, with costs." He afterwards erased plaintiff, and substituted "defendant."

Mr. Graham, K.C., for the respondents, read affidavits to show that the Magistrate made an error in saying and writing: "Judgment for plaintiff," and that he intended to give judgment for defendant. When the Magistrate discovered his mistake he altered the record.

Dr. Greer argued that the Magistrate acted beyond his authority in altering the record, and that the judgment given in the first instance must stand.

Without calling upon Mr. Graham, the Court refused the application.

Buchanan, J., in giving judgment, said that the applicant sued Dala in the Magistrate's Court on a dishonoured cheque. On the defendant admitting his signature he was required to prove

non-liability, and he thereupon put his witnesses into the box. The plaintiff and his witnesses afterwards went into the box to answer defendant's case. The Magistrate, through inadvertence, as defendant had given his evidence first, gave judgment for the plaintiff, but, as a fact, he said that the judgment he intended to pronounce in Court was for the defendant, and he stated that he entered this judgment on the record, which now showed judgment for defendant instead of for plaintiff. He had at once informed the parties of these facts. Under these circumstances, no order would be made, but by consent, leave would be reserved to the applicant to appeal on the merits if so advised, such appeal to be noted within three days.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

HONIBALL V. CAPE CENTRAL RAILWAY. 1904. July 8th.

Damnum injuriarum — Measure of damages.

This was an action brought by Henry Edward Honiball, farmer, division of Mossel Bay, against the Cape Central Railway, to recover £250 in respect of damage alleged to have been done to the plaintiff's farm Bon Avontuur.

The plaintiff, in his declaration, stated that he was a farmer living in the division of Mossel Bay. The defendant company were authorised to extend and had been extending their line of railway from Riversdale to Mossel Bay. The said line of railway passed over the farm of the plaintiff, Bon Avontuur. A route was laid out but this was subsequently abandoned in favour of a deviation to the route now followed. In laying out the original route, the defendants destroyed 1,800 valuable aloe trees and bush, the value thereof being £250. Plaintiff prayed for: (1) Judgment for £250; (2) alternative relief; and (3) costs of suit.

The defendants in their plea admitted the formal allegations, and also that, as authorised by the Act of Parliament, they entered upon the plaintiff's land and felled certain aloe and other trees, but they denied that they had acted wrongfully and unlawfully. They admitted that they were liable to pay compensation for any damage that was done, but denied that the plaintiff had

sustained damages in the sum of £250, and said that £20 was a sufficient sum to pay. They paid into court a sum of £20 in sufficient discharge of the plaintiff's claim.

The replication was general.

Mr. M. de Villiers was for the plaintiff; Mr. Upington (with him Mr. Struben) was for the defendants.

[Hopley, J.: It comes, then, to a question of what is the value of the trees?]

Mr. De Villiers: Yes.

Henry L. Honiball, son of the plaintiff, said he knew the old route that was laid out by the railway, but abandoned afterwards, over his father's farm. The old route went partly over red and black soil, covered with aloes and black olives. The ground was closely planted with aloes. In making the clearance for the route, about 1,800 aloes were destroyed; he counted that number. The flowers and seeds of the aloe were used as ostrich food. The aloe was considered very valuable for that purpose. It was, in fact, the principal food of the ostrich during drought. After the drug had been extracted, the leaf was good for goats, and greatly eaten by them. The value of the aloes at the time of the destruction of the trees was £1 per 100 lb. The stems of the aloe trees were also useful as poles for wire fencing. He estimated the value at 1s. 6d. per pole. Only a portion of the trees cut down could be used for poles, as they were too short. Other trees were also felled that were suitable for cattle food. He reckoned the value of an aloe tree at 2s. 6d.

By the Court: He regarded the value of the olive and other trees that were knocked down, apart from the aloes, as £25.

Cross-examined by Mr. Upington: As a rule, the tapping of the aloe trees was done by poor people. The farmer usually took one-third of the price, and the person who tapped took two-thirds. He repeated: that an aloe was worth 2s. 6d. Ground containing aloes was worth a good deal more than any other ordinary ground. He had never heard of anybody buying or selling an aloe tree. He had never bought one. The presence of aloes would improve the value of ground about 25 times over.

Hopley, J., asked witness if he considered that a piece of ordinary ground of 100 morgen worth, say, £100, would be worth £2,500 if covered with aloes.

Witness said that that was so. They got about half a pound of sap from each aloe tree; that was the quantity when it had been boiled. Witness was the general agent of his father, who was too ill to travel. The portion on which the damage was done was about 850 morgen; the whole extent of the farm was about 2,000 morgen.

By the Court: The ground on which

the damage took place was a large ostrich camp.

A farmer in the Riversdale district gave corroborative evidence as to the number of aloe trees destroyed and their value as ostrich food. Aloes were especially valuable as food for breeding birds, and the presence of a patch of aloe trees on a farm increased its value.

Daniel J. Pienaar, farmer, gave similar evidence.

By Mr. Upington: Witness had bought 500 morgen of aloe trees from his brother for £100, but he thought his brother sold too cheaply.

Mr. De Villiers closed his case.

Cyril P. White, engineer, on the Mossel Bay Railway, said that all the work done on the line was within the limits of deviation allowed by the Act as shown in the plan. The line had to be cleared, and certain trees cut down. Messrs. Muller and Meyer accompanied witness to the place where this had been done.

Cross-examined: The ground was not thickly clustered, and witness thought it impossible that there could have been 1,800 trees.

George Frederick Muller, farmer, stated that he considered the value of aloes to be on an average 3d. each. He had a lot of aloes on his farm, and would be glad to sell them at that price. To a man who farmed ostriches, a morgen of ground with aloes on would be more valuable than ground without aloes. £1 or £1 10s. more valuable. Witness would not say the whole of the clearing had been occupied thickly by aloes. He went over the ground carefully last Sunday with Mr. Meyer, and taking the ground adjoining, and assuming that this ground was of a similar nature previously, he estimated the damage done at £22 10s. The farm was not damaged, and if £22 10s. were given the plaintiff would be a gainer. They had counted 975 aloes on the ground.

Henry Oswald Meyer gave similar evidence, estimating the value of the aloes to be 4d., and the damage to the bush about 2s.

Elgard A. Muller, farmer, estimated the ground to be worth £10 per morgen. There were plenty of other aloes on this farm to use as food for ostriches.

Mr. Upington closed his case, and counsel were then heard in argument on the facts.

Hopley, J.: The only point in the case is the amount of damages to be awarded to the plaintiff. This portion of the claim must rest on the value of the aloes, and it was news to him that they were of considerable value for food, and that the dried leaves were also of value. Perhaps it was as Mr. Pienaar said, that some people did not appreciate the value of the aloe trees on their farm. He could understand the plaintiff's valuation if the trees were taken away permanently, but here it was not exactly the case. What the Court had to consider was that after

a partial diminution there would be just as many aloes inside of six or eight years. Taking the number of aloes at 1,800, he thought that the plaintiff was entitled to £45, counting each tree at 6d. a head. Outside out of the damage to the aloes he assessed the damages at £15, and gave judgment for £60, with costs.

GENERAL MOTION.

Ex parte THE TRUSTEES OF DUTCH REFORMED CHURCH OF HANOVER.

Mr. Sutton said that this matter had previously been before the Court, and he now produced the regulations of the Dutch Reformed Church.

The Registrar was authorized to register the transfer in trust for the Mission Church, Hanover, and also to pass a mortgage bond for £150.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSE.

GOURLAY, CAVANAGH AND *s* 1904.
CO. V. DAVIS. { July 11th.

Debtor and creditor—Liability for debts of predeceased spouse.

This was an action brought by William Gourlay and Co., at present trading as Gourlay, Cavanagh, and Co., to recover £219 on a guarantee in which the defendant undertook to meet her late husband's liability.

The declaration set out that the plaintiffs were carrying on business as Wm. Gourlay and Co., at the time a certain agreement was signed between the defendant's late husband, and the firm, whereby the former, for the consideration of £150 advanced on a promissory note, undertook to exclusively sell imported goods from the plaintiffs. The defendant's husband died in March, 1902, and the defendant undertook if she was allowed to carry on the business at the Clyde Hotel, to carry out the conditions of the original contract. Subsequently, the defendant continued the

business at the Clyde Hotel for her own benefit. About November, 1903, the defendant broke the terms of the contract by failing to purchase goods from the plaintiff, and thereafter plaintiffs claimed £89 18s. 9d. for goods sold and delivered, and £219, the amount of the indebtedness at the time of her husband's death. The defendant paid the £89 18s. 9d., but she refused to pay the £219, and plaintiffs claimed that amount with costs.

The defendant, in her plea, stated that she had no knowledge of the correct amount of the indebtedness of her husband at the time of his death, and while admitting the formal allegations, she refused to pay the sum of £219, an indebtedness which she set out she had not taken over.

Mr. McGregor (with him Mr. M. Bisset) was for the plaintiffs, and Mr. Graham, K.C. (with him Mr. Russell) was for the defendant.

William Dixon Gourlay, plaintiff, stated that the defendant's husband, in her presence, bound himself on consideration of the advance of £150 to purchase all imported goods from witness. Something was paid off the account, and before his death Davis gave him a note for the balance, in addition to the amount of the running account, which totalled £249. The defendant was present when the note was given; in fact, she took the principal part in all negotiations. Mr. Forsyth tried to get something substantial paid off the account, and witness instructed him to place the matter in the hands of an attorney. Shortly after the death of Mr. Davis, the defendant called with two children, and placed her position before him, saying that if she was allowed to stay on, as Ohlssons had agreed upon, she would be able to pay off the whole of her husband's indebtedness. It was quite clearly understood that she should fulfil her husband's engagements. There was nothing in writing to that effect; we accepted it in good faith.

Cross-examined by Mr. Graham: It must have been an error in the date that he sued on an agreement entered into after the defendant's husband's death, which was put down as September, 1901, whereas he did not die until March, 1902. He was certain, however, that the agreement was after her husband's death.

By De Villiers, C.J.: He did not think it necessary to file his claim against the estate of Davis. He admitted it was an unbusinesslike transaction to take over a fresh arrangement without any fresh document. He did so because he had such absolute faith in the defendant.

Frederick Skipper stated that he was present in Gourlay's office when the defendant called. Mr. and Mrs. Davis were present when the advance of £150 was being discussed. The defendant took the principal part in all the transactions.

Never to his knowledge did she deny any liability as to the second bill. During her husband's lifetime the defendant generally gave the orders.

Cross-examined by Mr. Graham: As there was no definite arrangement made about the bill, it was understood that the defendant was to have time to pay the debt off.

Wm. Forsyth, proprietor of the Welcome Hotel, Maitland, said that in September, 1901, he was the plaintiffs' manager. While he was manager the plaintiff handed him the promissory note for collection, and on the 11th August he called at the Clyde Hotel to see about the goods account and the bill. Mrs. Davis asked him to send a traveller a few days later to collect the money, and with regard to the bill she said that she would call and see the plaintiff the following Thursday. He called again on the 15th September, and the defendant agreed to pay £10 quarterly if the plaintiff would agree. She paid £10 on September 15, and witness gave her a receipt. Witness entered the payment in two cash-books, from which the accountant transferred it. Witness reduced the interest, and allowed discount as a concession, these not being strictly due. Witness wrote the receipt for the £10 as being on the bill account. A balance was left of £222 17s. 2d. Afterwards, witness saw Mrs. Davis and asked her to sign a bill payable on demand, but Mrs. Davis said she would prefer the arrangement to pay £10 quarterly.

Cross-examined by Mr. Graham: Witness never discussed with Mrs. Davis. When he took the bill Mrs. Davis never demurred to it; she only pleaded for time.

By the Court: The £10 was placed to the credit of the bill account in the ledger.

Stephen W. Cavanagh said the account sent in for £309 0s. 7d. was made up of the bill and the open account.

Cross-examined by Mr. Graham: Witness never discussed with Mrs. Davis her late husband's responsibility. Witness did not remember Mrs. Davis sending him a letter on the 5th January which he handed back to her.

Mr. Graham read the letter, in which Mrs. Davis stated that she knew the reason why she had not been treated in the same manner as previously, and that the reason was that some time ago they sent a servant to ask her to sign a certain bill, which she absolutely refused to sign, as she was not liable for her husband's debts.

In further cross-examination, witness said he did not remember the letter.

Re-examined: Witness had no interest in the old account, as the debt was contracted before he entered the firm as a partner.

Thomas Masterton, accountant and auditor to Gourlay and Co., deposed that

he had had conversations with Mrs. Davis about the account, in which the latter never denied liability. On the 30th December, 1902, she paid him £10. The balance of the bill, together with interest at 8 per cent., amounted to £249. In the account sent for £219 no interest was charged.

Cross-examined: The £10 paid in December was paid to witness personally, and not to a man, named Ainsworth.

Mr. McGregor closed his case.

Mr. F. Kinsley, clerk in Mr. Steer's office, said he had charge of the defendant's case. In January, 1904, he accompanied Mrs. Davis to the office of Mr. Cavanagh. This was after receipt of the letter of demand. He saw Mr. Cavanagh hand back to Mrs. Gourlay the letter of the 5th January, saying that he did not want his clerks to see it, and that he supposed she had written it in a moment of annoyance.

Emily H. Davis, the defendant, said her husband died on March 15, 1902. Witness was present when the contract was entered into between her husband and Gourlay. At her husband's death she knew he owed something on the bill, but did not know the exact amount. She determined to keep on the hotel, and she paid an account for goods supplied during her husband's lifetime. She never told Gourlay that if she were allowed to continue at the hotel she would take over her husband's liability. She had not talked with Gourlay since her husband's death. Witness always kept copies of her letters. She produced the letter books. Until the 18th September witness was not asked to sign any bills. When she paid the £10 on the 15th September she had a receipt, which had, however, been destroyed with other papers by a flood. The receipt was simply an acknowledgment for £10, and there was no statement of the items in the receipt. Witness made a note of the payment of the £10 in a small book which she kept in the bar for the purpose of making such entries. Witness never remembered seeing Mr. Masterton before to-day. Witness did not at any time understand what her husband's liabilities were under this bill, and she did not take over the liabilities.

Cross-examined by Mr. McGregor: Witness knew her husband's liability to Gourlay at the time of his death was something like £200. Her husband left a will, in which he appointed her his sole heir. She understood her husband's estate was insolvent. She got £800 from a policy on her husband's life. She paid the whole of the amount owing by her husband at the time of his death to Ohlsson's.

Alfred E. Crase, brother of the defendant, deposed that he was present when Mrs. Davis paid £10 to a man, named Ainsworth, who was connected with Gourlay's firm, in December.

Mr. Graham closed his case, and counsel were then heard in argument on the facts.

Mr. Graham put in the original of the will of the defendant's late husband, which he stated had not been filed, and in which Mr. James Brittain had been appointed executor.

The Chief Justice: And he has done nothing?

Mr. Graham: He seems to have done nothing.

De Villiers, C.J.: There is considerable conflict in the evidence in this case, but the weight of the evidence and the probabilities of the case seem to me to be entirely in favour of the plaintiffs. There is no doubt that there was some laxity in this arrangement, which is sworn to by the plaintiffs, but I am of opinion that all the facts of the case point to the evidence given by the plaintiffs as being correct. After the death of the defendant's husband, it is clear to me that the defendant was desirous of having the same facilities for the conduct of the business as had been enjoyed by her husband. It made very little difference to her—in fact, practically no difference—whether she took over the liabilities of her husband or not—because she is the sole heiress in her husband's estate, and there is no proof whatever that the husband's estate is insolvent. The defendant admits that she received a large sum by way of insurance from the estate of her husband, and yet the executor never took out letters of administration. Mr. Brittain had been appointed by the will, but he never took out letters of administration. And yet we find that in the letter of the 18th September, 1902—the letter upon which so much reliance has been placed on behalf of the defendant, and which the defendant is said to have returned—she says: "If this was owing by my late husband, he has been dead over six months. You had your remedy to have claimed the sum in my husband's estate." This seems to me a most disingenuous statement on her part. She surely must have known that no letters of administration had been taken out, that there was no one against whom the plaintiff could proceed in respect of the money excepting herself; and, as far as the plaintiff was concerned, if he had received a letter in these terms, if he had known that defendant repudiated it, surely he would at once have seen the absolute necessity either of having the estate sequestrated or of having an executor appointed in terms of the will. But it appears to me that the plaintiff was satisfied to accept the assurance of the defendant that she would be liable for the debts, and that in consequence of that assurance he gave her the same facilities as he had given to her deceased husband. He allowed her to purchase

goods from time to time on credit. He allowed this bill to stand over, and I am quite satisfied he never would have done it if he did not have this assurance from her. Of course, if the estate of her husband is insolvent, then the arrangement might be to her disadvantage, but there is no proof whatever of the insolvency of the estate. Her admission of the receipt of this large sum by way of insurance money shows that the estate could hardly have been insolvent, and if it was insolvent, there was a gross neglect on her part and on the part of the executor in not seeing that this estate was at once sequestrated for the benefit of all creditors. She preferred to sit there in possession of this estate, hoping to work it all out for her own benefit, she herself being sole heir in the estate, and I think it would be well that the attention of the Master should be called to the fact that here Mr. Brittain was nominated as executor, that the will has been in his possession for several months, and that not a single step has been taken to have this estate realised in the manner in which it ought to be realised. She surely must have been sufficient of a business woman to know that this was not the way in which the estate was to be realised, and the only manner in which her conduct can possibly be explained is by assuming that she did intend that this estate of her husband's should not be realised at all, that the business should go on, that she should have the benefit of the business in her individual capacity, and that she should hold herself liable for all the debts of the estate. It is not necessary to go into all the further details. This is the general impression on my mind, and the minor details I need not discuss. It is quite possible that Mr. Cavanagh did receive the letter about which so much has been said, but even supposing that letter had been received, it would not prove that ten days after the husband's death the arrangement was not entered into between the defendant and plaintiffs in the terms alleged. I am of opinion that the plaintiffs' case has been proved, and judgment will be given in terms of the declaration. As to the interest, however, Mr. McGregor consents to a reduction from 8 per cent. to 5 per cent. There will be judgment in terms of prayers (a) and (b), but interest will be at the rate of 5 per cent., instead of 8 per cent., the defendant to pay the costs. His lordship added that it would be simpler to declare the plaintiffs entitled to the sum of £219 0s. 10d., at the rate of 5 per cent.

[Plaintiffs' Attorneys: Harsant and Harsant; Defendant's Attorney: A. W. Steer.]

GENERAL MOTION.

ROWE V. MCGARRY.

Dr. Greer moved on notice of motion to have an arbitrators' award made a rule of Court. The matter was ordered to stand over from last Thursday for proof of service on the respondent, which counsel now put in.

Order granted.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION.

Mr. W. P. Buchanan moved for the admission of Wm. Hove Simpson, as an attorney and notary.

Application granted and oath administered.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

DEBENTURE HOLDERS OF GRAND JUNCTION RAIL- WAYS AND OTHERS V. HILLS AND OTHERS.	} 1904. July 12th. " 18th. " 26th.
LIQUDATOR OF GRAND JUNCTION RAILWAYS V. HILLS AND OTHERS.	

Debentures—Company—Partnership—Preference—General bond.

A Company acting under the powers of its trust deed passed a bond in favour of certain trustees for debenture-holders, charging the whole property and assets of the Company (without describing any of such assets), with the condition that the Company reserved the power to deal with any property and assets, provided that the proceeds be placed to credit of capital and not to that of revenue account. Thereafter the Company ceded its assets

to a partnership, which took over its liabilities. The Company was ordered to be wound up and receivers were appointed to realize and distribute the assets of the partnership.

Held, that the debenture-holders had no greater rights in respect of the assets of the Company than those of the holder of a general bond, and that their rights under the debentures did not include a preference against the assets of the partnership.

These were two actions for a declaration of rights, account and interdict—one brought by the London and Westminster Bank and others against the receivers of the Grand Junction Railways and others; and the other brought by the official liquidator of the Grand Junction Railways and others against the receivers of the said company and others. The plaintiffs in the former action were John Walker and George Morrison Palmer, in their capacity as trustees for the holders of debentures issued by the Grand Junction Railways, Limited, and the London and Westminster Bank, Limited, while the defendants were Edward Ridge Syfret and John Edwin Paul Close, in their capacity as receivers of the Grand Junction Railways, Arnold Frank Hills, John Walker, John Walker, jun., and Thomas Moutat Cameron Walker, now, or lately carrying on business in co-partnership at Cape Town or elsewhere under the style or firm of the Grand Junction Railways, Arnold Frank Hills personally and also in his capacity as receiver (in England) of the said co-partnership, and Edward Ridge Syfret in his capacity as official liquidator of the Grand Junction Railways, Limited. In the other case the plaintiff was Edward Ridge Syfret, in his capacity as official liquidator of the Grand Junction Railways, Limited, and the defendants, Edward Ridge Syfret and John Edwin Paul Close, in their capacity as receivers of the Grand Junction Railways, Arnold Frank Hills, John Walker, John Walker, jun., and Thomas Moutat Cameron Walker, now or lately carrying on business in co-partnership at Cape Town or elsewhere under the style or firm of the Grand Junction Railways, and Arnold Frank Hills, personally, and also in his capacity as receiver (in England) of the said co-partnership.

It was agreed that the actions should be heard together.

The pleadings in the first case were as follow:

The plaintiffs' declaration set out:

1. The first named plaintiffs, hereinafter termed "the trustees," are the trus-

and as against the first-named defendants:

(e) Interest *a tempore morae*;

(f) As against the defendants other than the liquidator, costs of suit.

The plea of the defendants, Edward Ridge Syfret and John Edwin Paul Close, in their capacity as receivers of the Grand Junction Railways, said:

1. The said defendants admit the allegations in paragraphs 1, 2, 3, 4, and 5 (a), of the declaration, but say that the construction referred to in paragraph 4 was done by the firm of John Walker and Sons, under contract with the Company, and that the company issued to John Walker and Sons or their nominee by way of payment for work done by that firm under such contract, 1,700 debentures of £100 each before the said 1,000 debentures were issued duly 20th July, 1898, and 1,000 debentures of £100 each after that date, which comprises the total issue of debentures, and includes those now held by the plaintiff bank, and they do not admit that the said debentures are held *bona fide* or for value received.

2. As to paragraphs 5 (b) and (c), the said defendants crave leave to refer to the said debentures and bond, and to the order of Court dated the 2nd March, 1904, for the true meaning and effect thereof.

3. They admit the allegations in paragraph 6, but say that the principal agreements constituting the partnership styled the Grand Junction Railways, whereof they are receivers, were entered into in May, and in August, 1898, and they beg to refer to the said agreements at the trial of this cause.

4. They admit the allegations in paragraph 7 (a), (b), (c), and (d), save that they say that the debentures in respect of which the parties mentioned in (c) took over the company's liability were the debentures theretofore issued, amounting to 1,700 as aforesaid, and they crave leave to refer to the terms of the undertaking of the 20th July, 1898, copy whereof is hereunto annexed and marked D.

5. As to paragraph 7 (b), they do not admit the meaning and intent therein alleged, they deny that the plaintiffs, or either of them, are entitled to the preference therein claimed against the assets of the partnership styled the Grand Junction Railways before or in competition with the creditors of the paid partnership, and they say that the said partnership at no time agreed or undertook to be liable for all debentures issued by the company either before or after the 20th July, 1898.

6. They say further that they are willing and ready to admit the holders of debentures to prove as concurrent creditors of the said partnership not as such holders, but to the extent to which such holders may after proper inquiry satisfy

this honourable Court that the said partnership has had value in respect of the consideration given for the issue of such debentures, or in respect of moneys or other valuable consideration given by the holders of such debentures; but they deny that said partnership has had such value to the extent of the face value of the debentures issued as aforesaid; and they are willing that an inquiry should, if deemed necessary by this Honourable Court, be directed, and an account framed accordingly.

7. As to paragraph 8, they beg to refer to the terms of the Act No. 19 of 1900, and the Schedules thereof embodying the contracts therein referred to.

8. As to paragraph 9, they do not admit that the Government consented to any cession and assignment as therein alleged to the said Hills acting for and on behalf of the said partnership, but they say that the cession and assignment to the said Hills was by him and the other members of the said partnership treated as a cession and assignment on behalf of the said partnerships, they deny that the partnership became subject to the liabilities of the company in respect of the said debentures; and they deny the allegations and contentions in paragraphs 9 after the words "subject to all the liabilities of the said company."

9. They admit that the said Hills, acting as set forth in the foregoing paragraph of this plea, proceeded with the further construction of the railways until the 20th June, 1902, but otherwise deny the allegations in paragraph 10 of the declaration.

10. They admit the allegations in paragraphs 11 and 14 save that for greater certainty they crave leave to refer to such proof as may be adduced of the correctness of the figure £254,769 13s. 6d., and of the amount of costs and expenses incurred after the 20th July, 1898; and they admit paragraph 12, except that they do not admit that the company has any assets other than its claims against the parties to the undertaking set forth in annexure D hereto.

11. As to paragraph 13, they crave leave to refer to the records of the actions instituted in November, 1902, and February, 1904, referred to in that paragraph, and to the orders made therein for greater certainty as to the capacity wherein the said Hills sued in each action, and as to the capacity wherein he obtained judgments.

12. They deny the contention set forth in paragraph 16.

Wherefore, subject to paragraph 6 of this plea, they pray that the plaintiffs' claim may be dismissed with costs.

The plea of defendant Hills personally and as a member of the co-partnership and as Receiver thereof was:

1. The defendant Hills admits in his above-mentioned capacities paragraphs 1, 2, 3, 4, 5 (a), 7 (a), and 7 (d), in so

far as the allegations therein concern him in his said capacities, and subject to what is hereinafter stated, and save especially that he says as to paragraph 5 (a), that the holders of certain of the debentures are not entitled to claim payment thereof, and have no valid title thereto, having obtained possession thereof improperly *mala fide* and without valuable consideration.

2. The defendant does not admit paragraph 5 (b) and especially denies the allegations therein that the undertaking authorised by the Acts of Parliament subsequent to Act 28 of 1895 was charged with payment as in paragraph 5 (b) set forth. The defendant craves leave to refer this Honourable Court to clauses 2 and 3 of Annexure B to the Declaration.

3. As to paragraph 5 (c), the defendant craves to refer this Honourable Court to the proceedings and orders of record in this Court for the true statement thereof.

4. The co-partnership referred to in paragraph 6 was not entered into until the month of August, 1898: paragraph 6 is otherwise admitted.

5. Paragraph 7 (b) is admitted save as to the words "acting personally and for and on behalf of the partnership" at the end thereof. The defendant annexes as part hereof a copy of the said cession marked A. The said cession was never registered in the Deeds Office of this Colony.

6. The defendant admits paragraph 7 (c), save that for the correct terms of the undertaking to pay the debts of the company, the defendant refers to the copy of the undertaking of the 20th July, 1898, annexed hereto as part hereof marked B.

7. The defendant denies paragraph 7 (c), and says that the signatories to the said undertaking agreed to pay the debentures as debts, not as preferent debentures.

8. The undertaking of the 20th July, 1898, was not an undertaking of the partnership which was not yet entered into at the said date. The Thames Iron-Works and Shipbuilding Company (hereinafter called the Thames Company) one of the signatories to the undertaking was not and at no time became a member of the partnership.

9. At the time of the said undertaking the Company, owing to financial and other difficulties, had ceased business, and was unable to proceed with the railway contracts, or to pay the debenture holders or other creditors.

10. By the said undertaking, the signatories neither intended to give nor by a reasonable construction of the contract did they give any rights of preference to or in favour of the debenture holders.

11. With regard to the first part of paragraph 8, the defendant admits the same save that as to the liabilities to which the Thames Company were subject defendant refers to Annexure B, and to the foregoing.

12. As to the second part of paragraph

8, the defendant says that the Acts rights and liabilities were preserved and kept intact by the Acts of Parliament referred to in so far only as concerned the parties to the contracts confirmed by the said Acts of Parliament.

13. The defendant admits the first part of paragraph 9 down to the full stop in line 7 thereof, save that he says that, though the Colonial Government recognised only the cession to the defendant Hills personally, the said Hills held and acquired for the partnership all rights obtained by him in respect of the contracts made after the formation of the co-partnership in August, 1898.

14. The defendant, subject to the foregoing, denies all the allegations in paragraph 9 after the said full stop.

15. The defendant says that the co-partnership proceeded with the construction of the Railways until 20th June, 1902, and that large sums of money were expended thereon, otherwise he denies paragraphs 10 and 11.

16. The allegations in paragraph 12 are not in defendant's knowledge, and he does not admit the same.

17. Paragraphs 13 and 14 are admitted save that all moneys due under the judgments became thereafter payable to the Receivers in this Colony, and the defendant Hills has no control over the said money.

18. The defendant denies paragraph 16.

19. The greater part of the debentures issued are held by the plaintiff Bank (and other Banks or persons) pledged as collateral security for advances made to the partnership. So far as regards debentures so held the defendant says that the present action is premature, the pledges not being entitled to sue now by virtue of any prior action brought or of execution issued or of any claim made in insolvency in respect of any of the debentures.

20. Without prejudice to his right to challenge (on claim being made thereunder) the validity of the claims which may be put forward by the holders of such of the debentures as are held improperly, *mala fide* or without valuable consideration (as set forth in paragraph 1 hereof) the defendant says generally that the claim of the plaintiff is not one that avails against the partnership, but is one on which the signatories aforesaid are jointly liable personally and individually, and that therefore the amounts paid to the Receivers are not subject to the said claim, and that whether the claim be one which is valid against the partnership or the signatories as aforesaid, it is not a preferent one.

Wherefore, subject to the above the defendant Mills prays that the claim against him in his said capacities may be dismissed with costs.

The plea of the defendant, Edward Ridge Syfret in his capacity as Official Liquidator of the Grand Junction Railways, Limited, was as follows:

For a plea the defendant Edward Ridge Syfret, in his capacity as Official Liquidator of the Grand Junction Railways, Limited, says:

1. That he submits to the judgment of this Honourable Court herein.

2. That in case this Honourable Court see fit to grant any relief to the plaintiffs or one or more of them under prayer (a) of the Declaration then the said defendant prays that his costs may be paid out of the moneys paid over to the above-named Receivers by the above-named defendant Hills, in accordance with the order of this Honourable Court made on the 2nd day of March, 1904, on the application of the London and Westminster Bank.

3. That in case this Honourable Court should not see fit to grant such relief to the plaintiffs as in paragraph 2 hereof set forth, then the defendant prays that his costs may be paid by the plaintiffs.

The pleadings in the second case were:

The plaintiff's declaration set out:

1. The plaintiff, Edward Ridge Syfret, sues in his capacity as the official liquidator of a duly registered company in this colony, styled the Grand Junction Railways, Limited, and hereinafter styled "the company," the said plaintiff being hereinafter styled "the liquidator."

2. The defendants are Arnold Frank Hills, who is sued in his personal capacity and as the receiver (duly appointed in England) of the co-partnership herein next described and hereinafter termed "the partnership"; Arnold Frank Hills, John Walker, John Walker, jun., and Thomas Mouat Cameron Walker, trading in co-partnership at Cape Town and elsewhere as the Grand Junction Railways; and Edward Ridge Syfret and John Edwin Paul Close, who are sued in their capacity as the receivers (duly appointed in this colony) of the said partnership, and are hereinafter termed "the receivers."

3. On or about the 19th May, 1896, as regards the first three lines of railway to be hereinafter specified, and on or about the 13th October, 1896, as regards the last line, the company entered into a contract with the Government of this colony, for the construction of four lines of railway within this colony, to wit, from Oudtshoorn to Klipplaat, from Somerset East to Fort Beaufort, from Fort Beaufort to King William's Town, and from Mossel Bay to Oudtshoorn—the said lines being hereinafter termed "the railway." The construction of the railway was authorised under Act 28 of 1895.

4. The company thereupon proceeded with the construction of the railway and expended money and incurred liabilities in and about the same.

5. On divers occasions between the 31st October, 1896, and the 29th August, 1899, the company in terms of Act 43 of 1896, and for value received duly issued debentures in due form of law secured by a

bond duly registered in the Deeds Registry of this colony on the 23rd October, 1896. The debentures so issued number 2,700 of £100 each, making together the sum of £270,000. Of the said debentures, 1,000 were issued after the agreement set out in paragraph 7 hereof, but with the knowledge, consent, and sanction of the partnership. Copies of such debentures and bond are hereunto annexed marked respectively "A" and "B."

6. Prior to the month of July, 1898, the said Arnold Frank Hills and a firm of John Walker and Sons, consisting of the said John Walker, John Walker, jun., and Thomas Mouat Cameron Walker, carrying on business in this colony and elsewhere, entered into partnership for the purpose of constructing the railway and carrying out the said contract of 1896. The members of the partnership were and are those set out in paragraph 2.

7. (a) On or about the 2nd day of August, 1898, a certain further contract, annexed as schedule A to Act 40 of 1896, was (in so far as the construction of the said railway was still to be executed) entered into between the Colonial Government and a company registered in England and known as the Thames Ironworks and Shipbuilding Company for the further construction and completion of the said railway. The said contract was thereafter superseded by a later contract entered into on the 18th March, 1899, between the same parties and for the like purposes.

(b) For the purpose of and in connection with the said contracts which were entered into with the consent and approval of the Grand Junction Railways, Limited, the latter company on or about the 20th July, 1898, ceded and assigned all its right and title and interest in and to the contracts of the 19th May, 1896, and the 13th October, 1896, to the said Thames Ironworks and Shipbuilding Company, and (or) to the defendant Hills acting personally and for and on behalf of the partnership.

(c) On the same day, to wit, the said 20th July, 1898, and in consideration of the said cession the said Thames Ironworks and Shipbuilding Company, the said Hills and the said firm of John Walker and Sons agreed with the company to pay all its debts, including the said debentures theretofore issued by it and took over all the liabilities and engagements of the company.

(d) The amount of the said debentures, and all of them, is still wholly unpaid.

8. Hereafter the said Thames Ironworks and Shipbuilding Company, having vested in it the rights, and being in possession of the undertaking, and being subject to all liabilities, of the company, proceeded with the execution of the contracts of 18th March 1899, until the month of July, 1900, when fresh contracts (set forth in the schedules G and H annexed to and incorporated in Act 19 of

1900) were entered into with the said Government in lieu of the said contract of 1899, in so far as such last-named contract still remained to be executed. The plaintiff specially craves leave to refer this Honourable Court to the recitals in the preambles to the contracts and to section 10 of Act 19 of 1900, whereby all acts done, rights acquired, or liabilities incurred in connection with the contracts therein referred to are preserved and kept intact, and craves leave to refer to section 3 of the said Act 40 of 1886, for a similar preservation and keeping intact of acts, rights, and liabilities.

9. The said Thames Ironworks and Shipbuilding Company proceeded with the execution of the said contracts until December, 1900, when it ceded and assigned with the consent of the Government all its right, title, and interest in respect of the said contracts of 1900, and also further ceded and assigned all its right, title, and interest in respect of the said contracts of 1896, 1893, and 1899 to the defendant Hills, acting personally and for and on behalf of the partnership. The said Hills acting for himself and the partnership thereby became vested with the rights, possessed of the whole undertaking and subject to all the liabilities of the company.

10. By reason of the premises the liquidator is entitled to prove and claim, as a debt owing by the partnership and payable out of any funds belonging or accruing to it or the receivers, the amounts of the various debentures hereinbefore in paragraph 5 set out.

11. The moneys received from time to time from the Colonial Government in respect of the said contracts were expended upon the construction of the railway. The amount of actual cost incurred and so expended up to the 20th July, 1898, amounted to £254,769 13s. 6d.; and further costs and expenses amounting to a large sum were thereafter incurred up to the 20th June, 1902.

12. The company was placed in liquidation on the 15th July, 1902, and there are no assets thereof, other than those appearing from the foregoing paragraphs hereof, to satisfy the claims of the holders of the said debentures.

13. In November, 1902, and again thereafter in February, 1904, the said Hills, suing both personally and in his capacity as trustee in the first, and as receiver in the second action, for and on behalf of the partnership, instituted an action against the said Government, in which it was decided by judgment of this Honourable Court that the plaintiff was entitled to recover the actual cost of the construction of the railway, and the Honourable Court thereafter gave judgment on the 3rd August, 1903, in favour of the plaintiff therein in the sum of £76,225 9s. 4d., together with certain other amounts which might be found due to him, and on the 29th February, 1904, gave judgment for the said plaintiff for

the sum of £73,500 12s. 7d., together with certain other and further amounts. The plaintiff craves leave to refer to the terms of the judgments of record in this Honourable Court, and annexes copies hereto marked "C" and "D" respectively.

14. On the 2nd day of March, 1904, this Honourable Court granted an order directing that all moneys received by the said Hills from the Colonial Government should be paid to the receivers, pending an action to be brought by the proper parties to decide upon the claims of the debenture holders to a preference in respect of the moneys thus paid over to the receivers. The debentures, for the benefit of whose holders payment is claimed in this action, are the debentures referred to in the said order.

15. By reason of the premises the plaintiff claims that he is entitled to claim the amount of the said debentures from the defendants herein.

Wherefore the plaintiff claims:

(a) An order declaring that the liquidator is entitled to prove against the partnership and claim payment from the receivers out of the said moneys in their hands of the amounts of the said debentures.

(b) An account of the amount due by way of interest on the said debentures.

(c) An order restraining the paying out by the receivers of any portion of the said amounts until the plaintiff's claim on behalf of the debenture-holders, with interest and costs (as hereinafter claimed) be fully satisfied.

(d) Alternative relief.

(e) Interest *a tempore morae*, together with costs of suit.

The plea of the defendants Edward Ridge Syfret and John Edwin Paul Close, in their capacity as receivers of the Grand Junction Railways, was:

1. The defendants admit paragraphs 1, 2, 3, and 4 of the declaration, but say that the construction referred to in paragraph 4 was done by the firm of John Walker and Sons under contract with the company.

2. They admit paragraph 5, except that they are not aware and do not admit that 1,000 debentures issued after the 20th July, 1898, by the company were issued with the knowledge, consent, and sanction of the partnership styled the Grand Junction Railways.

3. They admit the allegations in paragraphs 6 and 7 of the declaration save that they crave leave to refer to

(a) The two principal agreements entered into in May and August, 1898, constituting the said partnership of which they are receivers, and

(b) The undertaking of the 20th July, 1898, copy whereof is hereunto annexed and marked E.

4. As to paragraph 8, they beg to refer to the terms of Act No. 19 of 1900, and the schedules thereof, embodying the contracts therein referred to.

5. As to paragraph 9, they do not admit that the Government consented to any cession or assignment as therein alleged to the said Hills acting for and on behalf of the said partnership, but they say that the cession and assignment to the said Hills was by him and the other members of the partnership treated as a cession and assignment on behalf of the said partnership; and they deny that the partnership became subject to the liabilities of the company in respect of the said debentures.

6. They deny paragraph 10 of the declaration, and say specially that the plaintiff as liquidator of the Grand Junction Railways, Limited, has no title to prove, and claim the amounts of the debentures or any claim to which, after proper inquiry, persons holding such debentures may be entitled.

7. They admit paragraphs 11 and 14, save that for greater certainty they crave leave to refer to the proofs which may be adduced of the correctness of the figure of £254,769 13s. 6d., and of the amount of costs and expenses incurred after the 20th July, 1898.

8. As to paragraph 12, they crave leave to refer to the records of the actions instituted in November, 1902, and February, 1904, referred to in that paragraph and to the orders made therein for greater certainty as to the capacity wherein the said Hills sued in each action, and as to the capacity wherein he obtained the judgments.

9. They deny the plaintiff's contention in paragraph 15.

Wherefore they pray that the plaintiff's claim may be dismissed, with costs.

The plea of defendant Hills, personally and as a member of the co-partnership and as receiver thereof, was:

1. The defendant admits paragraphs 1, 2, 3, 4, 7 (a), 7 (d) in so far as the allegations therein concern the said defendant in his capacities aforesaid, and subject to what is hereinafter stated.

2. As to paragraph 5 the defendant says specially that certain 400 of the debentures are held by persons who are in possession thereof improperly *malafide*, and without having given value therefor. The defendant otherwise admits paragraph 5.

3. The co-partnership was not entered into until August, 1898; paragraph 6 is otherwise admitted.

4. Paragraph 7 (b) is admitted save as to the words "acting personally and for and on behalf of the partnership" at the end of paragraph 7 (b). The defendant craves leave to refer to the document of cession when produced at the trial for the true terms thereof.

5. The defendant admits paragraph 7 (c) save that for the correct terms of the undertaking the defendant craves leave to refer to the agreement when produced at the trial.

6. The defendant says that the partnership was not a party to the agreement or cession aforesaid.

7. At the time of the said agreement and cession the company, owing to financial and other difficulties, had ceased business, and was unable to proceed with the railway contracts or to pay the debenture holders or other creditors.

8. As to paragraph 8 down to the full stop in line 8, the defendant admits the same save that as to the liabilities, to which the Thames Company was subject, defendant refers to the terms of the agreement aforesaid.

9. With regard to the remaining portion of paragraph 8, the defendant says that the debts, rights, and liabilities were preserved and kept intact by the Acts of Parliament referred to in so far only as concerned the parties to the contracts confirmed by the said Acts of Parliament.

10. The defendant admits the first part of paragraph 9 down to the full stop in line 7, save that he says that though the Colonial Government recognised only the cession to the defendant Hills personally, the said Hills held and acquired for the partnership all rights obtained by him in respect of the contracts made after the formation of the co-partnership in August, 1898.

11. The defendant, subject to the foregoing, denies all the allegations in paragraph 9 after the said full stop.

12. The defendant says that the co-partnership proceeded with the construction of the railways until 20th June, 1902, and that large sums of money were expended thereon; otherwise he denies paragraphs 10 and 11. He denies specially that the debentures are or were a debt of the partnership, and says that the partnership never undertook liability for the debentures or any part thereof. He denies that the funds of the partnership whether in the hands of the receiver or otherwise are liable to the claim of the plaintiff.

13. The allegations in paragraph 12 are not in defendant's knowledge, and he does not admit the same.

14. Paragraphs 13 and 14 are admitted save that all the moneys due under the judgments became thereafter payable to the receivers in this colony, and the defendant Hills has no control over the said money.

15. Defendant denies paragraph 15.

16. A number of the debentures issued were pledged to and are held by creditors as collateral security for the indebtedness of the partnership. So far as regards debentures so held, the defendant says that the present action is premature, the pledges not being represented by the present plaintiff, and neither the pledgees nor the plaintiff in any case being entitled to sue now in respect of any debentures by virtue of any prior action brought, or of execution issued,

or of any claim made in insolvency in respect of any of the debentures.

17. Without prejudice to his right to challenge (on claim being made hereunder), the validity of the claims which may be put forward by the holders of such of the debentures as are held improperly *malà fide* or without valuable consideration (as in paragraph 1 set forth) the defendant says generally that the plaintiff's claim is not one that avails against the partnership, but is one on which the signatories to the agreement of 20th July, 1898, are jointly liable personally and individually, and that therefore the amounts paid to the receivers are not subject to the present claim.

Wherefore, subject to the above, the defendant Hills, in his capacities as aforesaid, prays that the claim against him may be dismissed, with costs.

In the first case: Mr. W. P. Buchanan for Plaintiffs; Mr. Schreiner, K.C. (with him Mr. Upington) for Grand Junction Railways; Mr. Close (with him Mr. Biset) for Hills; Mr. Russell for official liquidator of Grand Junction Railways.

In the second case: Mr. McGregor for the official liquidator.

Other counsel as in the first case.

De Villiers, C.J., stated that a letter had been received from the attorney of T. M. Cameron Walker, intimating that he was not interested in the co-partnership, and that he should not have been cited as one of the defendants. His Lordship added that it was now too late in the day to come forward with this objection.

Mr. McGregor said that, with the permission of the Court, he would briefly enter into the history of these matters. In August, 1895, Parliament passed the Act 28 of 1895, to provide for the construction of certain lines of railway. There was a schedule to that Act, which specified the lines that were to be constructed, and were to be constructed under a subsidy. Previously, in September, 1894, a company had been incorporated called the Grand Junction Railways, Ltd., whose affairs were now under consideration. In May, 1896, the Government granted to this company a cession to build on subsidy the lines mentioned in the Act of Parliament, viz., Oudtshoorn-Klipplaat, Somerset East-Fort Beaufort, and Fort Beaufort-King William's Town. This agreement was set out in 13 Shiel, p. 106. In October of the same year a similar agreement was concluded in regard to the Mossel Bay line. The construction was proceeded with, the Government paid subsidies, money was put into the lines. Then, not unnaturally, debentures were issued, the ordinary commercial expedients for providing the finances wherewith to construct such lines. In August, 1898, a further agreement was entered into for the construction of these lines of railway, and that agreement was annexed to the Act 40 of 1898, passed in the

month of January, 1899, the parties to the agreement being Sir James Sive-wright, then Commissioner of Works, and David Urquhart, as representing the Thames Ironworks Company. The recital was important, because it pointed out that the Thames Ironworks Company, the new company now coming in, had agreed to take over the Government contracts for the construction of these lines of railways. Some difficulty was introduced into the case at the very outset by the shape that affairs took, because it certainly was a curious position to find that a limited company got a concession to build certain railways on certain lines and routes authorised by Parliament, that on the strength of that, they raised money by debentures—one could quite understand that such debentures furnished the finances for building the line—and after they had done that there was another agreement by which the alleged cessionary got the right further to construct the said railway. The exact position of the new cessionary on that line he should prefer not to discuss now, but would merely point out the fact that there was a curious turn given to the circumstances under which the railway was being built.

[De Villiers, C.J.: I do not think counsel should argue the matter at present.]

Mr. McGregor said he would confine himself to the facts. In March, 1899, an agreement was entered into which was annexed to the pleadings in the case of *Hills v. Colonial Government* (13 C.T.R., 106). Instructions proceeded, and debentures were issued. They found in the meantime that certain arrangements were made between Hills and Walter in May and August, 1898, under which the Grand Junction Railways partnership came into being. A cession was given by the limited company to the Thames Ironworks Company; on the same date a undertaking was given, under which Arnold Frank Hills and John Walker Bros. were to take over all liabilities of the limited company, including debentures already issued to the value of £170,000. There was also on the same date a cession by John Walker Bros of all their rights under the contract. In July, 1900, further agreements were entered into that were annexed to Act 19 of 1900. The construction thereupon proceeded until the month of June, 1902, when the Government intervened as by Statute authorised, and they got an order of Government taking the whole of the construction of these lines out of the hands of the parties then engaged upon the construction. Thereupon Mr. Hills, suing for himself and in his capacities, brought an action against the Government, and there was a fund of money now payable by the Government.

Mr. Schreiner and Mr. Close briefly

stated the position of their clients in relation to the plaintiffs' claims.

Mr. Buchanan having read a number of documents on behalf of the plaintiffs, Mr. McGregor intimated that he did not propose to lead any evidence.

Mr. Schreiner said that he proposed to call Mr. J. E. P. Close on the position taken up by the receivers appointed by the Court in regard to the debentures.

John Edwin Paul Close, accountant, Cape Town, said that he was one of the receivers appointed by the Court in the matter of the Grand Junction Railways. They found that 60,000 debentures were given to the London and Westminster Bank as security for £50,000 paid to Mr. A. F. Hills to recoup him for the deposit that he had had to make with the Agent-General. This was not money required by the joint venture contract. According to the books, the London and Westminster Bank made those advances to Mr. Hills, and the amount formed part of his capital account. Mr. Hills advanced considerable sums to the partnership from time to time, both before and after he joined the partnership. The books showed that the partnership was indebted to Mr. Hills for £52,000, and for subsequent advances, £41,000. The attitude Mr. Hills took up was to pay everything into the partnership, so as to pay creditors as much as possible. The position the receivers took up was that they would be prepared to regard the London and Westminster Bank as concurrent creditors to the extent of the value received by the partnership. If the Court thought fit to appoint him to conduct the inquiry he would do so.

Cross-examined by Mr. McGregor: The first amount of £50,000 was, he understood, given to Mr. Hills, and that was supposed to be handed over to the bank. The partnership, as between themselves would be responsible for it. The interest was charged to Mr. Hills, by the bank. Witness could not say who paid it.

Re-examined by Mr. Schreiner: Mr. Hills took up his own securities, and lodged them with the Government.

Gerald Edward Darcy Orpen stated he was a partner with Mr. Syfret. He had been working in this case, and was familiar with all the particulars. He agreed with what Mr. Close had said. He knew that the bank now had 9,250 £100 debentures. He found that only 827 debentures constituted the partnership. He did not know how the bank had got hold of the 60,000 debentures. Witness had never had any communication admitting liability from Mr. Hills. A circular was issued with regard to claims.

Cross-examined by Mr. McGregor: He believed John Walker and Co. did about £173,000 worth of work. He did not care to speak definitely on that point, as Mr. Roy, the company's engineer, would be able to give evidence on it.

Thomas Roy stated he was engineer in charge of the Grand Junction Railway venture from 1886. In 1897, when he was refused "sinews of war," the work was at an end; but it began again when Mr. Hills undertook it. He had prepared a list of the debentures issued. Walker never did any work after October, 1897. Any work done after that date was put through by Mr. Hills. The certificates were passed by both the company and railway engineers. He was one of the referees to whom the Court referred the matter.

This closed the case for the plaintiff. No witnesses for the defence were called.

Mr. McGregor contended that the debentures gave a certain legal interest in the property. It would be idle to deny that the question was a difficult one, or that the circumstances were peculiar. They had the fact, however, that the holders were people who had advanced money on security, and they had no prior mortgages here. Counsel could not see by what right the Grand Junction partnership could be put in possession of the funds. In the first place, the cession was made to the Thames Ironworks Company, and after that to Hills, and they found after a general collapse of the whole undertaking, strangely enough, not Hills but the Grand Junction Railway coming forward as the owner of the funds to which they could only have possession as trustees. It was a very ingenious method to get out of paying debentures, and counsel submitted that the scheme could not succeed. To make the cession of '98 a good cession it was necessary to construe it as one in which the cessionaries were holders under and for the ceding company. If it were a cession in the ordinary sense, then, although he had no authority on the point, he submitted that the new company must be subject to the liabilities of the old company.

Mr. Schreiner (for the Receivers) argued that as the bank had signed the consent paper under which the receivers were appointed, he held that they were appointed as if there had been sequestration of the estate. The receivers were authorised by the bank to receive such amounts as were due from the Colonial Government and others, and also to sell any further assets, and as soon as possible frame a distribution account, and distribute the assets in accordance with the order of preference in insolvency. Therefore the principles governing this case would be the principles that would govern the estate, if it had been sequestrated. That placed the receivers in the position of trustees in insolvency. In a previous case of the kind the Chief Justice had overruled the claim, and held that an action must be brought by the proper parties to settle the point. The sums of money which formed the assets in the present case were sums of

money recovered by Hills in his own name, but Hills had always dealt with the matter as if he was acting for the partnership.

De Villiers, C.J., inquired if there was any difference between the case now being heard and one in which the African Banking Corporation were concerned.

Mr. Schreiner replied that the difference was caused by the appointment of the receivers.

De Villiers, C.J., said he had not been able to find any cases under English law where debentures affected any property other than that in the possession of the company at the time. It seemed to the Court that the liquidators could not be kept out of the money owing to them any longer.

Mr. Schreiner contended that the receivers did not hold that they were liable to the debenture holders at all. The debenture holders could come in as soon as concurrent creditors, and prove not for the face value of the debentures only, but for the consideration actually received. If a man held £15,000 debentures, and had only advanced £3,000, the face value of the debentures was not £15,000, but £3,000. Counsel said he would leave that point and addressed himself to the case of the liquidators. It was difficult to understand how the liquidator could claim in face of the fact that he was only a successor to the directors, and the only asset that he possessed in law was that he himself had admitted it in the undertaking dated July 20, 1898, signed by the Thames Ironworks, John Walker and Sons, and A. Hills. These three persons in July, 1898, took over a concession to the Thames Ironworks of all property, and undertook all liability, and gave an undertaking in their own proper persons that they would pay the liability of the works, including the £170,000 debentures already issued, but this only applied to those three persons. It was true that in August, 1898, a partnership was formed, but as a partnership they never took any liability of the sort. As individuals they bound themselves, but the Thames Ironworks had nothing to do with the partnership of the other two parties. All the Thames Ironworks wanted was to be sure that it would get its money, and then it was willing that the money should be handed over to this shell of a company.

[De Villiers, C.J.: If two individuals take up an undertaking and afterwards enter into a partnership with another person, why should not the partnership be liable?]

No agreement had been entered into between the Grand Junction Railway and the partnership.

[De Villiers, C.J.: It may be that no preference could be claimed, but how can they be prevented from claiming as concurrent creditors?]

Mr. Schreiner said they objected to the last 1,000 debentures, representing £100,000 altogether. Was it fair to have those who had advanced that amount having persons who held perhaps £15,000 worth of debentures for £3,000 coming in? The minute of the 14th February, 1899, stated that at the 31st January, 1898, the amount of work done by Walker and Sons entitled them to 3,870 debentures, and thereupon it was resolved to issue 2,170 debentures. Counsel suggested an inquiry into the whole issue of debentures, in order that justice might be done.

Mr. Close contended that the liabilities on account of the debentures were not debts of the partnership, but were of private persons who signed the documents on the 20th July, 1896. At the same time, he was prepared to accept the course proposed by the Court as to the proof of the amount of the debentures as a concurrent claim against the partnership assets, subject to the *bona fides* of the other claims.

Mr. McGregor said that if the debentures were negotiable instruments, then they had a character of their own, and he contended nothing should be done, if the Court held that, to infringe upon their right. There was no reason in law why the same privileges and the same rights should not be accorded to these debentures as those accorded to the prior ones.

Cur. Adv. Volt.

Postea (July 26th).

De Villiers, C.J.: The substantial question raised by the first case is whether the holders of certain debentures issued by a company known as the Grand Junction Railways (Limited) are entitled to rank as preferent creditors against the assets of a partnership known as the Grand Junction Railways. The substantial question raised by the second case is whether the official liquidator of the company is entitled to prove and claim the amounts of certain debentures issued by the company as a charge upon certain sums of money paid to the receivers of the partnership by virtue of certain judgments given by this Court in favour of the partnership. It is an extraordinary circumstance in both cases that the Court is asked to declare a preference against an estate which has never yet been finally sequestrated as insolvent. A provisional order had been made against the partnership but the order was discharged by consent of the plaintiffs and defendants in that suit as well as of the other principal creditors upon certain conditions. One of the conditions was that Syfret and Close be appointed as receivers with power forthwith to issue a notice calling on creditors to file their claims and with power to receive the amounts of certain judgments awarded or to be awarded by this

Court in certain suits brought by Hills, one of the present defendants and a member of the partnership against the Colonial Government, for the amount of the actual cost of several lines of railway constructed by him. Another condition was that the receivers should so soon as conveniently possible frame a distribution account of all moneys available and should distribute the same according to the legal order of preference in insolvency. The amounts awarded by the Court have been placed to the credit of the Registrar of this Court, and the main question to be decided is whether the debentures in question constitute a first charge against these amounts. The second section of Act 43 of 1895 authorises registered companies, acting within their powers, to issue debentures and cause them to be registered, and enacts that such debentures shall as from the date of their registration operate as a first or preferential charge in respect of so much of the property of the company as shall be mentioned and described in such debenture as bound by way of security for the fulfilment of the obligation undertaken by the company under such debenture. The debentures now in question do not describe any of the property of the company beyond stating that "the whole property and assets of the company subject only to the reservation in the next clause are hereby pledged and given as a first charge in security for the due payment of this bond and all debentures issued under it." The reservation in the next clause is as follows: "The company reserves power and right to deal with any property and assets provided the proceeds of such shall be placed to credit of capital and not to that of revenue account." I have already, in the African Banking Corporation case, indicated my views in regard to these provisions, and I will here only add that the debenture-holders in my opinion acquire no greater rights under the bond than are enjoyed by the holder of a duly registered general bond. There are no ear-marked assets, movable or immovable, upon which the charge can operate, and the only preference which the debenture-holders can claim in the winding-up of the company is that they shall be paid before any of the unsecured creditors can share in the distribution of its assets as they existed at the date of the order for winding up. By a series of cessions, some of which almost have the appearance of juggles, the construction of the railways passed out of the hands of the company to a partnership having the same title as the company and from the partnership to the Thames Ironworks and Shipbuilding Company, and then again from the last-named company to the defendant Hills. On the 20th of July, 1898, Hills and the firm of John Walker and Sons agreed with the company to pay all its debts in-

cluding the debentures theretofore issued by it. At that time £170,000 worth had been issued. On the 15th of August, 1898, the members of the partnership, viz., Hills and John Walker and Sons, entered into a formal agreement whereby it was agreed, *inter alia*, that the partnership should be entitled to all subsidies due to John Walker and Sons from the company and to the debentures, 827 in number, of £100 each, of the company subject to any existing charges thereon. It is now contended that by reason of the partnership having taken over the liabilities of the company, the preference which would have been awarded to the debenture-holders as against the company should be extended to the assets of the partnership. No fresh bond was passed by the partnership, and I fail to see how the bond passed by the company can in any way create a preference against assets belonging to another *persona* and not specially pledged or mortgaged to the debenture-holders before they became the property of the partnership. The bond, as I have said, operates as a general bond, and can only affect the assets of the *persona* which passed the bond, and that is the company. In regard to the claim of the liquidator of the company for payment from the receivers out of the moneys in their hands of the amounts of the debentures, there is this difficulty, that it is impossible to gather from the evidence what proportion of the debentures was lawfully issued as against the company. If the evidence had been sufficient for the purpose, the more satisfactory course would have been to give judgment for the liquidator for the whole of the indebtedness of the partnership to the company. The liquidator of the company is also one of the receivers of the partnership, and between them they ought to be able to ascertain what that indebtedness amounts to. Having ascertained the amount, the receivers would be justified in allowing the liquidator to prove for the amount as a concurrent creditor, without first asking the Court to find the amount. The sole object of the liquidators' present action seems to be to obtain an order that the amount of the debentures be paid out of the sums paid to the receivers by virtue of the two previous judgments of this Court. Those judgments, however, were given for the actual cost of the work done by the plaintiffs in the previous cases, and the amounts paid thereunder cannot be charged with a preferential claim in favour either of the debenture-holders or of the company which issued the debentures. The receivers, by their plea, express their willingness to allow the debenture-holders to prove as concurrent creditors to the extent to which they have given value for their debentures. The apprehension of the receivers seems to be, not only that de-

benture-holders might claim more than they have advanced on the security of the debentures, but that Mr. John Walker, one of the partners, and the principal debenture-holder, might come into competition with the creditors of the partnership in the distribution of the assets of the partnership. These are matters, however, upon which the receivers should exercise their own judgment without the assistance of the Court. If they find that there is a debt owing by the partnership to the company, they should pay the debt to the liquidator if they have sufficient assets for the purpose. But I cannot see that there is any obligation on them to make direct payments to any of the creditors of the company. They have to realise and distribute the assets of the partnership, and they must leave it to the liquidator of the company to realise and distribute the assets of the company. The debenture-holders must make their claim on the assets of the company, the liquidator of which will, no doubt, award to them the preference due to the holders of a general bond. There must be absolution in each of the two cases, and the costs must be paid by the respective plaintiffs.

His Lordship added that Mr. Justice Hopley, who heard the cases along with himself, concurred in the judgment.

[Attorneys for debenture holders and for L. and W. Bank: Findlay and Tait; for receivers of Grand Junction Railway: Moore and Son; for Hills: Tredgold, McIntyre and Bisset.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

APPEALS.

CAVE'S IMPERIAL BREWERY
OR CAVE'S SOLID BEER
SYNDICATE, LTD. (Defendants), Appellants, v. THE
CAPE GOVERNMENT RAILWAYS (Plaintiffs), Respondents.

1904.
July 13th.
" 26th.

Freight—Mistake—Undercharge
—Relief—Railway.

The defendants, on receiving a consignment of drums of extract

of malt at B., which had been conveyed on the plaintiff's railway from P., paid the amount of freight charged by the railway official at B. The plaintiff subsequently discovered that the official had by mistake made an undercharge, and, before the defendants had in any way altered their position, the plaintiff demanded the difference. There was no evidence that the railway tariff book, by which the official had to be guided, was needlessly obscure, or that the official had been guilty of gross carelessness.

Held, affirming the judgment of the High Court of Southern Rhodesia, that the plaintiff was entitled to recover the difference.

This was an appeal from a decision of the High Court of Southern Rhodesia, dismissing an appeal by the present appellants from a judgment of the Resident Magistrate of Bulawayo, granting a decree against the appellants for the sum of £50, amount due for work and labour done and services rendered. The appellant had been summoned in the Magistrate's Court for the sum of £51 4s. 3d. (less £1 4s. 3d., to bring the matter within the jurisdiction of the Court), for carriage hire, work, and labour done, and services rendered in carrying a certain number of drums of malt from Port Elizabeth to Bulawayo. The respondents carried 52 drums of extract of malt, later on 126 drums, and at a yet later date 174. In the alternative the plaintiff stated he, by an error, under-charged the defendant £51 4s. 3d., through his officers and employees in Bulawayo having in error charged the defendant 12s. 7d. per 100 lb. for carriage, instead of 16s. 1d., the proper legal and tariffed charges, therefore, the defendant being well aware of the error, which sum, although often requested so to do, he neglected and refused to pay. The defendants in their plea stated they were not indebted to plaintiffs as alleged, and as a further plea stated that goods were delivered to the plaintiffs for carriage, from Port Elizabeth to Bulawayo, on the condition that the plaintiffs would charge the defendant for such carriage on arrival at Bulawayo. On arrival the plaintiffs charged the defendants £29 8s. 11d., £55 1s. 7d., and £99 12s. 5d., respectively, for the three consignments mentioned, and when defendants paid that sum the contracts were concluded. The amounts

were fair and reasonable and defendants were not aware, and had no means of knowing that the rates charged by plaintiffs were not the ordinary current rates. As a further plea the defendants stated that the plaintiffs' agents contracted with them for the conveyance of the consignment at owner's risk and undamagable rate, and plaintiffs accepted such consignment, and carried it in pursuance of such contract at 12s. 7d. per 100 lb. The defendants held that the error as having been made by the plaintiffs' officers and employees, was not a *justus* error, as it was the duty of the plaintiffs, their servants, and agents to know what rate to charge, and they having such knowledge charged 12s. 7d. per 100 lb. The plaintiffs in their replication to the defendant's plea denied that there had been any special agreement between plaintiffs and defendants with regard to the carriage of the goods at a low rate, and on the contrary, stated that some of the drums of extract of malt were damaged, and the defendant was paid for them.

Mr. Schreiner, K.C. (with him Mr. McGregor) for appellants. Mr. H. Jones with him Mr. Nightingale for respondents.

Mr. Schreiner contended that the first claim was quite out of the question, as there was no balance due, the plaintiffs in accepting the money having concluded the contract, therefore the plaintiff could only recover on the alternative claim. The defendant's plea set out that he considered he had paid the proper amount, and was not cognisant of the fact that the amount charged was less than he was supposed to pay. He thought it would simplify matters if he stated that he did not just at present intend to quote the real tariff rates, because he did not know them. He did not know why the plaintiffs had fixed on 16s. 1d., because although he had carefully perused the tariff book, he was unable to find it stated there. The charges which the defendant had paid had been going on for years. Where was the limitation? If this appeal failed, the plaintiffs would hold a sword over the people's heads for years, and probably be able to claim for unlimited periods, and in that way ruin firms. A settlement of accounts was final, and if that were not the principle, business would be very much deranged. From every case in which *justus* error was discussed it would be seen in this particular case the Court would not hold it was a *justus* error.

Mr. Jones said that the case was a very simple one, and was on all fours with the case of a purchaser who did not look at his own list, and requested goods from a shopkeeper at cost price. Surely the shopkeeper, if he made a mistake, would be entitled to recover the balance? Assuming that the Government had given a receipt for the 12s. 7d. rate, even that would not estop them from pro-

ceeding to recover the balance of the proper rate. His learned friend's argument, he contended, was not sound, and he submitted the judgments should not be reversed. The error was one which any person in the position of a railway clerk could easily make, and it was not of such a nature as to debar the Government from making any claim they might have in equity.

Cur. Adv. Vult.

Postea (July 26).

De Villiers, C.J.: It is clear from the evidence in this case that on the arrival of the drums of extract of malt in question at Bulawayo, the plaintiff's officials there made an undercharge for the freight due for conveyance by railway from Port Elizabeth. The freight legally chargeable was 16s. 1d. per 100 lb., whereas the rate charged was 12s. 7d. per 100 lb. The drums were delivered to the defendants, but no receipt was given to them for the amount paid. An action was subsequently brought by the Commissioner of Public Works in the Resident Magistrate's Court for the difference of freight, and alternatively for relief against the mistake committed by the railway officials at Bulawayo, and judgment was given in favour of the plaintiff. On appeal to the High Court of Southern Rhodesia, that Court dismissed the appeal, and the defendants now appeal to this Court against the judgment of the High Court. The case has been argued on behalf of the defendants as if a discharge from further liability for freight had been given by the railway officials to the defendants, but, as I have already remarked, no receipt of any kind was given. Reliance is, however, placed on an admission made by one of the plaintiff's witnesses at the trial that the defendants would not have obtained delivery of the goods if they had refused to pay the freight demanded. This admission does not show that the acceptance of the freight and delivery of the goods constitute a complete discharge from all further liability in respect of freight. Unless there were such a discharge, there is no reason in law why the plaintiff should not, on discovery of the mistake, claim the balance of the freight owing on the goods. But, assuming that the transaction constituted a discharge, the question would still remain whether the plaintiff is entitled to be relieved against the mistake which was undoubtedly made by his officials. Mr. Schreiner admits that it was a mistake of fact, but he contends that the mistake was so gross that the plaintiff cannot avail himself of it. I cannot agree to this view. The classification of goods like extract of malt is by no means a simple matter, and a mistake like the one in question might easily be made in the press of work by the most careful offi-

cial. The mistake made by the clerk in the case of *Wiggins v. Colonial Government* (16 S.C., 425) was of a different nature. There the clerk charged for melons not placed in any receptacle as if they had been placed in bags, and the tariff book clearly indicated what charge he ought to have made. In the present case the tariff book was not equally clear. It is said that if the tariff book is obscurely worded, the department ought to suffer for the obscurity. No evidence, however, was given on the point, and in the absence of such evidence, I am not prepared to decide that it would have been possible to make the tariff so clear as to obviate any possible mistake. There is this further difference between the case of *Wiggins v. Colonial Government* and the present case, that there the consignor was induced by the clerk's mistake to send goods by train which he would otherwise not have sent; whereas in the present case there is no proof whatever that the defendants' position was in any way altered by the mistake. If, for instance, it had been proved that in consequence of being charged freight at the lower rate, he had sold the extract of malt at a lower rate than he otherwise would have done, there would have been fair ground for holding that relief should not be granted. In the absence, however, of any evidence to show that the parties cannot be reinstated in the positions in which they would have been if the proper charge had been made and paid, I am of opinion that the Courts below correctly decided in favour of the plaintiff. The appeal must therefore be dismissed, with costs.

Buchanan, J., concurred.

De Villiers, C.J., added that Hopley, J., also agreed with the judgment.

[Appellant's Attorneys: Walker and Jacobsohn; Respondents' Attorneys: Reid and Nephew.]

REX V. BOTHA.

Act 35 of 1893—Jurisdiction of Circuit Courts.

While increasing the jurisdiction of Magistrates, Act 35 of 1893 in no way reduces that of judges in respect of punishment for offences committed under the Act.

This was an appeal from the Circuit Court of Barkly East. The accused was charged under the Stock Thefts Act of 1893 and found guilty of being in possession of five head of cattle belonging to a farmer named Loubacher, of Barkly East. At the trial, counsel for the prisoner asked the pre-

siding judge to reserve the point that the Court had no jurisdiction under that particular Act. The judge refused to reserve the point.

Mr. Rainsford (for the appellant) contended that according to the Act, if the prisoner could not give a satisfactory explanation of being in possession of the cattle, the Magistrate could assume his guilt, but it did not provide that juries could do so. The accused had been charged under a particular Act, and the powers of the Court under that Act as to punishment were limited.

Mr. H. Jones (for the Crown) was not heard.

De Villiers, C.J., said that the Act 35 of 1893 had a twofold effect. It increased the jurisdiction of the magistrates, and it facilitated proofs of theft of stock, but there was nothing in the Act which implied that there was any intention on the part of the Legislature to reduce the power of the judges in the infliction of punishment, and that the higher Courts were intended to retain their jurisdiction was perfectly clear. The 20th section clearly showed there might be cases in which the jurisdiction conferred on the Magistrate by the 13th section would not be considered sufficient, and in which the higher Court should be called in to aid to inflict suitable punishment. There was a charge of theft, and looking at the evidence, there was clear proof of theft quite independent of the Act, and even if it was a contravention of this Act he was of opinion that the higher Courts had jurisdiction. The point reserved must be decided in favour of the Crown.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION.

{ 1904.
{ July 14th.

Mr. W. P. Buchanan moved for the admission of James Cowan O'Reilly as an attorney-at-law, notary public, and conveyancer. The applicant had served three years, and twenty days over, but he had had three months' sick leave.

Application granted and oaths administered.

VAN DER BYL V. KABER.

Mr. Sutton moved for provisional sentence on a mortgage bond for £100, with

interest at the rate of 6 per cent., and that the property specially hypothecated be declared executable.

Order granted.

MARCHAND V. TALANDA.

Mr. J. E. R. de Villiers moved for provisional sentence on a deed for £50, balance of rent, less £5 paid for repairs, with costs, and for an order of ejectment from the premises.

Order granted.

NORTHAMPTON BANK V. { 1904.
WARD AND CO. { July 14th.

Provisional sentence — Legal holder of bill—Knowledge of equities.

On a claim for provisional sentence by the holder of a bill of exchange against the acceptor, the defence was raised that the goods for the price, of which the bill had been accepted, did not correspond to the goods actually bought, but the plaintiff denied any knowledge of any defence which the acceptor might have against the drawer. Held, that the plaintiff was entitled to provisional sentence.

This was an application for provisional sentence for £370 on a certain bill of exchange with interest and costs.

The affidavit of Thomas Ward, managing director of Thomas Ward and Co., stated that the company carried on business as merchants in Cape Town. Since March, 1903, they had the sole right in South Africa to sell a certain patent boot, and extensive orders were placed with Abbot and Sons, of Northampton. The boots were not manufactured according to the samples, with the result that the defendant firm was mulcted in heavy damages. The mode of payment was by draft, payable at three months in London. Two drafts amounting to £1,179 ls. had already been paid, and cash payments had been made to Abbot and Sons from time to time.

The affidavit of the bank manager stated that he knew nothing of the business relations between Abbott and Son and the defendant company. The bill was discounted in the ordinary course.

Mr. McGregor (for defendant) thought that the matter should be ordered to stand over for the principal case, and argued that by Act 19 of 1893

presentation of a bill is not required in order to make the acceptor liable if the acceptance be general. Pay to A B at C D is a general acceptance, unless the words "and not elsewhere" are added. *Prince, Vincent and Co. v. Grand Junction Railway* (12 C.T.R., 238).

De Villiers, C.J., said that the bank was the legal holder of the bill, and it lay upon the defendant to show that the bank was not the *bona fide* holder for value. The defendant made an assertion—a very grave assertion—but it was categorically denied by the bank manager, who said that he had no knowledge of any defence the defendant might have against the drawer. It was clear that the bank was entitled to provisional sentence, which would be granted, with costs.

HEYDENRYCH V. DUNMAN.

Mr. Schreiner, K.C., moved for provisional sentence on a promissory note for £270, for value received.

Mr. M. de Villiers put in the affidavit of the defendant, which set out that in November, 1902, she went to Mr. Stephan, who promised to get her a loan of £250. Subsequently, she was introduced to the lender, and Mr. Stephan said that she should sign a note for £270, and it was agreed that the £20 would be returned when the debt was paid. Interest was paid at the rate of 3 per cent. On the 16th August she paid £237 19s. 6d. to Mr. Stephan. The plaintiff never disputed Messrs. Sibbet and Stephan's right to receive the money. On the 13th October she received a letter from the plaintiff to pay the amount of the promissory note, and that was after she had told plaintiff on the street that she had settled with Stephan. The plaintiff wrote to her that if she did not pay the money he would proceed against her. She saw Stephan, and he said that he had taken over the loan himself. The plaintiff admitted the transaction in the presence of Mr. Stephan, adding that he did not mind as long as the interest was paid. In June, six months later, she received another letter from the plaintiff, threatening to take proceedings. The affidavit of Mr. Stephan set out that the plaintiff agreed to let him have the loan on the same security, he (Stephan) hypothecating his property as security.

Mr. Schreiner read the affidavit of the plaintiff, which set out that the arrangement was that she was to return the principal to him personally. Stephan said that the defendant had agreed to let him have the money as long as he paid the interest, and the defendant admitted that to plaintiff. Deponent told her that she would have to get the money for him. Subsequently Stephan told him that he had a purchaser for the defendant's property, and that she

would pay him the money herself. He denied the conversation as set out by the defendant and Stephan as to a transference of the debt. He knew that Stephan at that time was in financial difficulties, and even if he had asked for a loan, plaintiff would not have given it without very good security. He said Stephan was the same person at present under a charge of theft in another case, for converting a client's money to his own use.

De Villiers, C.J.: If the statements made by the defendant are true, it is perfectly clear that the plaintiff is not entitled to succeed. It would be a grievous injustice to the defendant to give provisional sentence if the facts as stated here are true. She says that Stephan acted as agent for the plaintiff. Interest was paid to him as agent of the plaintiff. Stephan corroborates her statement. He says that he received the interest as the agent of Heydenrych, and paid over that interest to Heydenrych as his agent, and he says that the capital sum was paid over to him, and that it was arranged between him and the plaintiff that the money should be lent to him instead of to the defendant. The statements of these two witnesses are corroborated by Miss Legrew, who was present when the conversation took place between Stephan and the plaintiff, and she understood from that conversation that it was arranged that Stephan should take over the debt. At this stage I wish to say no more than this: that the probabilities of the case are in favour of the defendant. At all events, it is not a case in which the Court should give provisional sentence. The plaintiff should go into the principal case, and the costs in this application will be costs in the cause.

MALMESBURY BOARD OF EXECUTORS V. KENNEDY.

Mr. W. P. Buchanan moved for provisional sentence on a series of mortgage bonds for £300, £200, £300, £150, £100, £250, for £10 9s. premium of insurance paid, with costs, that the property specially mortgaged be declared executable, and under 329d, for £20 3s., money expended by the plaintiff, and £1 1s. paid for the defendant, with interest and costs.

Order granted.

VAN DER BEEG V. MAKE.

Mr. Russell moved for provisional sentence on a mortgage bond for £100, with interest from 1st July, 1903, and costs. The Bond became due by reason of non-payment of interest.

Order granted.

MALAN V. STRYDOM.

Dr. Krause moved for provisional sentence on a mortgage bond for £600, with interest at the rate of 6 per cent., and for £1 9s. 6d., and that the property specially hypothecated be declared executable.

Order granted.

WALSH AND WALSH V. ERSKINE AND SADLER.

Mr. Gardiner said that in this matter he moved against Erskine only. Both defendants had been served by edictal citation, but there had been no return in the case of Sadler. He moved for provisional sentence for £7,000, balance due on a mortgage bond which had become due by reason of non-payment of interest, and £56, being money expended for the defendant; also for £24 18s. 4d. and £32, quitrents and cash advanced, and that the property specially hypothecated be declared executable.

Order granted.

MARAIS V. HARRISON.

Mr. Sutton moved for provisional sentence on two mortgage bonds, one for £3,500, with interest at 6 per cent. from July 1, 1903, and one for £1,000, with interest at 6 per cent. from 18th August, 1903, with costs, and that the property specially hypothecated be declared executable.

Mr. Burton (for the defendant) read the affidavit of the defendant, in which he admitted his signature with power to pass the bond. He was not now in a position, owing to an action, which had been taken against him by his wife for a decree of separation, to meet all his creditors, but if execution was stayed there would be ample funds for all creditors.

Mr. Sutton said he had instructions to consent to a stay of execution as regarded the capital for one month; but no stay as regarded the interest.

Sir H. Juta (for the receivers of defendant's estate) pointed out that the receivers had power to realise, and the plaintiff should not have proceeded against Harrison at all. He should deal with the receivers.

[De Villiers, C.J.: Yes, but he wants his money.]

Then let him come to us.

[De Villiers, C.J.: He does come to you.]

But he makes Harrison the defendant.

[De Villiers, C.J.: And he is the proper defendant.]

Plaintiff should not have gone behind the receiver's back and sued Harrison, who has not got the property, and cannot deal with it.

[De Villiers, C.J.: Supposing he had come to you, how could you avoid paying the debt?]

Sir H. Juta said he was not instructed on the merits, and he held that the plaintiff should have approached the receiver.

De Villiers, C.J., said he thought that for the sake of the plaintiff, it would be better to accept the terms offered. There would be provisional sentence for the capital, and interest, and stay of execution as regarded the capital for three months.

GORDON MITCHELL AND CO. V. VIVIER.

Mr. Sutton applied for a decree of civil imprisonment against the defendant, in default of his paying a sum of £12 ls. 3d.

Granted.

BATTENHAUSEN V. DU PLESSIS.

Mr. Sutton applied for provisional sentence on a mortgage bond for £530, together with interest at the rate of 6 per cent. from June 30, 1890, and also for sentence on a mortgage bond for £300, together with interest at 6 per cent., from the 30th May, 1890.

Granted.

WEIDNER V. RABIE.

Mr. Alexander applied for provisional sentence on a mortgage bond for £157, less £25, paid on account, together with interest from February 11, 1894.

Granted.

HENNESSY V. MUITER.

Mr. Rainsford applied for provisional sentence on a mortgage bond for £2,000, together with interest at 6 per cent., from the 3rd December, 1903.

Granted.

VEIR V. MACNAUGHTON.

Mr. Rainsford applied for provisional sentence on a mortgage bond for £5,000, together with interest at 6 per cent., from the 1st July, 1903.

Granted.

REID V. LATEGAN.

Mr. Bisset applied for provisional sentence on a mortgage bond for £1,530, together with interest, from the 8th June, 1903.

Granted.

ILLIQUID ROLL.

NEWTON AND STEWART V. I. 1904.
I. AND J. HERMANN. (July 14th.

Mr. Upington applied, under Rule 319, for the return of certain documents, relating to a sale in which the defendants acted as agents for the plaintiffs, and also for a full account of all moneys received by the defendants.

Granted.

DE VILLIERS V. LOUW.

Mr. Close applied on behalf of the applicant to invest the *curator bonis*, with the usual powers to carry on the business of respondent's estate.

Granted.

ESTATE HUGO V. KRIEGLER.

Mr. Pitman applied, under Rule 329d, for provisional sentence on a promissory note for £200

Granted.

LYONS V. GREENLAND.

Mr. Close applied, under Rule 329d, for provisional sentence for the sum of £28 4s. 7d., balance of account due.

Granted.

MATARE, BURNS AND CO. V. SMALL- BERGER.

Mr. Roux applied, under Rule 329d, for provisional sentence for £320 16s. 8d., balance of account due.

Granted.

SCHULTZ V. KETS.

Mr. Pitman applied, under Rule 329d, for provisional sentence for £32, less £10 paid on account, balance of account due.

Granted.

ADAMS V. MOHAMED.

Mr. Sutton applied, under Rule 329d, for provisional sentence for a sum of £5, money lent and advanced, and £12 rent due.

Granted.

MOSTERT V. MULLER.

Mr. Sutton applied, under Rule 329d, for provisional sentence for a sum of £8 5s., amount due for professional services rendered.

Granted.

JARREDINE V. MAQUINOLT.

Mr. Russell applied, under Rule 329d, for provisional sentence for £100, money lent.

Granted.

ZEEDERBERG AND DUNCAN V. DAVIS.

Mr. Buchanan applied, under Rule 329d, for provisional sentence for a sum of £76, balance of account due.

Granted.

ORCHARD V. BREDARDORP } 1904.
LICENSING COURT. { July 14th.

Liquor licence — Conditions —
Coloured people — Prohibition.

The Licensing Court of B. imposed a condition on a licence granted to the applicant that he shall not sell liquor to coloured persons without a permit, and another condition that he shall not sell liquor after ten a.m. on the Saturday before Nachtmal.

Held, that these conditions could not be legally imposed.

This was an application for a review of the proceedings of the Bredasdorp Licensing Court, held on the 2nd March, 1904, on the grounds that such proceedings were illegal. The applicant owned an hotel in Bredasdorp, and at the last Licensing Court, which was presided over by the Resident Magistrate (Mr. Scully), several orders were made on his licence, one of which was that coloured people should only be allowed to obtain drink between the hours of 11 a.m. and 1 p.m., and that only on a permit from a European master, and also that no drink be sold after 10 a.m. on the Saturday preceding "Nachtmal."

Mr. Schreiner (for the applicant): We say that these conditions are *ultra vires*. The Court has no power to draw a distinction as to colour.

[Mr. Scully (R.M. of Bredasdorp, who appeared on behalf of the Licensing Court): I admit the illegality of that.]

We ask this Court either to amend these conditions, or to direct the Licensing Court to amend them, and to substitute "native" for "coloured person."

[Mr. Scully: As chairman of the Licensing Court I consent to that.]

Then I would suggest that liquor should be supplied to natives not only

on the certificate of a "European master" but of any master who is a registered voter.

[De Villiers, C.J.: Would it not be better to refer the matter back to the Licensing Court?]

That is the usual practice, a coloured registered voter is on exactly the same footing as a white man; and here "European" evidently means white man, and not merely one born in Europe. As to the prohibition of the sale of liquor on the Saturday before "Nachtmal" see *Queen v. Van Zyl* (3 C.T.R., 289). Act 25 of 1891, sec. 1, sub-sec. 2 (b) gives a Licensing Court no power to prohibit the sale of liquor after 10 a.m. The Court had already fixed the hours of sale for all days save Sundays, Good Friday, and Christmas Day, and they could not single out any other days for exceptional treatment. Another point is that canteens cannot be opened till 11, and then they prohibit all sale after 10. That is total prohibition for the day.

[Mr. Scully: A canteen is not a bar, a native with a permit could get liquor in a bar.]

De Villiers, C.J.: I fully appreciate the desire of the magistrates to check drunkenness amongst the coloured people of Bredasdorp, but any desire of that kind has to be carried out according to law. The law makes no distinction between coloured people and white people, but it does between the natives and coloured people, and gives a definition of "natives." In my opinion, it was beyond the powers of the Licensing Board to place the condition as to "coloured people" on the licence. On the second point, it seems to me that it is on the same footing as the case of Van Zyl, heard some time ago. The prohibition extends from 10 a.m. on the day prior to Nachtmal, and consequently the sale of liquor to natives on that day is prohibited for the whole day; because, under ordinary circumstances, the canteen does not open until 11 o'clock. There is nothing in the Act which provides for the prohibition of the sale of liquor on the day prior to Nachtmal. I therefore declare both conditions to be illegal. If the Licensing Board wishes to amend the first condition by substituting the word "natives" for "coloured people," I presume the machinery of the 92nd section of the Act will be sufficient to enable the Licensing Board to reconsider its decision, and the proper course will be to substitute "natives" for "coloured people." The Court will therefore make an order in accordance with the summons, but there will be no order as to costs. It seems to me that the Licensing Board has acted quite *bona fide* in the course they have pursued.

[Applicants' Attorneys: Berrangé and Son.]

GENERAL MOTIONS.

BENNER V. BENNER. { 1904.
{ July 14th.

Mr. Russell moved for a decree of divorce in consequence of the defendant's failure to comply with the rule *nisi*.
Granted.

STAUDE V. STAUDE.

Mr. Russell moved for an order of substituted service, the plaintiff being unable to effect personal service. The defendant was last heard of in Cape Town.
Granted, one publication in the "Cape Times," returnable in four weeks.

MOORE V. MOORE.

Mr. J. E. R. de Villiers moved to make absolute a rule calling on the defendant to return to the plaintiff by the 15th July, or to show cause why a decree of divorce should not be granted with costs.

Rule made absolute.

Ex parte **LE ROUX.**

Mr. P. Jones moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Rule made absolute.

FEDERAL SUPPLY CO. V. BUFFALO SUPPLY CO.; AND *Ex parte* ROBERTSON AND ANOTHER.

Sir H. Juta, K.C., was for the applicants in the first case, and Mr. Burton for the respondents, and for the applicants in the second case. The application was for an order authorising the applicants to sell or dispose of certain shares, awarded in arbitration, in such reasonable parcels as they deemed fit.

His Lordship, in giving judgment, said that in the first case the Court authorised the petitioners to sell the shares in parcels after one notice of the sale of each parcel to the official liquidator. In regard to the second case the company would be wound up, Messrs. Robertson and Bootie appointed as official liquidators, with powers under the 149th section of the Winding Up Act, and to give security to the satisfaction of the R.M. of East London to the extent of £20,000.

Ex parte **KREFT.**

Mr. J. E. R. de Villiers moved for an order cancelling a certain bond.
Order granted.

Ex parte **BEHR AND OTHERS.**

Mr. Gutsche moved for an order cancelling a certain bond.
Granted.

BREABLEY V. CAPE GLASS CO.

Mr. Schreiner, K.C., for the applicant (defendant in the action), moved for an order to take the evidence in London of John Forster, a material witness in the case, on commission, and to have the trial set down at a later date.

Order granted, and the case set down for November 7.

Ex parte **ELSON.**

Mr. Pittman moved for leave to pass transfer of certain property in favour of the applicant's minor son. The Master's report was favourable.

Order in terms of the Master's report.

Ex parte **DE KOCK.**

Dr. Krause moved for an order authorising the Master to pay out certain money for disbursements in favour of the son.

Order in terms of the Master's report.

Ex parte **VAN DER MERWE.**

Mr. Roux moved for an order confirming the sale of certain property, for which the applicant was executor. The purchase price was £47, and the Divisional Council valuation was £76.

De Villiers, C.J., said that if an executor bought at a sale he must clearly prove that he has given full value for the property, and he was not satisfied that a fair price had been paid in this case. There must be more proof or another sale.

HEDDON V. SAWKINS.

Mr. J. E. R. de Villiers was for the applicant, and Mr. Schreiner, K.C., for the respondent. Mr. Schreiner asked for a postponement until August 1 for further affidavits.

Order to stand over accordingly.

TROTT BROS. V. MARSEL BROS.

Mr. Struben moved for leave to sue the defendants by edictal citation, and to attach certain goods in Cape Town, in order to found jurisdiction for £189 9s. 2d., for damages by reason of a breach of contract.

Order granted, personal service, with leave to the respondents in the meanwhile to apply to have the attachment set aside.

Ex parte VAN TONDER.

Mr. Sutton moved for leave to raise £200 on a mortgage bond, in order to pay the debts of the estate. The Master's report was favourable.

Leave granted in terms of the Master's report.

HILLIER V. HILLIER.

Mr. Russell moved for leave to sue the defendant by edictal citation for restitution of conjugal rights, failing which a decree of divorce by reason of his wrongful and malicious desertion.

Leave granted, personal service, returnable first day next term.

Ex parte WENTZEL AND ANOTHER.

Mr. J. E. R. de Villiers moved for leave to execute an ante-nuptial contract. The parties were married in April last, and both had children by former marriages. Counsel put in documentary evidence to show that it was their clear intention to register a contract before marriage.

De Villiers, C.J., said it was a very special case, and as it really was in the interests of every one, the application would be granted under very exceptional circumstances.

Ex parte CAMPBELL.

Mr. J. E. R. de Villiers applied for authority to amend a certain transfer. He stated that in the original transfer the applicant's third name was omitted, and for that reason the application was made.

Granted.

ARMSTRONG V. ARMSTRONG.

Mr. Buchanan, on behalf of the applicant, Ruby Catherine Howard Armstrong, applied for leave to sue the respondent, Frederick Lawrence Armstrong, by edictal citation. He stated that the applicant and respondent were married on the 6th December, 1894, in St. Mark's Church, Cape Town, by the Rev. W. L. Clementson. After the marriage they went to reside at Woodstock for about two and a half months, when the respondent got into financial difficulties, and left petitioner in March, 1895, for Victoria, Mashonaland. About six months after petitioner joined him. During that time respondent drank heavily. Petitioner becoming ill returned to Cape Town for a change. Since then petitioner received a few letters from him, but these soon ceased, and she had not heard from him since. About June last year petitioner's brother, while on a visit to Beira, saw

the respondent, who informed him that he was settled there. It had come to petitioner's knowledge that her husband had been unfaithful to her, and had openly lived an immoral life at Beira, and had committed adultery with divers prostitutes. Petitioner was desirous of instituting proceedings against her husband for divorce by edictal citation, and was desirous of having the evidence of Tilly Brook and May Leslie taken on commission, and requested that Mr. R. H. Greville, British Consul, be appointed commissioner.

The application was granted, and the return day fixed for October 31.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

VERSTER, VAN WYK AND CO. { 1904.
V. PIENAAR. { July 15th.

Mr. Percy Jones (for the plaintiffs) said this was an action brought by the holders of a promissory note against the surety. The defendant had signed a consent paper, and counsel now asked for judgment in terms thereof. The defendant consented to judgment in terms of the declaration, subject to stay of execution for a period of three months, cession of rights of action, and other conditions. Counsel applied for costs of the provisional case to be included in the present order for costs.

Mr. M. Bisset (for the defendant) said that he agreed to costs of the provisional case being included.

Judgment entered accordingly.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

ESTATE DE JAGER V. { 1904.
THYSSE. { July 15th.

Interdict — Trespass — Prescription.

This was an application on behalf of the executors in the estate of the late

Cornelius Johannes Jagger, for an interdict to restrain the respondent from taking possession of portion of the farm Pogelsdrift, in the Oudtshoorn district. The petition of the applicant stated that the respondent intended taking forcible possession of certain portions of the farm which he intended cultivating. The respondent was a tenant of another portion of the farm, but had no claim whatsoever to the portion in question.

The respondent's affidavit stated he had been in possession of the farm he now held for the past 30 years. It had ever since been occupied by him or his wife, to whom he was married in community of property. He denied that he had taken forcible possession of the farm, but that he had held it under lease for years. The piece of land in dispute was pointed out to witness in 1874 by his wife's father as her marriage portion.

Certain replying affidavits stated that the respondent had only taken possession of the farm during the past few years, and consequently could not have been held by him for the past thirty years as stated.

Mr. W. P. Buchanan (for the applicant). The present application arises out of a case which has, in various forms, been several times before the Court. In 1875 (Buch. p. 86) the case of *De Jager v. Scheepers* was heard. De Jager had left a farm to his two sons, with *fidei commissum* to the eldest son of the elder son. The younger of the two sons of the testators, on the death of his elder brother, claimed that brother's share of the farm in virtue of a supposed *jus accrescendi*. It was, however, held that there was no *jus accrescendi*. The case came up again in 1880. *De Jager v. Scheepers and others* (Forde, 120). There the question of prescription was raised, and it was held that prescription did not run until the property was out of the hands of fiduciary. In the case of *De Jager v. De Jager* (Ap. 1-423), the Court held that the eldest grandson of the testator was entitled to succeed to a half share of the farm, and this decision was upheld on appeal to the Privy Council (Ap. 2-146). As to the claim on the ground of prescription, there can be no prescription unless the occupation is *nec vi, nec clam, nec precario*. There the occupation was certainly *precario*. The possessor cannot, therefore, show 30 years' prescription. Then, again, Johannes Stephanus was only a fiduciary, and prescription does not begin to run until the property has left the hands of the fiduciary. We ask, therefore, for an interdict restraining the respondent from cultivating the land at Pogelsdrift, which is enclosed by the wire fence.

Mr. J. E. de Villiers (for the respondent): Applicant's contention is not in accordance with the notice of motion. We have occupied the portion of the farm outside of the wire fence for 50

years. As to prescription not running against Johannes Stephanus, we do not claim under the will.

[Buchanan, J.: It is difficult to prescribe an individual portion of a farm.]

But we held that *pro diviso*, and I submit we could prescribe as to this against Gideon's branch of the family. Our prescriptive rights to that portion of the farm on which the house is situated are not attacked.

Mr. Buchanan (in reply) was not called upon.

Buchanan, J.: The applicants as the executors of the estate, hold the legal transfer and title to the property in dispute. They ask for an interdict to restrain the respondent from trespassing on any part of the farm over which they have legal rights. The respondent claims the right to be on the farm under a license from his father-in-law, who he says thirty years ago pointed out part of the farm as being the share belonging to the respondent's wife under the will of her grand-parents. Since then this will has been the subject of litigation, and the claim of persons in the same relationship as respondent's wife was set up first in the Oudtshoorn Circuit Court, then on appeal to the Supreme Court, and finally to the Privy Council, and all these tribunals decided adversely to the right now claimed by respondent through his wife. The main objection set up by respondent therefore fails. But he also alleges that he has been in possession of a portion of the farm as of right for a period of thirty years, and he now claims a title by prescription. He further says that during that period he has improved the property by building a house on it worth £200. The ground principally relied upon by the respondent is a very weak one. As the matter now stands the plaintiffs are clearly entitled to an interdict, and an interdict will be granted, but with a stay of execution for four months, which will enable respondent to establish by action any right he may have on the property, for compensation for any improvements. Costs of the application will follow the result of the action if brought otherwise, to be paid by respondent. Respondent must also be restrained at once from trespassing on the part of the farm enclosed by a wire fence, which was formerly leased to Meiring and to which he clearly has no right.

STRYDOM AND OTHERS v. s 1904.

BLIGNAULT AND OTHERS. (July 15th.

Interdict — Disposal of surplus funds collected for a specific object by public subscription.

This was an application calling on the respondents to show cause why an order should not be granted to interdict a cer-

tain committee comprised of the respondents from parting with a certain sum of money, which was subscribed for the purpose of celebrating the King's Coronation at Calitzdorp. The amount of money in hands was pretty large. The history of the case was as follows: A public meeting was called in Calitzdorp prior to the King's Coronation, and subscriptions were called for. A certain sum of money was collected, and it was found that it was more than was necessary for the costs of the sports, so the petitioners decided to make a lasting memento to the memory of His Majesty, by making a recreation ground, and applied to the respondents to lodge the amount of money in hands, to the credit of the committee of the recreation ground, as was agreed to at a public meeting, but they refused to do so.

Mr. W. P. Schreiner, K.C., appeared for the applicants, and Sir H. Juta, K.C., appeared for respondent. Mr. Close watched the case on behalf of the Rev. Mr. Barry.

[Buchanan, J.: What do the respondents propose doing with the money?]

Mr. Schreiner: They want to have a Market-square, and we propose a recreation ground. Mr. Blignault, who acted as treasurer to the committee, formed by the respondents, and who were the supporters of the Market-square, did not keep the subscriptions in a separate account in the bank at all, but mixed it with his own money. He purchased a portion of his own property for the Market-square. The main point that the Court had to decide was whether people of Calitzdorp were to have a recreation ground or a Market-square.

[Buchanan, J.: It is a shame that the money subscribed for such a purpose should be spent in litigation.]

Mr. Schreiner said his clients had tried to impress that point on the respondents, but they would not listen to them. His clients relied on the findings of the public meeting, at which, by a large majority, it was decided to purchase a recreation ground; whilst the respondents relied on the decision arrived at by a public meeting, held during the existence of martial law, and at which they said there was a large gathering, but which petitioners claimed was not properly advertised. In fact, so badly was it done, that many of the principal people in the village knew nothing of the meeting.

Sir Henry Juta read answering affidavits made by the respondents, in which it was stated that at the meeting at which it was decided to ask for subscriptions towards defraying the cost of the Coronation festivities, it was agreed that if there was any balance, it should be devoted to the purchase of a market square, and the resolution to the effect was actually seconded by one of the petitioners in the present case. They claimed that the meeting was

properly advertised and thoroughly representative. At the meeting there was considerable obstruction, caused by most of the present petitioners, who brought a number of school boys to support them. They contended that a market square was more likely to be for the welfare of the town than a recreation ground.

Mr. Schreiner read a replying affidavit, which alleged that a petition got up by the committee in favour of the market square had been signed by persons who were not ratepayers, and in some instances had been signed more than once by the same person. With regard to the statement that obstruction at the meeting was caused by school children, various witnesses stated that there were only three school children present, who did not vote.

Mr. Close did not oppose the application, but only applied for costs.

Buchanan, J., said he thought the best course to adopt would be to either return the money to the subscribers, or else let the chairman of the Municipality take a poll of the subscribers as to the manner in which the money should be spent. The money in the meantime to be lodged in the Standard Bank, to the credit of the Coronation Fund.

Mr. Schreiner said if the Court, in its judgment, would give an expression of opinion as to which object was best, a recreation ground or a market square, it would tend to save any amount of ill-feeling.

The Court made an order authorising the Assistant Magistrate to take a poll of the subscribers on or before August 31, and to report to the Court as soon after the 31st August as possible.

[Applicants' Attorneys: Walker and Jacobsohn; Respondent Berry's Attorneys: Herold and Gie; Other Respondents' Attorneys: Tredgold, McIntyre and Bisnet.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

ESTATE BLACK AND SIMON'S } 1904.
TOWN MUNICIPALITY V. } July 18th.
JACKSON AND CO., LTD.

Mr. Close moved for the appointment of a commission to take the evidence of Rear-Admiral Durnford, who was about to leave Simon's Town for some months.

De Villiers, C.J., asked counsel if it were not desirable to take the evidence of other witnesses on admission.

Mr. Close said that another witness was staying behind for a week or two.

De Villiers, C.J., said there was no chance of the case being heard before next term.

Mr. Close said in that case he would apply for the commission to include the evidence of Mr. H. C. Winn Edwards, subject to the consent of the other side.

An order was made accordingly, Mr. Advocate Russell to act as commissioner, costs to be costs in the cause.

INELSON V. NELSON.

This was an action for judicial separation, brought by the wife against her husband on the ground of cruelty. Mr. Upington was for the plaintiff; Mr. Burton was for the defendant.

Mr. Upington said that the plaintiff claimed a judicial separation on the ground of certain cruelty alleged in the declaration. The defendant claimed in reconvention a decree of restitution of conjugal rights, on the ground of malicious desertion. The case would now be very much shortened. The plaintiff's legal advisers, after considering the case of *Doran v. Doran* (13 C.T.R., 781, 929), which was very similar in its features, had come to the conclusion not to proceed with the claim for judicial separation, and they would not oppose the application for a decree of restitution of conjugal rights. He was instructed by the plaintiff that on no account would she return to or live with her husband, and under these circumstances he (Mr. Upington) would, on behalf of the plaintiff, withdraw the claim in the declaration. He understood that the defendant was willing that the two younger children of the marriage should remain with the plaintiff, and that he was prepared to pay a sum of £6 a month towards their maintenance.

Mr. Burton said that, under the circumstances, he proposed merely to lead formal evidence as to the desertion.

Andries Nelson (the defendant) was called. He said he was married to the plaintiff in May, 1895, out of community of property. They had had three children—two boys and a girl. The oldest child was 8½ years of age. They lived together for some time, but towards the end of last year their relationships became very strained. In April of this year the plaintiff deserted him, and she refused to return to him.

By the Court: The furniture and certain life policies were conferred upon his wife by the ante-nuptial contract.

Cross-examined: He did not object to the two younger children remaining with his wife, provided he could have

reasonable access once a week. He was claiming back the life policies which he had ceded to his wife.

Mr. Burton (replying to the Court) said that they did not press for costs.

Decree of restitution granted, plaintiff to return to or receive the defendant on or before the 1st August, failing which to show cause on the 18th August why a decree of divorce should not be granted, defendant to have custody of the eldest child of the marriage, or to pay to the plaintiff £3 a month towards the maintenance of each of the two other children until 16 years of age, plaintiff to have been declared to have forfeited the benefits of the marriage, each party to pay her or his own costs. On the claim in convention, the order of the Court was absolution from the instance.

WARNER V. SCHULTZ.

Partnership—Racehorse—Costs.

This was an action brought by Robert Charles Warner, of Cape Town, coal merchant, against one Schulz, of Three Anchor Bay, to recover balance of account.

The declaration set out that the defendant was indebted to the plaintiff in three sums, viz., £26 odd in respect of money lent, £37 10s., being half the purchase price of a certain racehorse called Joe Chamberlain, and £93 10s., money lent and advanced by Mr. R. Warner, carrying on business as R. Warner and Co., and services in and about the endorsement of certain promissory notes. The said R. Warner, trading as aforesaid, had ceded his business to the present plaintiff, more particularly in relation to the debt owing by the defendant.

Defendant, in his plea, admitted that he owed the loan of £26 he had received from the plaintiff, but he disputed the other transactions. As to the racehorse, Joe Chamberlain, he said that the horse was left in his charge by the plaintiff when he left Pietersberg, Transvaal, and witness left it in charge of his son, from whom it was requisitioned by the Transvaal authorities during the war. No compensation had been paid. In regard to paragraph 4 of the declaration, he admitted that he was indebted to the plaintiff in the sum of £59 18s. 1d., being balance of account and interest thereon; but he said that he had tendered the said sum to the plaintiff. He denied that he had agreed to pay the plaintiff any sum of money for services in or about the endorsing of the promissory notes. He said further that he was entitled to half share of a prize of £150 won by the said racehorse, and also to a sum of £35, in respect of the feeding of the horse for seven months at £5 a month. He also said that he was en-

titled to set off the sum of £68 10s. against the amount of £86 14s. 4d., which he admitted that he owed the plaintiff, and he tendered to pay to the plaintiff the sum of £18 14s. 4d., together with costs. Subject to the above tender, he claimed in reconvention the sum of £68 10s.

The plaintiff in replication said the prize in question was not £150, but £107 8s. 6d. He admitted the tender, but said the same was insufficient, and he prayed that the claim in reconvention might be dismissed with costs.

Mr. Upington for plaintiff; Mr. P. T. Jones for defendant.

Mr. Upington read the evidence of several witnesses in the Transvaal, taken on commission.

The plaintiff, Robert Charles Warner, said he was carrying on business in Cape Town as R. Warner and Co. As to the racehorse, they purchased this animal in partnership in May, 1899. He was then living at Pietersberg, Transvaal. The horse won an event, and the prize was £107 8s. 6d. gross. Witness left the Transvaal on account of the war. Subsequently the defendant came down to Cape Town, and he approached witness with a view of raising money to start a boarding-house at Three Anchor Bay, Milner Hall. He wanted £750. Witness obtained £150 from the business of R. Warner and Co., which was lent by witness's father. The firm also endorsed four bills of £87 10s. each on behalf of the defendant. The notes had been paid. The advance was made in November, 1901. For the accounts witness had sent to the defendant, he had always brought up an item of £25 commission for endorsing the bills. He arranged with Schulz on the 5th January, 1902, that he should pay commission on the bills and interest on the loans; and it was agreed between them that £25 would be a fair amount. Schulz had never repudiated his liability for that sum until the present action was brought. When he left the Transvaal, Joe Chamberlain was in the defendant's possession. In December, 1903, he learned that the horse was stolen. In the defendant's claim for £32 10s. the defendant did not allow for entry fees, nominations, etc., but merely took the gross share of the transaction. All that he was liable for was the keep of the horse from the time it was taken over.

Cross-examined: He denied the defendant's statement in his plea that there was any arrangement made with regard to endorsing the bills. In the first instance he made the arrangement as a friendly transaction, but he could not be responsible for the commission of £25 to which the firm was entitled. At the time of the races he was not suffering from fits, consequent on heavy drinking. If the defendant said that the payments in June, August, and Sep-

tember were not for the keep of the house he would contradict him.

Robert Warner denied the tender of £59 18s. 1d. in March, 1903, by the defendant. It was in March this year that he had a conversation with the defendant in Long-street about the account. Cross-examined: He might have said that he would not press Schultz for the money until his son had settled with the latter.

Mr. Upington closed his case.

Mr. Schulz, the defendant, stated he never promised to pay £25 commission. Witness agreed either to give good interest or a bonus for the loan, and ultimately he agreed to pay 8 per cent. When he got the account in April, 1902, he went straight to the office of the defendant and repudiated the commission of £25. Witness heard that Joe Chamberlain had been commandeered and was in possession of President Steyn. He accepted the cheques as payments on the open account, and had nothing to do with the keep of the horse.

Cross-examined by Mr. Upington: He had no authority from Warner to sell his share of the horse, and the reason he would not part with it was that he was in debt to witness. It would have been difficult to get £100 for the horse in January, 1900. When he got the letter about the commission witness went straight to the office and saw Mr. Warner, and he put the mistake down to the clerks. Until the matter practically came to action he never actually wrote repudiating the £25. Witness's books were destroyed by the Boers at Waterval. Witness debited the plaintiff with £57, half the amount of the purse. Plaintiff paid for the nominations, acceptances, weighing fees, and colours. Witness understood that they amounted to £87, and that amount deducted from the purse would leave £20, or £10 each. Mr. Warner boarded with witness about two months. Witness had been paid for that. In March plaintiff told witness that he had heard that his (witness's) son had sold the horse in December, 1899, for £75. Witness saw the accounts, on which he was credited with £13 7s.

Re-examined by Mr. Jones: Witness got £26 on account from plaintiff to pay for his board and lodging whilst in Cape Town.

Mr. Jones closed his case.

Counsel for the plaintiff addressed the Court, and said he would submit that with regard to the £25 commission, that the plaintiff's story was correct, and that the defendant was wrong in his version. It was a peculiar thing that in all the correspondence that passed between plaintiff and defendant there was no reference to the fact that this money was not due, although accounts for it had been sent in. Mr. Warner, senior, certainly corroborated the plain-

tiff in what he said as to an agreement having been arrived at. There was nothing extraordinary, considering the relations of these two men prior to the transactions, in the fact that the actual amount was not agreed on before the loan was arranged. With regard to the racehorse transaction, it seemed perfectly clear that there could be nothing due to the defendant. Defendant admitted that the nomination fees, weight and colour charges, and expenses of that nature were paid by the plaintiff. The defendant stated he had debited plaintiff with £53 14s. 3d. in his book, and that sum was exactly half of the purse, and yet he wanted to make out that that amount was arrived at after taking into consideration all figures.

De Villiers, C.J., said that with regard to the horse it was clear that the defendant's son understood that he took over the horse when he paid the £75, the purchase price of the horse, but it was also clear that there was a misunderstanding—and one could quite understand how in the confusion during the war such a misunderstanding could occur, what the defendant clearly understood was that anyone taking over the horse should only take his half share. It might be that the transaction that if there was a partnership the defendant could not take another person into the partnership, but the question that arose was, did he leave the horse there with the intention of selling the horse to his son, or with the object of making over his half share to his son. The probabilities were that the defendant asked the son to take over his share of the horse at £75, because when he last saw the plaintiff he was unwilling to sell his portion, and the utmost responsibility he took over was the half share. Subsequently, there was a commandeering and loss of this horse, and it was only right that both owners of the horse should suffer instead of one, and only in the case of there being an out and out sale to the son would the Court hold that the defendant should stand the whole loss. With regard to the £25, the Court was not satisfied that this was due. It was a loan transaction. He got a fair rate of interest—8 per cent.—and it might well be that he gave his endorsement of the promissory note without expecting any reward. It was clear that Warner expected other benefits to arise out of the advantage given to the defendant, and at all events it lay upon the plaintiff to prove that there was promise of this £25. Therefore those two items fell to the ground. Continuing, he said he was not satisfied that there was more than £22 16s. 3d. owing to the plaintiff. On the other hand, the defendant had not tendered the amount that he should have done. The ordinary rule of the Court was that the per-

son against whom judgment was given must pay the costs. He did not see sufficient reason for departing from that rule except on the point as to the costs of the commission, and the costs of that would have to be borne by both parties.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorney: C. E. P. Hughes.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ALEXANDER V. MUIR. { 1901.
 { July 19th.

Personal injury—Negligence.

This was an action brought by Julius Alexander, optician, of Cape Town, against William T. Muir, of Ceres, to recover £500 damages for injuries received through the negligence of defendant's servant.

The declaration stated that plaintiff was an American optician practising in South Africa. The plaintiff was a passenger in the post-cart from Ceres to Ceres-road. In, or about, December, 1902, the plaintiff visited Ceres on business. It was agreed between plaintiff and the defendant that the plaintiff should become a passenger on the post-cart. The plaintiff was not carefully carried by the defendant as agreed, but was thrown over the banks at the side of the road, a distance of about 15 feet, and rolled 30 feet more. The negligence was caused by the defendant harnessing an untrained horse to the cart, and also owing to the negligence of his servant in driving. In consequence of the accident, plaintiff sustained a fracture of the jaw, and had some teeth knocked out. His forehead and face were scratched. Certain goods which plaintiff used in his business were destroyed. In consequence plaintiff claimed £500 damages.

The defendant's plea admitted the accident, but denied that it was owing to the negligence of his servant. He also denied that an untrained horse was harnessed to the cart. He denied that the cart was overcrowded. He admitted that in con-

sequence of the accident plaintiff received several scratches, but denied that he received a fractured jaw.

The replocation was general.

Mr. Alexander appeared for the plaintiff, and Sir Henry Juta, K.C. (with him Mr. Close) for the defendant.

Julius Alexander, the plaintiff, stated he was an American optician, carrying on business in Cape Colony. In December, 1902, he was on business in Ceres, and booked a seat in the mail cart to get to Ceres-road. He paid 5s. for it. The mail cart left at 5.30 p.m. A Mr. Cooke travelled with witness. The cart would seat three passengers and the driver. They picked up another passenger in Ceres. They then drove to Mrs. Van Wyck's house, and picked up a Mr. Van der Merwe. In addition there were the mails and passengers' luggage on the cart. Mr. Van der Merwe complained of the lack of room, but the driver made room for him by sitting on the mail bags with his legs over the splash board, on which attitude he would not have any control over the horses. The horses were somewhat frisky throughout the journey. The driver teased the friskiest of the two horses with a whip. They drove along the Pass, and the driver turned his attention to the other horse Mr. Van der Merwe spoke to him about it, but he took no notice of it. They came to a water-course in the road, and the driver took the horses through it on the side of the road nearest the precipice. One of the horses was a "jibber," and the driver whipped it up. The horse at the "off-side" shied, and forced the near horse over the precipice. Had the driver been in a proper position he could have controlled the horses. Witness was rendered unconscious by the fall. He recovered, and pulled himself together, and washed his face in the water-course, and lay there until some people picked him up. The cart was smashed to atoms, and the horses lay about 50 feet away from it. Drs. Morris and Munnik and Mr. Muir, the defendant, came out from Ceres. Witness had his travelling "test cases" with him, and a quantity of the contents were smashed. Witness was taken back to Ceres, and remained in bed about three days. Witness's lower jaw was fractured, two teeth were dislodged, and the others were loosened. Witness, who was in perfect health prior to the accident, now suffered considerably from nervousness.

Cross-examined by Sir H. Juta: Witness was confined to bed for three days.

After that you came downstairs?—I did not, because there's no stairs to come down.

You were the life of the hotel?—In what way?

I believe you used to keep the hotel pretty lively after your accident?—It is my nature to make everybody lively.

Did you show Dr. Morrison your fractured jaw?—I did.

Would it surprise you to know that he says it was not fractured?—He tried to close my jaw three times, but failed.

Witness had never seen drivers sitting on the mail bags on the front of a cart before. When the defendant arrived, they were all together in the road. Witness did not hear Cooke tell Muir that the whole thing was an accident, and that the driver was not to blame. Cooke was in England at present, but was expected back to South Africa soon. Witness was making about £5 a day out of his business.

[De Villiers, C. J.: Are there no parapet walls along this road?]

There are loose stones.

Were there any just where the accident occurred?—There were.

What happened to them?—The horses forced them out of the way.

Rudolph van der Merwe, of Hope Town, stated he was a passenger by the mail cart on the occasion of the accident. He corroborated plaintiff as to the details of the accident. He knew a good deal about horses, and he considered the horses driven by the defendant were not suitable for such a road as that between Ceres and Ceres-road. Witness took an action against the same defendant, and settled it for £15.

Dr. Harris gave evidence as to an examination of the plaintiff. He saw him in January, 1903. He complained of pains in his jaw. Witness examined it, and found signs indicative of a fracture. The symptoms at present seemed to be the same as they were then.

Mr. Alexander closed his case.

Karl Johannes van der Merwe stated the boy who drove for defendant had been in his employment about twelve months. He was a sober, competent driver. Witness drove in the cart which met with the accident along with five other passengers from Ceres to Ceres-road the day prior to the trial of the case.

Mr. Alexander: You must have made a mistake as to the cart you drove in yesterday, because that cart is smashed?—I meant one built in the same way.

To the Court: The driver may have been careless when passing the point at which the accident occurred on the occasion in question.

William V. Blackburn, examined, stated he had been residing in Ceres for the last three years. In 1902 he was a transport driver. He had driven the horses that met with the accident repeatedly, and never had any accident with them. The cart was larger than the ordinary Cape-cart. Witness knew Williams to be a competent, careful driver. He still drove the mail cart. Witness saw plaintiff walking about after the accident. He was using a stick to assist him.

Cross-examined by Mr. Alexander:

Witness resided with Mr. Muir. He often drove for him. He did it for pleasure.

Richard Giddey, proprietor of Elam's Hotel, stated the cart was a full-sized one, by which he meant it should comfortably seat three passengers on each seat. He also testified as to the driver's competency. Mr. Alexander was brought back to the hotel after the accident, and he was "the life of the house." He derided the "cake-walk" on a couple of occasions.

Cross-examined by Mr. Alexander: Plaintiff was of a very lively temperament. Witness considered the driver in sitting on the mail bags, had perfect control over the horses.

Petrus J. T. Wolfaardt also testified to the competency of the driver.

Hendrick Williams stated he was a post-cart driver in the employment of the defendant for the past four years. He had been driving horses for many years. Witness had been driving one of the horses two years, and the other six months. He had driven the two together for three months. Witness was still engaged in driving the cart between Ceres and Ceres-road. Witness never had an accident before or since. Both horses were accustomed to harness. The cart was a large one. It was not overcrowded in any way. Witness had often carried six people in the cart, and the mails. Witness denied that he whipped the horses unnecessarily. He drove fast because he had lost time in starting. Mr. Van der Merwe put his hand in front of witness, and took hold of the right hand rein, thus preventing witness from using his whip. The effect of this was that the horse's hindquarters came into collision with the pole.

Cross-examined by Mr. Gardiner: He was some distance off the edge when Mr. Van der Merwe caught hold of the rein, but he was unable to resume possession of the horses. He denied altogether that he was teasing the horses previous to the accident. He was ten minutes late for the train.

Dr. Morris stated that in December, 1902, he was practising at Ceres, where he saw the plaintiff on the day of the accident, and found him suffering from bruises of the face, left hand, and left thigh, one tooth missing, and another pushed out. A few days after the accident, the plaintiff was practically all right. Beyond the bruises there was no permanent injury.

Cross-examined by Mr. Alexander: The thickening of the jaw would be the result of the accident. Witness attended the plaintiff for seven days. If the plaintiff said that he suffered from sleeplessness and cold sweats, they might probably be caused by nervous disorder.

Dr. Norman Wilson stated that he examined the plaintiff on the 5th July last, and found no traces of a fracture of the jaw. Beyond a thickening of the jaw, there was no evidence of any per-

manent injury. There was no mention of sleeplessness or nervous disorder.

Cross-examined by Mr. Gardiner: The thickening of the jaw might be the result of the fall.

Alfred Dyason, an attorney, practising at Ceres, said that he was present when the cart was measured. The cart was 6 feet wide and the road over 16.

Cross-examined by Mr. Alexander: He was attorney for the defendant.

The evidence of T. Muir, taken on commission, set out that the cart was a roomy one, and the present driver had been in his position for a number of years. He used the same horses for nine months after the accident. Mr. Cook and the other passengers thought it was purely an accident, and that the driver was not to blame. Another cart had gone over the precipice at the same place, which was very dangerous, and insufficiently protected by guard stones. Eleven or twelve accidents had happened at the place during his time.

Sir H. Juta closed his case, and counsel having been heard in argument on the facts,

De Villiers, C.J.: It is a matter of great regret that two important witnesses who saw the accident, and were sufferers in the accident, have not been called as witnesses to state what they actually saw took place. It seems that these two witnesses have left the country, and it is to be regretted that the case was not brought on while they were here, and able to give their evidence. The only statement we have in regard to their views of the accident is a statement made by the defendant as to what took place shortly afterwards in the presence of the plaintiff. The plaintiff was hurt, but still the statement was made in his presence by these two witnesses to the effect that it was a pure accident. The silence of the plaintiff should not affect his case, because he was hurt at the time. Therefore, this should not bear very much against him. At the same time, we have the fact that these two witnesses made these statements in the presence of plaintiff. A great deal has been said about overcrowding in this cart, but I confess I don't see that the cart was overcrowded. It is true that the driver did not sit upon the cart seat, but from the description as to the manner in which he sat, it seems to me he would have had as good control of the horses as if he had sat on the seat. There was some luggage and also a letter bag. He sat on the letter bag, and, according to his statement, his feet were inside the board. The plaintiff's witnesses, no doubt, say the contrary, but on his own statement that his feet were inside, if that were true, he would have as firm a footing as he would have had if he sat on the seat. It is not an unusual thing to see these people sit on the splash-board, but that in itself would not be proof of

negligence. But, then, it is said that the two horses did not pull well together, and that they were unfit for the work. But they had been used for that work for some months before, and also used since without having any accident. The plaintiff, I think, was not such a competent judge of horses as to be able from the short experience he had of these two horses on the journey from Ceres to the scene of the accident to say whether these two horses were fit and proper for their work, and the same remark applies to Van der Merwe. The elder Van der Merwe saw the horses daily, and he says that these horses were fit for the work, and, moreover, that this Williams, the driver, was a very competent driver. He had been in his service for years, and never had an accident, and that he was a sober, steady, and industrious man. This is the local evidence of men on the spot, who knew the horses, the driver, and the defendant, so that, so far as that evidence goes, it seems entirely in favour of the defendant. But there is still the fact that an accident happened, and I quite agree with Mr. Alexander that the mere fact that this accident happened is sufficient to call upon the defendant to show that the accident happened, notwithstanding the exercise of reasonable skill and care on the part of the driver. It is the undertaking of the cart contractor to carry the plaintiff safely, so far as the defendant can with reasonable skill and care, and to show that he was so carried. Beyond that his liability does not go, because he is not an insurer. He undertakes so far as he can to exercise reasonable skill and care that the plaintiff shall be carried safely to his destination. The plaintiff then has to produce evidence to show that this accident could have been avoided by the exercise of reasonable skill and care. On this point the plaintiff and Van der Merwe have given their evidence, and, according to them, the driver whipped up the left hand horse, with the result that he startled the horse on the right hand, which pulled with greater force than the other, and pressed against the pole, ultimately pressing the cart over the embankment, but I don't consider that the mere whipping of the horse on the left hand side was in itself an unskilful act of the driver. A good driver will work as much with his whip almost as with the rein, and there are occasions when the whip will be the means of preventing horses from going from one side of the road to the other, and this seems to have been one of these occasions in which a judicious whipping of the left hand horse would have materially assisted in bringing the cart out of the predicament. It was one of those occasions in which a skilful driver ought to have been left to himself. It is a great mistake people often make, and it is not alone made by ladies, to interfere with the driver. Here

is a skilful driver, who never had an accident. His former master praises him as a good and skilful driver, and his present master employed him before, and since the accident, and it appears, to my mind, if the driver had been left to himself, he might have taken the cart out of the predicament, but then Van der Merwe thought he might come to his assistance by pulling at the right rein. I consider it is not the mere pulling of the rein which interfered with the driver, but it is the general interference with the driver, and in nine cases out of ten it will lead to an accident which the person who interferes wishes to prevent, and that is what I consider took place in the present case. A strong jerk of the right rein would do more harm than good, and I believe that a gentle pull of the right rein would be, under the circumstances, most beneficial, with a slight whipping of the left-hand horse on the left-hand side. If the driver had been left to himself, I consider that is what he would have done, but the interference of Van der Merwe, in my opinion, contributed to the accident. Still, I quite agree on this point with Mr. Alexander, that if there was neglect on the part of the driver, and there was only contributory negligence on the part of Van der Merwe, that the defendant would not be excused; but on this point, in my opinion, after careful consideration of the evidence, the driver exercised proper skill and care, and that it was Van der Merwe's interference alone which contributed to the accident, and that therefore the plaintiff is not entitled to recover any damages in the present case. The defendant exercised due care in the appointment of his driver, who was a careful, sober, and industrious man. Judgment will be for the defendant, with costs.

[Plaintiff's Attorneys: Moore and Son; Defendant's Attorneys: Faure and Zietsman.]

GENERAL MOTION.

Ex parte TOOCH. { 1904.
July 19th.

Mr. De Waal moved for an order for the arrest of N. K. Spencer, under the 3th rule of Court, who was indebted to the petitioner in the sum of £9 0s. 7d. pending an action in the Magistrate's Court. It was believed that respondent was about to leave for England.

De Villiers, C.J., said that the rule of Court fixed the lowest amount at £15, and he was not prepared to put the formidable machinery of arrest in operation for the recovery of such a paltry sum.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

AMER V. VAN DER BYL AND { 1904.
OO. AND THE MASTER. { July 19th.

This was an application on notice of motion for the discharge of an order for the attachment of a certain shop at the corner of Stone and Ellesmere streets by the messenger of the second-named respondent on the ground that the said shop belongs to the applicant, the said attachment having taken place under the sequestration of the estate of one Ebrahim Cassim.

The affidavit of the applicant stated that he had purchased the shop from Cassim, and that he had been wrongfully ejected.

A number of supporting affidavits were put in.

Certain answering affidavits were put in to the effect that the applicant acted in collusion with Cassim in attempting to defeat the rights of the merchants, his creditors. Applicant had been a partner of Cassim (his half-brother) in three shops. A plot had been hatched whereby the applicant was to take over the bulk of the goods in Cassim's shops, so as to defeat the rights of creditors. The sale to applicant was denied, and it was alleged was merely a fraudulent and collusive arrangement.

Copy of a document was put in, in which applicant acknowledged having been in partnership with the insolvent.

In a replying affidavit, the applicant denied the alleged plot to defeat the creditors of Cassim. He also denied that he was related to the insolvent, and in regard to the document, he declared that he did not understand its contents when he signed it.

Mr. J. E. R. de Villiers for the applicant; Dr. Krause for the respondents.

[Buchanan, J.: Why do you proceed against the first respondent and not against the trustee?]

Mr. De Villiers: We are proceeding against the Master.

[Buchanan, J.: You see, Mr. De Villiers, you make an allegation of fraud. Will your client, Dr. Krause, give security for costs of any action which may be brought against you?]

Yes, certainly.

Buchanan, J.: I fear we can hardly decide this case without having the witnesses before us. No order will be granted. On the respondents giving an undertaking to abide by and submit to any judgment, which may be given in an action to be brought by the applicant for recovery of property and damages, action to be brought forthwith, and costs

to abide result; failing any action to be brought next term, applicant to pay costs of this motion.

ESTATE FAURE V. VAN DER { 1904.
BYL. { July 19th.

Ejectment—Motion.

B. had purchased certain land from the applicants, had sued them for transfer, and the applicants were ordered to give transfer, or in the alternative, to pay B. £500 damages. They paid the money, which was accepted by B., however, remained in possession of the land, as it had never been registered, either in the name of F. or of the applicants. On a motion for the ejectment of B.,

Held, that an order must be granted as prayed.

This was a motion on behalf of the executors testamentary in the estate of the late Johannes Albertus Faure, for an order compelling the respondent to give up possession of certain two erven, 24 and 25, situate at Gordon's Bay, in the division of Stellenbosch.

The affidavit of the petitioners stated that an action was brought in 1902 (see 12 C.T.R., 476) by the present respondent against the present petitioners for an order for transfer of the property in question, which he had alleged had been sold to him by the late Mr. Faure. On the 6th June, 1902, the Court gave judgment in the following terms: "Judgment for the plaintiff, with costs, including expenses of plaintiff as a necessary witness, and the Court orders the defendants, in their aforesaid capacity, to give transfer to the plaintiff within three months, failing which to pay the plaintiff the sum of £500, as and for damages, plaintiff to be allowed to remove his materials from the property." Petitioners went on to say that they had been unable themselves to get title, consequently they could not grant transfer to the present respondent, and on the 8th September, 1902, they paid him £500 and costs. Respondent still remained in possession of the property, and petitioners now prayed for an order compelling him to at once restore or give up possession of the property to the applicants.

The respondent, in his affidavit, said that the property was not registered in the name of petitioners, but in the name of a gentleman now residing at Johannesburg, who had asked him to remain

in possession till he could come and assert his rights. In the meantime, he (respondent) was prepared to pay rent till he was ejected from the premises.

Mr. Schreiner, K.C., for the applicants; Mr. De Waal for the respondent.

[Buchanan, J.: You have already brought your action, Mr. De Waal, and obtained judgment, why then do you oppose the present application?]

We object to this matter being decided on motion. Here there has been no spoliation, and such a case cannot be decided on motion. *Maasdorp's Institutes of Cape Law* (Vol. 2, p. 87).

[Buchanan, J.: Have you anything to say on the merits?]

Since the action was tried a new issue has arisen. Then it was assumed that the whole question was one of breach of contract. Nobody then knew that the property was in the hands of third persons. Had they had any title they might have got possession under the Derelict Lands Act, but knowing they had no title they did not venture to make the application. Possibly Faure may have made a mistake in selling these two lots, but we cannot be compelled to deliver up the property to the applicants, as they can show no title. *Melior est conditio possidentis*. We are in possession, and nobody can oust us save by a vindicatory action. *Grotius* (2-2-6). *Nathan's Colonial Law* (Vol. 1-374, par. 606). The first thing the claimant has to prove is ownership. *Grotius* (2-7-2). As against third persons we have as much right as if we could show prescriptive title. The property is still registered in the name of Frieslich, and the Court in the action did not order us to hand it over to the first claimant. Mr. Schreiner was not called upon.

Buchanan, J.: The respondent admits that he went into possession of this property under this contract of sale from Faure. He bought from Faure, and looked to Faure to put him into possession, he brought the action for transfer and in that action, failing the transfer, he got a judgment for damages, and it is clear from the permission, attached to the judgment, for him to remove his materials, that if he recovered damages he certainly must give up the property. It is a necessary consequence. Objection has been taken to this motion, which is to remove the respondent, and it has been argued that an action should be brought. An action has been brought, and the whole question has been decided upon action. It is no defence to say that property belongs to a third party. Respondent derived occupation from Faure, he sued Faure for transfer he could not get transfer, he had paid no rent for occupation all these years, and he has accepted the £500 damages awarded to him by the Court. There is no title in anybody else set up in this case from whom the respon-

dent could claim, except Faure. The application will be granted with costs, and respondent will be allowed one month in which to remove the materials.

Ex parte PAM.

Leave to appeal to Supreme Court—Interlocutory order.

This was an application for an order granting one Julius Pam leave to appeal from a judgment of the High Court of Griqualand West. On May 16, 1904, the High Court had granted a rule absolute authorising the Official Liquidator of "The Free State Mines, Ltd.," to attach certain shares, and a bond registered in the name of the petitioner, to found jurisdiction and leave to sue him by edictal citation. Petitioner applied for leave to appeal to the Supreme Court, but the High Court dismissed the petition. The petitioner now asked leave from the Court to appeal.

Mr. Gardiner moved accordingly.

The Court refused the application with costs, on the ground that the order of the High Court was purely interlocutory.

[Applicant's Attorneys: Van Zyl and Buissinné.]

WRIGHT AND ANOTHER v. f 1904.
THE CAPE TIMES, LTD. { July 19th.

Pleading—Libel.

If it intended to plead justification in an action for libel, that defence must be pleaded specifically.

This was an argument on exceptions taken to the defendants' plea. The matter arose out of certain statements in reference to the administration of Wynberg Gaol, contained in a series of articles published in the "Times." The plaintiffs are Dr. Wright, District Surgeon of Wynberg and Dr. Molteno, assistant District Surgeon, and the defendants are the proprietors of the "Cape Times."

The declaration set out that one of the duties of the plaintiffs was the medical care of prisoners in the Wynberg Gaol. On the 24th March, 1904, the defendants published in the "Cape Times," of and concerning the plaintiffs, the following false, malicious, and defamatory words: "The food, generally speaking, is disgraceful. The meat often putrid, green, and quite unfit to eat; the mealie meal frequently sour, and in a filthy state, the bread stale or under weight, and so on. . . . The 'hospital' accommodation is beyond description. To start with, there is no such thing as a hospital. A narrow cell, in one corner a stretcher, devoid of all necessaries, At

the time these notes were written (secretly sent out to a chum through a little hole in the wall), a coloured man, in the last stages of consumption, was occupying the one stretcher in the hospital. This man had at one time or another received corporal punishment, which had been administered in such a disgraceful manner that part of the man's lungs (already slightly affected) were severely beaten in by the tails of the 'cat-o'-nine tails.' For weeks this man had been lying in the hospital, unable to move, never washed, and in an indescribable filthy state. The skin was black instead of light brown. This unfortunate man was kept on the ordinary prison diet. When the time came for him to die the doctor ordered him some brandy—which he rarely received. For days at a stretch he never saw a doctor at all."

The plaintiffs said that this meant that they had been guilty of gross neglect and misconduct in the discharge of their professional and official duties, and they claimed £2,000 damages.

Defendants, in their plea, admitted the allegations in paragraphs 1 and 2 of the declaration, except that they said they had no knowledge that it was the duty of the plaintiffs, or one of them, once a day to visit the sick prisoners, and inspect the quality of the food cooked and uncooked. They admitted the publication on the 24th March of the words set out in paragraph 3 of the declaration, but denied the other allegations in the said paragraph. They said that the words complained of were not published maliciously, they were published *bona fide* in the public interests, and by way of legitimate public comment and criticism upon a matter of great public concern in one of a series of articles properly published in the "Times," respecting the administration of certain public gaols in this colony, of which the Wynberg Gaol was one. They further said they were privileged, and that their statement did not support the plaintiff's action. They denied the allegation as to damages.

On this, the plaintiffs excepted to the plea on the ground that the same was bad in law, and offered no defence to the claim of the plaintiffs.

Mr. Upington (for the exceptors).

The defendant company admit that it was part of the duty of the plaintiffs to superintend the floggings in the gaol. They do not plead justification, and unless they do so their plea is bad. This is no question of public comment. See *Upington v. Solomon* (Buch. 1877-260).

[Buchanan, J.: That was before the passing of Act 46 of 1882.]

Yes, but it is the leading case as to newspaper privileges. See particularly the judgments of the Chief Justice (p. 260), and of Stockenström, J. (p. 283); see, also, *Payne v. Sheffield* (2 E.D.C., 166), particularly the judgment of the Judge President. This judgment clear-

ly distinguishes between the imputation of acts and comments on acts. A newspaper has no more right than a speaker to impute a crime; either may comment on crime. Here the exceptors are charged with a crime committed against a particular individual in the hospital. If a newspaper were allowed to make charges of this kind nobody would be safe. They have no special privilege. It is no defence to say that they believed the charges, or that they are fair comments. The only possible plea would be that of justification. *Odgers* (p. 35) citing *Lefroy v. Burnside* (4 Irish L. Rep., 465, 466). I submit that the plea is bad.

Mr. Schreiner, K.C. (for the respondents): It is difficult to understand the object of this exception. We have not the plaintiffs in view, and there is no special mention of them. The article only says that a man had been brutally flogged, and afterwards shamefully neglected at some time or other.

[Buchanan, J.: Do you intend to prove these facts?]

Oh yes, as against the gaol, but not against the plaintiffs. We contend that we are quite justified in commenting on a system.

[Buchanan, J.: Do you say your plea admits that these words are true?]

Yes, paragraph 2 of the plea denies all allegations of paragraph 3 of the declaration, save as to publication of the words; we deny, therefore, that the words were either "false," "malicious," or "defamatory." But we cannot admit all the statements and innuendos of the declaration. The furthest we go is to say that for days this unfortunate man did not see a doctor. The plaintiffs say that it was their duty to see him every day; but we do not know that. We are quite willing to add to our plea that the allegations we have made are true both in substance and in fact. I quite admit that legally speaking newspapers enjoy no wider privileges than anybody else, but in practice juries usually allow greater latitude to them than to other people. See *Odgers* (p. 33). The plaintiffs have shown themselves far too sensitive. Suppose that some accusation were made against (let us say) the Colonial Office, would every man in that office be justified in at once running for a summons? The givemen of libel is malice, *Botha v. Brink* (Buch. 1878-118), and the presumption as to malice is rebutted by the fact that we commented on the management of an institution, and not on the conduct of individuals. *Res ipsa loquitur*. As to the judgment of Stockenström, J., in *Upington v. Solomon*, I cannot find the doctrine therein stated endorsed in the same general terms by any other authority. If comments on a public institution are made *bona fide*, it is not neces-

sary to prove every minute circumstance. As to the distinction between "privilege of the occasion" and "privilege of the words," see *Odgers* (p. 33).

[Buchanan, J.: Do you say the words are true?]

We deny that they are false.

[Buchanan, J.: Is that sufficient according to the rules of pleading?]

I submit it is, and that the exception should be overruled, with costs.

Mr. Upington was not heard in reply.

Buchanan, J.: The defendant's newspaper published certain allegations regarding the conduct of public officials in the management or control of the prisons of the Colony. Among these allegations were certain statements charging the plaintiffs with distinct acts of misconduct, and on these charges this action was founded. The declaration averred that the charges made were false, malicious, and defamatory. The plea simply denied this averment, and did not say that the charges were true. I have not now to deal with the question of privilege, but only to decide as a question of pleading, whether the plea properly raises the issue which the defendants wish to have tried. Counsel admits that the defence is one of justification, and that the defendants intend proving the truth of the charges. That being so their plea should distinctly and in terms raise that issue. This it does not do, and the exception will therefore be allowed, with costs. Defendants, however, will have leave to amend their plea.

Exception allowed accordingly, with costs.

[Plaintiffs' Attorney: D. Tennant; Defendants' Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

TRIAL CAUSES.

DE WET V. BLOOM. { 1904.
July 20th.

Mr. W. P. Buchanan (for the plaintiff) moved for judgment in terms of a consent paper. The action arose out of a sale of property, and plaintiff sought an order for payment of £2,500 as an instalment of the price and the

passing of a mortgage bond for £6,500 and interest for the balance, or, alternatively, an order for cancellation of sale.

Judgment in terms of consent paper.

KARRIEM V. HARRIS.

{ 1904.
July 20th.
Oct. 26th.

Broker—Shares—Cover—Damages.

The plaintiff bought certain shares in companies through the agency of the defendant, a broker, the arrangement between them being that the defendant should retain the scrip until the price was paid, and that in the meantime, if the market price fell, the plaintiff should pay to the defendant the difference as "cover." The price fell, and the plaintiff from time to time paid sums as "cover." The price having fallen still lower, the defendant demanded further "cover," and as the plaintiff did not pay it, the defendant sold the shares under Stock Exchange regulations on account of the plaintiff.

Held, that the defendant, although bound to account for the sums received by him, was not liable in damages as for an illegal sale of the shares.

This was an action brought by Mohamed Karriem, an Indian general dealer, of Cape Town, against Elias Harris, stock and share broker, Cape Town, to recover certain cover money paid upon share transactions, and also damages in the sum of £1,000.

Defendant stated that he was unable to appear by counsel, as he had given notice of his intention to surrender his estate. He added that his principal witness, Mr. Woodhead, could not attend through illness.

Mr. Upington said that a plea had been filed, and on the 12th inst. a letter was received from Messrs. Tredgold and Co., who had been attorneys to the defendant saying that they had withdrawn from the case, defendant having advertised his intention to surrender.

[De Villiers, C.J.: What effect has the insolvency on the action?]

Mr. Upington said he believed the effect was to stay execution.

The declaration set out that in 1902 plaintiff and defendant entered into an agreement whereby the defendant agreed for remuneration to purchase for and on behalf of the plaintiff such stock or shares as the plaintiff should from time to time authorise him to buy, and that it was a condition of the said agreement that upon such purchase of stock or shares as aforesaid the plaintiff should deposit cover money. On the 5th September, 1902, defendant purchased for plaintiff certain 100 shares known as Coal Trusts for £387 10s. On the 9th September defendant purchased 200 shares known as Main Reefs for £500. Plaintiff duly deposited with the defendant from time to time cover amounting in all to £436 11s. 10d., and it thereupon became the duty of the defendant to hold the said shares for and on behalf of the plaintiff until instructed to sell or otherwise dispose of the same. On the 6th April the defendant wrongfully, unlawfully, against the wish of the plaintiff and in breach of agreement sold the shares for £196 5s. and £285. The said shares had since greatly increased in value, and could have been sold at a profit. Plaintiff prayed that the defendant be ordered to repay to him £436 11s. 10d. paid as cover money, or, in the alternative, for the said sum as damages, and £1,000 additional damages.

Defendant, in his plea, said he was a dealer as well as a broker; he denied that the shares had increased in value, and could have been sold at a profit. He agreed to hold the shares in accordance with the rules and usages of the Cape Town Stock Exchange. He gave the plaintiff notice in April to take delivery of the said shares, and plaintiff failing to do so, he caused the shares, in accordance with the agreement and the rules of the Exchange to be sold by the secretary. He prayed that the claim be dismissed. In reconvention, he claimed a sum of £87 5s. in respect of the said shares. The shares only realised £481 5s., and the total sum that had been owing to him was £568 10s.

The replication of the plaintiff denied that an agreement was entered into subject to the rules and usages of the Exchange or that the shares were held in accordance with the rules and usages of the Exchange. For a plea in reconvention, he craved leave to repeat the allegations contained in the declaration.

Mr. Upington was for the plaintiff; defendant appeared in person.

Mahomed Karriem (the plaintiff) said he had been in Cape Town nine years, and had carried on business as a general dealer. He arranged with Harris that he should buy shares on his behalf. An Indian named Gaffoor spoke for him. The arrangement was that Mr. Harris should buy shares for witness, and that he should deposit cover. If the shares

went down Harris was to hold them for him, and witness from time to time was to pay sums in the way of cover. Nothing was said about the rules and customs of the Stock Exchange. Witness was also to pay interest at the rate of 8 per cent. on the purchase of shares. On the 5th September, 1902, Harris bought 100 Coal Trusts for £387 10s., and on the 9th September 200 Main Reefs for £500. Witness had from time to time paid cover amounting in all to £406 11s. 10d. On the 4th April, 1904, he received a letter from Harris threatening that unless he took up the stock he would sell it. Witness saw the defendant about more cover; he did not agree to the sale of the shares on the Stock Exchange. At that time the shares were rising. On the 6th April he received another letter from the defendant, saying that he had sold the shares on High 'Change, the Main Reefs at 28s. 6d. and the Coal Trusts at 39s. 3d. On the 19th April he instructed his attorneys, who sent a demand for return of the cover and £1,000 damages. After the shares had been sold, they continued to go up in value.

Cross-examined by the Defendant: He did not agree that the shares should be sold when defendant thought fit, according to Stock Exchange rules. He did not sign the document (produced), vesting the defendant with authority to sell on these terms.

Defendant said he was willing to arrange for the shares in dispute to be bought back at the price at which they were sold on High 'Change, and to be delivered to the plaintiff. He again mentioned the absence of Mr. Woodhead, who was a material witness.

[De Villiers, C.J.: Mr. Woodhead appears to be a most important witness. When will he be able to attend?]

Defendant said he did not think he would be able to appear within a week.

Abdol Gaffoor stated he took plaintiff to Mr. Harris, as the latter asked him to do so. Witness took several Indians. Harris said the arrangements with them were to be the same as with witness. These arrangements were that the men should have a call on the shares for a certain sum. Witness was present when Karriem entered into negotiations with defendant.

[De Villiers, C.J.: How long was this agreement to last?—As long as Karriem could pay the cover.]

Cross-examined: Defendant courted witness's custom. Witness was not satisfied with the way the business was done. The plaintiff had the same arrangements as witness. Witness was decreed by defendant.

Mr. Harris: When I got judgment against you, you disappeared, and have not since been seen, although I have searched high and low for you. I had to make my living, and, besides, I was summoned here to-day to give evidence.

Why didn't you defend your case?—Because I was advised not to.

[De Villiers, C.J. (to defendant): What do you say the agreement was?]

Defendant: The circumstances were as follows: The plaintiff was brought into my office, and said he wanted to buy shares. The man who brought him in had done large transactions with me. I told him I could buy or sell shares for him, as I was a jobber, as well as a share-broker. I said, "You must pay cover, and at any time that you do not do so, I can sell them." Unfortunately, that regulation was not on the brokers' notes. The plaintiff agreed to that. I called on him for £100 cover, but he could not give it. My clerk dealt with him, and he can give evidence on that point.

Charles Howard Greenway, secretary of the Stock Exchange, handed in the bye-laws of the Exchange, and added that they were being revised, and that a new book was at present being compiled. On the instructions of defendant, witness, on the 7th April, sold 100 Coal Trusts at 29s. 3d., and 200 Main Reefs at 28s. 6d. Since then these shares have been up and down. The highest price for Coal Trusts in the meantime was 51s., buyers, and 52s. 6d., sellers, on the 4th May, but there were no sales, and Gold Reefs, 38s. 6d. on the 12th May. It was necessary under the bye-laws that all brokers' notes should bear "Stock Exchange Rules" on them. At the words "Subject to Cape Town" the present time Coal Trusts were about 39s. or 40s., and Main Reefs about 30s. 6d.

[De Villiers, C.J.: What price did he buy at?]

Mr. Upington: I believe 87s. 6d.

[De Villiers, C.J.: The defendant is quite willing to give the plaintiff back his shares.]

Mr. Upington: I submit the defendant should pay the highest price quoted since buying.

Cross-examined by Mr. Harris: Witness had considerable knowledge of Stock Exchange business. As he did not know Mr. Harris's agreement with plaintiff, he could not say if he had treated him well or not.

Defendant said he had considerable difficulty with the plaintiff, as he would not sell when he advised him to do so. He was willing to buy the shares back, and give them to him.

Plaintiff (recalled) said he would not have sold the shares without making a profit out of them.

Elias Harris, the defendant, stated that if the plaintiff had been in a position to pay cover he would not have sold the shares. Instead of witness owing plaintiff money, plaintiff owed witness money. Witness knew very little about the case.

Cross-examined by Mr. Upington: Witness was present when the agree-

ment was entered into. The total amount of cover paid was £436. A demand was made on plaintiff to pay cover. Witness did not demand it. Woodhead did it. Witness was financially embarrassed at the time. He could have got the shares "carried" elsewhere for him. Mr. Benjamin was not a partner with witness.

De Villiers, C.J., said it was impossible to deal out justice in the case without Woodhead, as he seemed to be a most important witness.

Mr. Upington said that if his lordship made such an order he would have to agree to it. If such was done, it would mean that his client's rights would go.

[De Villiers, C.J.: It is all the same.]

Mr. Upington: But he will have the judgment of the Court.

The case was allowed to stand over until next term for the evidence of Mr. Woodhead.

Postea (October 26th).

Charles W. Woodhead stated, in reply to the defendant, that he had been his clerk for 13 years. He wrote to plaintiff on the Saturday before Easter Monday, telling him he would have to take up his shares unless he could give cover. Witness interviewed him, and told him he wanted £100 cover. Plaintiff offered £60 cash on the Monday following, and a bill for £50, payable in 30 days. Witness said that was useless, as the bank was pressing Mr. Harris. The firm had always had trouble with plaintiff about cover. He always demanded heavy cover from the plaintiff, because the man who introduced him let the defendant down for £2,000. Defendant's business was always carried out under the rules of the Stock Exchange.

Charles Twycross, chairman of the Cape Town Stock Exchange, stated defendant had been a member of the Cape Town 'Change from its formation up to a couple of months ago. It was quite common for brokers to carry stock for clients with cover. If a man did not take delivery when called upon to do so, the broker was supposed to sell out against him.

Cross-examined: Witness said that even where cover was given, only one hour's notice to take over shares was necessary.

Are you quite sure that 30 days' notice is not required by your rules?—One hour's notice is all that is necessary.

I am going to put the question to you in this way. We will assume that there is a contract between a client and a broker. The client intends to have a number of transactions with him. He says: I am going to deposit a certain fixed sum of £50 cover. You are to retain these shares in your possession until asked by me to sell. I am prepared, whenever called on by you, to pay the difference in the market value of shares. That is not an ordinary

Stock Exchange transaction?—I must say that we recognise transactions according to the Stock Exchange rules. No member can come to us and excuse himself for not complying with the Stock Exchange rules.

De Villiers, C.J.: The agreement alleged by the plaintiff in the present case was that the defendant agreed for remuneration to purchase certain stock and shares, and that on the purchase of stocks or shares, the plaintiff should deposit with the defendant a certain amount of cover money, and that the defendant should retain the stocks and shares for the plaintiff, until duly instructed by him to sell or otherwise dispose of them. The plaintiff, in the meantime, to supply cover money. I am quite satisfied from the evidence that the plaintiff must have misunderstood that any transaction between them was to be subject to Stock Exchange rules, but the difficult question to decide, if it were necessary to decide it, is whether the Court would be justified in holding that where contracts such as that alleged in the present case were entered into, the broker was or was not bound to keep the stock for a requisite time, and not to sell it, without giving reasonable notice to the client that he must either pay the cover or else take back the shares. Mr. Twycross has given evidence as to the rules of the Stock Exchange, but under the view that I have taken of the facts of the case, it is not necessary to consider them, because I am satisfied from the evidence given by Mr. Woodhead that an opportunity was given to the plaintiff before the stock was sold to pay the cover. It is said that that was not pleaded, but if it were necessary in that case, I could allow the plea to be amended. The evidence given by Mr. Woodhead proved that the plaintiff did receive notice to bring in cover or his shares would be sold, and as he did not bring it in, his shares were sold on the 6th of April. I am not satisfied with the evidence given by the plaintiff. His evidence with regard to the signature on the agreement was very unsatisfactory. I am inclined to believe that the plaintiff should not succeed in his action. There is a claim in reconvention. The defendant said that, as the estate has been assigned, he was not entitled to claim in reconvention, and in the absence of any proof that he was authorised by the assignees of the estate to receive the money, I will make no order on the claim in reconvention. I wish to say I would not encourage any action being brought by the assignees against the plaintiff, because there are certain circumstances that might justify the Court in believing that, although the plaintiff was not entitled to recover from the defendant, that the defendant was

not entitled to recover from the plaintiff either. Therefore, there will be absolute from the instance on the claim in reconvention, and as for the claim in convention, there will be judgment for the defendant, with costs.

[Plaintiff's Attorneys: Reid and Nephew. Defendant's Attorneys: Tredgold, McIntyre and Bisset.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ARONSTRAN V. MAISEL BROS. } 1904.
AND CO. { July 21st.

In this matter Mr. Gardiner appeared for the plaintiff, and Mr. M. de Villiers was for the defendants.

Mr. De Villiers applied for a postponement until Monday next, and explained that the defendant was not ready, as he had only just returned from Johannesburg, where he had been engaged in litigation. They offered to pay the costs of the day.

Mr. Gardiner: Plaintiff is to blame for the postponement. He applied for attachment *ad fundandam jurisdictionem*. Then he asked to have it discharged, and said he did not mean to go on with the case. We oppose any postponement.

De Villiers, C.J., said that, unless the case were heard to-day, it would have to stand over till next term.

Mr. De Villiers: In that case I shall have to retire from the matter.

After hearing counsel further,

De Villiers, C.J., said that it might, perhaps, be possible to set down the case for Wednesday.

The case was ordered to stand over till Wednesday next, on condition that the defendant pay the costs of the day.

CAPE TOWN TOWN COUNCIL } 1904.
V. COLONIAL GOVERNMENT { July 21st.
AND OTHERS.

Jurisdiction — Imperial Government—Exception.

In an action brought by the Cape Town Town Council against Colonel H., as repre-

sending the Secretary of State for War, for an order compelling him to remove certain fences placed by him around certain land claimed by the plaintiffs as a public recreation ground, the defendant excepted to the jurisdiction.

Held, that as the action was in reality against the Imperial Government, and as there had been no direction of His Majesty that right should be done in the matter, the Court had no jurisdiction.

This was an argument upon an exception taken by the third defendant, Colonel Hoskyns, Royal Engineers, as representing the Secretary of State for War.

The action refers to land forming part of Green Point Common, and situate in the neighbourhood of Mouille Point and Fort Wynyard. The plaintiffs are the Town Council of Cape Town, and the defendants are: (1) The Colonial Government, (2) the Table Bay Harbour Board, and (3) Colonel Chandos Hoskyns, Commanding Royal Engineers, as representing His Majesty's Secretary of State for War. The plaintiffs claim:

(a) A declaration as to the rights of the Town Council and the defendants in respect of the laboratory and the plaintiff Council making no claim in respect of the said portion of land and laboratory, and the plaintiff Council making no claim in respect of the laboratory and the small portion of ground adjoining it, which were actually granted in 1840, nor in respect of the land occupied by Fort Wynyard.

(b) An interdict restraining the first defendant from granting any portion of the said land, save as above, to either the second or third defendant, or from purporting to reserve the said land, or to give the second or third defendants any rights over the same.

(c) An order on the second defendant (1) to quit and deliver up the portion of the said land of which it is in occupation, (2) to remove all buildings and other obstructions therefrom and the fencing around the same, (3) to fill in all excavations made by it thereon, (4) to build up and restore the road which it has encroached upon.

(d) A declaration that the said Council and the inhabitants of Cape Town are entitled to the free use of and access to the foreshore encroached upon by the second defendant, and an interdict restraining the second defendant from interfering with the same, or from obstructing or trespassing on the foreshore.

(e) An order compelling the third defendant (1) to remove the fence placed by him or under his authority round portion of the said land, (2) to allow all roads across the said portion to remain free and unobstructed.

(f) As against the first and second named defendants, £100 damages for trespass.

(g) As against the third defendant, £100 damages for trespass.

(h) Alternative relief.

(i) Costs of suit.

The present exception was brought by Colonel Hoskyns, on the ground that, without submission or consent on the part of the Secretary of State for War, the plaintiffs were not entitled to maintain an action against him as an officer of His Majesty's Government.

Mr. Schreiner, K.C. (with him Mr. Gardiner) for the exceptor; Mr. McGregor for the respondents.

Mr. Schreiner: The cases of *Palmer v. Hutchinson* (6 P.C., 65 and 45 L.T., 180), and *Fraser v. Stewerwright* (3 Juta, 375) show that the Imperial Government cannot be sued without its consent. My client represents the Secretary of State for War, and is sued purely in that capacity. The plaintiffs' only remedy against him is to proceed by way of Petition of Right.

Mr. McGregor: It is quite true that Colonel Hoskyns represents the Imperial Government, and I cannot question the authority of the cases cited. There is, also, the case of *Binda v. Colonial Government* (5 Juta, 284). At the same time we cannot consent to the withdrawal of the third defendant, because the other defendants might object, and it might prejudice our case as against them. The Harbour Board is concerned with the lower portion of Green Point-road. The case of *Graham v. Commissioner of Works* (85 L.T., 96) has an indirect bearing on the present case. We must submit should the Court order the third defendant to be struck out, but we cannot consent to such a course, as we wish to preserve the record intact. If the Crown gave an order that "right be done," probably execution would not issue, but right would be done by means of funds provided by the Colonial Government. It is, however, most important that the first defendant should be interdicted from giving title, and that the Harbour Board should not be allowed to continue to make excavations at the foreshore. As to joinder of parties out of the jurisdiction in cases of contract, see *Darcy* (p. 232). The principles he there states as to contract apply *a fortiori* in cases of tort.

[De Villiers, C.J.: Why do you sue the Secretary for War?]

The military have a fort and a lavatory on the ground, and they have also been using and fencing land between the road and the sea. The question of

the user of that land is the really important point.

Mr. Schreiner asked that the name of the third defendant (the exceptor) should be struck out of the record.

[De Villiers C.J.: That matter is not now before the Court. Of course all natural consequences of upholding the exception will follow.]

De Villiers, C.J.: There are three defendants in this case, viz., the Colonial Government, the Table Bay Harbour Board, and Colonel Hoskyns, as representing His Majesty's Secretary of State for War. There are separate prayers in the declaration against each of the three defendants. As against the first defendant there is a claim for a declaration of rights, and for an interdict restraining the first defendant (that is the Colonial Government) from granting any portion of the land in dispute to either the second or third defendant. The claim as against the second defendant is to quit and deliver up the portion of the said land of which it is in occupation, remove all buildings and other obstructions therefrom, and the fencing around the same, fill up all excavations made by it thereon, and to build up and restore the road which it has encroached upon, and a declaration that the Town Council and the inhabitants of Cape Town are entitled to the free and unobstructed use of and access to the foreshore encroached upon by the second defendant. With those two claims there is no necessity for dealing at present. The claim against the third defendant (Colonel Hoskyns, as representing the Secretary of State for War) is for an order compelling him to remove certain fences placed by him or under his authority round portions of the said land, and to allow all the roads across the said portion to remain free and unobstructed. If this had been an action against Col. Hoskyns personally, there would have been no ground for the exception, but it is an action against him in his capacity as representing His Majesty's Secretary of State for War, and the question arises whether this Court has jurisdiction. In my opinion, the decision of the Privy Council in the case of *Palmer v. Hutchinson*, which was an appeal from the Supreme Court of Natal, is conclusive in the present case. It was there held generally that jurisdiction over all Her Majesty's subjects does not include jurisdiction over an officer of the Imperial Government as representing His Majesty, and that decision was subsequently followed in this Court in the case of *Fraser v. Sivewright*, where the matter was fully discussed, and the rule clearly laid down that the Court has no jurisdiction without an order of His Majesty's Government that right should be done in an action brought against an officer of the Imperial Government in his official capacity. That decision appears

to me conclusive in the present case, and, therefore, the exception taken by the third defendant to the jurisdiction of the Court must be allowed, with costs.

Schreiner, K.C., asked whether the Court would not order that the prayers (c) and (g) be struck out of the claim of the plaintiff Council.

De Villiers, C.J.: That will follow. At present I can only deal with the exception. Any necessary results of allowing the exception will follow.

[Plaintiffs' Attorneys: Van Zyl and Buisinné; Attorneys for Exceptor: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

HODGSON V. ESTATE { 1904.
HODGSON. { July 21st.

This was an application for an order setting aside an interdict restraining the applicant from passing transfer of two farms in the division of Frasersburg.

A rule *nisi* had been granted on the 14th June, and leave was granted to the respondent to move to have it set aside. The applicant was indebted to the estate of the late George Hodgson, who was his brother, in the amount of £3,380 on a certain mortgage bond, and in the sum of £2,151 18s. 6d. The applicant was the registered owner of the two farms, and the petitioners in the first instance stated that he had sold one of the farms for £400 and the other for £5 to his son, and they alleged that those prices were far below the value of the farms, and they further believed that if the farms were divided up it would greatly reduce the farm Grootfontein. The deceased, in his will, left an injunction that no claim was to be made until three years after his death, provided the interest was paid. Now the present petitioner, Augustus Frederick Hodgson, applied to have that interdict set aside, and he made affidavit to the effect that he had improved the farm Grootfontein to the extent of £600. The estate of his brother held his life policy, which would be worth £1,000. He sold the two properties for the purpose of reducing his indebtedness to his brother's estate. In 1902 he paid £500, but a drought intervened in 1903 and 1904, and nothing further could be paid. The applicant's attorney had written to the respondent's attorney, that the applicant was still pre-

pared to pay to the executors the proceeds of the sale in order to reduce his liability to the estate, but there was no answer.

The answering affidavit of Moses Hollander, an adjoining farmer, set out that if the farm Moordenaarsgat and Wittephen were sold, the farm Grootfontein would be reduced in value by £1,000. The farm Grootfontein derived water from the other farms. Johannes Hodgson, son of the deceased, further testified to the depreciation that would result from a division of the farms.

Mr. Burton (for the applicant); Sir H. Juta, K.C. (for the respondent).

Counsel having been heard in argument on the facts,

Buchanan, J.: The executors of the late Mr. Hodgson obtained an interdict on an *ex parte* motion restraining the respondents from transferring a certain piece of landed property. The ground upon which this interdict was granted was that the executors representing the deceased person were creditors for a large sum of money, and that the debtor was disposing of certain of his landed property to his son at a very low value. On the face of the application, there were ample reasons for granting this interdict, and it was granted pending further action, with leave to the respondent to move to have it set aside. This interdict was granted on the 14th June last, and up to the present no further action had been taken. The respondent now moves to set aside the interdict, and on the fuller information before the Court it appears that the principal debt is secured by a mortgage bond on the farm Grootfontein. The applicant does not propose to deal with Grootfontein now; what he wishes to sell is the place Moordenaarsgat and a small piece of land named Wittephen. The deceased advanced to the applicant the purchase price of Moordenaarsgat, and, though the deceased restricted his executors from taking any action for the recovery of this money for a period of three years after his death, still that restriction must be read in equity as meaning on condition that the owner of property does not dispose of the property for which the debt was incurred. He has now sold it, and I think he is entitled to sell the property not specially hypothecated, but he can only do so in fairness to the estate by paying into the estate the amount advanced to him to buy this property, and that was £432. The order of the Court will be that the application will be granted, and the interdict be set aside on payment to the executors of the sum of £432, and any interest due, unless an action is brought before the end of next term by the executors, and should such action be brought, costs will abide the result, failing which the applicant should pay the costs, because the inter-

dict was necessary under the circumstances.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Moore and Son.]

ESTATE RHODES V. HARTIGAN AND OTHERS.

Landlord and tenant—Rent—Collateral agreement.

This was an application on notice of motion for an order on behalf of the executors of the estate of the late Cecil John Rhodes, calling on the respondents, Alfred Henry Hartigan, Harold G. Baker, and Leslie Stewart, carrying on business at Wynberg under the style of Bamboesvlei, Limited, to show cause why they should not be evicted from the farm Bamboesvlei. The affidavit of Gerald Edward D'Arcy Orpen, a member of the firm of Messrs. E. R. Syfret and Co., duly appointed agents of the executors of the estate of the late Cecil John Rhodes, set out that in January last, plaintiff (Sir Lewis Lloyd Michell), through his firm, as his duly appointed agent, let to the defendants the farm Bamboesvlei, and the defendants took possession the same month under the obligations in the lease. The rent was stipulated at £20 a month, payable in advance on the first day of each month, but the defendants had wrongfully and unlawfully failed to pay on the due dates rents which became due on the first of March and April respectively. It was a further term of the agreement that on failure by the lessees to pay on the due dates, the lessor should be entitled to terminate the tenancy, and to take immediate possession of the property. On the 19th May, they were ordered to give up possession, but they refused to do so.

The answering affidavit of Henry Barker set out that on behalf of himself and the other partners he paid the first half-month's rent in advance. One of the considerations of their taking over the farm was that the petitioner guaranteed that a pump for drawing water from a well should be put in proper order, and he promised to do this forthwith. The petitioner did not put the well in order until the 13th March last. At the end of February the petitioner agreed, after representations had been made to him about the worthlessness of the farm without water, that the £10 already paid should count as rent to the end of February. On the 10th April the pump broke down, and respondents were unable to get any water. Through the want of water, they had lost through grazing £60 a month. On the 29th April E. R. Syfret obtained an interim interdict against his firm restraining them from removing any property on

the farm, but for some reason or other he had not moved to have the rule made absolute. On the 17th June Sir Lewis Lloyd Michell summoned them for £40 rent due, and for an order of ejectment, but he had failed to proceed with his action. Through the failure to put the pump in order, they had lost a good connection, and they were desirous of proceeding with the action.

The replying affidavit of Gerald Edward D'Arcy Orpen denied the allegation as to the conditions mentioned. It was merely as an act of grace that the £10 was counted as a settlement until the end of February, and that the pump was put in order. It was owing to the respondents' carelessness that it broke down again.

Mr. Close for the applicants; Mr. J. E. R. de Villiers for the respondent.

Counsel having been heard in argument on the facts,

Buchanan, J.: This is an application for an order of ejectment of the respondents from the property of the estate now vested in the executors. The respondents were put in possession of the property under the terms of the letter of the 14th June, which terms were accepted unconditionally by the respondents. Among these terms were that the rent was to be paid monthly in advance—£20 a month. There is also a condition that the lease will be terminated on two months' notice on either side. £10 rent only has been paid, and though repeated demands have been made, no further payments have been made. The applicants now wish to eject the tenants, and the only defence set up by them is founded on an alleged collateral agreement that the applicants would put a certain pump in order. This is denied by the applicants, but from the evidence it is clear in February this pump was properly put in order so that this ground of defence has been removed. There is absolutely no reason why possession should not be given up, and an order to that effect will be granted, with costs. If the respondents have any claim for damages, they can bring their action for these damages. The applicants do not now claim anything beyond an order of ejectment, and the application will be granted, with costs, possession to be given on or before the 28th inst.

[Applicants' Attorneys: Dold and Van Breda: Respondents' Attorney: E. J. Sydney.]

VEERASAMY V. SUBBAYA { 1904
AND ANOTHER. / July 21st.

Trust funds—Religious purposes
—Right of subscribers to an account.

This was an application for an order compelling the respondents to furnish

a full account supported by proper vouchers of certain moneys expended by them in connection with certain funds collected for the erection of an Indian Temple at Port Elizabeth.

The affidavit of the applicant set out that he was an Indian shopkeeper, and resided at Burghersdorp. During 1902 the respondents visited various towns of the Cape Colony for the purpose of collecting money for the erection of an Indian Temple at Port Elizabeth. He was a member and a subscriber to the said Temple, for which a committee to administer the funds had been appointed at Port Elizabeth. Between March, 1902, and December, 1903, he subscribed to the funds of the said Temple £65 13s., and the money was paid to the respondents, who had received other large sums of money. The respondents had assumed control of the money, but he was unable to obtain any information from them. Certain members had formed themselves into what was now called the Indian Hindoo Benefit Society, and defendant was making the application in their interest, as well as his own, for the purpose of having the erection of the Temple proceeded with. He had been informed, and verily believed that the said respondents were about to leave this colony, and it would be in the interest of all concerned to have trustees appointed to receive and administer the funds. The respondents had promised to render an account, but they had not done so. The affidavit of Hubert Pagden, attorney, of Port Elizabeth, set out that the second respondent was requested to furnish certain information, but he failed to do so.

The affidavit of the first respondent, the vice-president of the society, admitted collecting the subscriptions, but denied that the applicant was a member of the Indian Temple. On the 30th July, 1902, a meeting of Indians was called at Port Elizabeth, when a president, vice-president, secretary and treasurer, and trustees were appointed for the purpose of administering the funds. No further election of officers had taken place since that date, and the same parties still held office. The second defendant was never appointed as a vice-president. He admitted that the president had left the Colony on a holiday, but a meeting had been called to appoint a substitute. He denied that the second-named respondent or himself had assumed entire control of the money. The affidavit of Daniel Brown, of Port Elizabeth, set out that his firm acted on behalf of the mortgagees of the Temple. The applicant had been ruled out of order at a meeting in his office by the members of the society, when he brought up the question of the administration of the money. He was informed that a general meeting would be called to discuss the matter.

Mr. McGregor for the applicant; Sir H. Juta, K.C., for the respondents.

Counsel having been heard in argument on the facts,

Buchanan, J.: The petition filed in this case has two prayers. The first is that the respondents should be compelled to render a full account, supported by proper vouchers of all moneys received and expended by them and by the committee, being funds collected from applicant and others for the erection of a certain temple. It would appear that in 1902, subscriptions were collected from the Indian community throughout the Eastern Province towards the building of a temple for religious services at Port Elizabeth. The applicant subscribed to these funds, and as such subscriber he now makes this application. I have no doubt whatever that the Court has full authority in cases like this to require anybody who receives trust funds to account for these funds if necessity for such a course should arise; but before the applicant can call on the respondent to account in this case two things at least are necessary. One is that the applicant has a right to make this demand; and, secondly, has the conduct of the respondent been such as to render such an accounting necessary? It is alleged, and not denied, that the applicant, though a subscriber to the fund, was not a member of the church. I am not prepared to say that the applicant would be precluded from having an enquiry into the spending of a fund to which he had subscribed on that ground alone, if there was anything to show that the money subscribed by him has been improperly dealt with by the respondent, but the affidavits fail to support a charge of misconduct. On the contrary, it is alleged that in July, 1902, when the first meeting of the subscribers of the church members took place, proper officers were elected and appointed by the church to carry out the object for which the funds were collected. One Modeley was appointed secretary and treasurer, and certain other members were appointed trustees, among whom was one of the respondents. Up to October, 1903, Modeley continued to act as secretary and treasurer. Being then about to leave for India, a meeting of the church and congregation was called, and to this meeting Modeley, as treasurer, submitted an account of his administration, and those interested signed a certificate that they were thoroughly satisfied with the account up to that date. One of the respondents, who is vice-president of the church—the other was not an office-holder,—seemed thereafter to have acted as secretary and treasurer in the absence of Modeley. He received certain moneys, and he called a meeting which was held on the 4th July last, when he, too,

rendered his account to the church of the moneys received and expended by him. This account was referred to Mr. Holton, a clerk in the office of Attorney Brown, and Mr. Holton has gone into these accounts rendered by the respondent, and he is thoroughly satisfied as to their correctness. At this meeting on the 4th July the respondent resigned office. A new set of officers was appointed to the church, and a new treasurer and new trustees. These new officials of the church are now in office, and none of them seem at all dissatisfied. The applicant wishes the respondents to account to him for everything received by them. His complaint is that he himself has not been furnished with an account. But I fail to see any duty on the respondents, after what they have done, to furnish the applicant with an account. The applicant is not a member of the church, and he did not have a right to attend the meetings of the church unless, indeed, he had grounds for supposing there had been fraud or mismanagement of the funds to which he contributed. Under the circumstances, the Court will not order any further investigation into the accounts. The next prayer of the applicant is that the respondent should be ordered to place any balance which might be found due in the bank, pending the appointment of proper trustees. It has been shown that at the present time proper trustees have been elected. Therefore the second prayer of the petition has been complied with, and there is no necessity for such an order. After hearing all the affidavits, I see no ground why an order should be made. Application refused accordingly, with costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondents' Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

BUDGE V. BUDGE'S EXECUTORS. 1904.
TORS. (July 22nd.

Executor—Account—Joint estate
—Inheritance—Discharge—
Restitutio in integrum—Mistake.

In an action brought by the applicant against the executors

of his parents' joint estate, the Court declared that he was entitled to one-eighth of such estate, and reserved leave to him, in case he should not come to a settlement with the executors, to apply for an order, that the joint estate be realised for the purpose of ascertaining such eighth share. The applicant did come to a settlement with the executors and accepted from them the sum of £1,000 in full discharge of his claim.

Held, that it was no longer open to the applicant to take advantage of the leave reserved.

Held further, that even if the matter had been reopened, or if the applicant had proceeded by way of restitution in integrum, the fact that he had given the discharge with full knowledge of all the facts would have disentitled him to relief in the absence of fraud or any other ground of relief.

This was an application on notice to the respondents that an application would be made pursuant to a judgment delivered in May, 1903, wherein the applicant, along with Mr. Steytler, as co-plaintiff, applied for an order calling on the respondents to furnish full particulars of the applicant's rights under the joint will of his father and mother (see 13 C.T.R., 307.) His parents made a joint will in 1866, in which the surviving spouse was to have a life interest in the estate. The mother died in 1874, and the father took possession of the whole of the estate. The father re-married in 1876, and made another will, revoking the previous one, and making a fresh disposition of the property. His lordship granted an order declaring the applicant entitled to an eighth of the estate, but reserved the right to give a further order thereafter, as to the realisation of the assets, and for the appointment of Mr. Steytler to jointly administer the estate. Now the applicant came to court in terms of the reservation referred to. The affidavit of the applicant set out that he was the eldest son of George Budge. A joint will was drawn up between his father and mother in 1866. His mother died in 1874, and there were eight children of the marriage. The original will stipulated that on his father's death one-half of the estate was to be paid out and the other half was to be retained to pay interest

to his wife, and on her death it was to be divided among the heirs. His father died on the 1st September, 1902, but he was not paid his share after his father's decease. Subsequent to the judgment in the Supreme Court, he accepted £1,000 as a settlement from his mother's estate, but he did not accept it as a full settlement from the joint estate.

The answering affidavit of George Runciman, one of the respondents, set out that after negotiations, the applicant, after demanding £1,500 and £1,200, finally accepted £1,000 in full settlement.

The answering affidavit of Mr. Steytler and Mr. Metcalfe, corroborated the affidavit of Mr. Runciman as to the applicant accepting £1,000 in full settlement of his share in the joint estate.

The replying affidavit of the applicant denied that he had signed away his rights. He also denied that he had been to the Deeds Office with Mr. Steytler. No balance-sheet of his father's estate was shown to him, and when he asked to see one, he was informed that he had nothing to do with it. It was only a couple of days previous to the trial that he had seen the balance-sheet, which declared the estate to be valued at £10,000, and that of his mother at £2,000. He knew that five of his brothers and sisters had been paid out by his father in his lifetime.

Mr. Burton was for the applicant; Sir H. Juta, K.C., for the executors testamentary in the estate of the late George Budge, and Mr. W. P. Buchanan for the executor dative in the estate of the late Emma Budge, and for the attorney, Mr. Metcalfe.

Mr. Burton: If the applicant is bound by his receipt clearly we are out of Court, but he says that he did not intend to sign away his inheritance for £1,000.

[De Villiers, C.J.: He may be entitled to bring an action for *restitutio in integrum*, but the Court has already made its order. Is there no possibility of the parties agreeing?]

Sir H. Juta: The matter is very simple. The applicant gave a clean receipt in terms of the order of Court, and now he wants to claim under the second will. He was put to his election and elected to claim under the first will.

[De Villiers, C.J.: In what capacity did Mr. Steytler write?]

He was one of the plaintiffs in the action, one of the executors dative.

[De Villiers, C.J.: You deny, Mr. Burton, that there was an election; then why was not the action proceeded with?]

Mr. Burton: There was an election, but the applicant knew nothing about the particulars of the joint estate, and no accounts thereof were ever submitted to him. In the applicant's favour it must be said that although Messrs. Steytler and Metcalfe may have thought

that they had made it clear to him that he was giving up his share of his father's he did not understand that. Months after he did not understand that. Months after he had signed that receipt he gave his attorneys £100 to prosecute a further claim; which sum was returned to him when his attorneys withdrew. I admit that the information we have received from Mr. Steytler and Mr. Runciman somewhat alters our position. The account of the father's estate shows £4,000, and that of the joint estate £10,000. Thus all the father could legally dispose of under the first will was £4,000. The widow gets £6,150, and the other heirs £1,800, and yet the applicant is expected to part with all his rights for £1,000.

[De Villiers, C.J.: The account must be incorrect.]

The two accounts appear to overlap. If it could be shown that the father acquired property after his wife's death, that would account for a great deal.

[De Villiers, C.J.: Practically you are asking us to re-open the whole account?]

Yes, I fear we do ask that.

[De Villiers, C.J.: What *prima facie* case can you show?]

The applicant says that he was never satisfied with the accounts of the first estate.

[De Villiers, C.J.: I suppose Sir Henry your contention would be that the father acquired property after his wife's death?]

Sir H. Juta: Yes.

Mr. Buchanan: That is also Mr. Steytler's position.

Sir H. Juta and Mr. Buchanan were not heard.

De Villiers, C.J.: I am clearly of opinion that it is no longer open to the applicant to take advantage of the right reserved to him by the previous judgment of this Court. The right reserved was to renew the prayer for an order that the assets of the applicant's parents' joint estate be realised for the purpose of paying his share of the inheritance, but the right was only to be exercised in case the parties did not come to terms as to the amount of the joint estate. In fact the parties did come to terms, and the applicant accepted from the executors of the joint estate the sum of £1,000 in full discharge of his claim thereon. The applicant now states that the discharge was given under a misapprehension, but I am satisfied from the affidavits of Mr. Steytler and Mr. Metcalfe that he fully understood the accounts that were rendered by the executors, and the nature of the discharge given by him. Even therefore if the applicant had been allowed to renew his prayer or had proceeded by action for a *restitutio in integrum* on the ground of mistake he would have failed in obtaining relief in the absence of fraud or any other ground of relief.

The present application must be refused with costs.

[Applicant's Attorney: G. Scanlon; Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

VAN DER MERWE V. EXECUTORS OF VAN DER MERWE. { 1904.
{ July 22nd.

Will — Legacy — Construction —
Direct substitution — *Fidei commissary* substitution.

Husband and wife, by will, bequeathed certain farms to their three sons subject to certain conditions, one of them being that the sons should show obedience to the testators during the lifetime of the latter. The will added that, if contrary to expectation, any of the three sons should die, the bequest should devolve on their respective sons, subject to the same conditions, including that of obedience to the testators.

Held, that a direct and not a fidei commissary substitution of the grandsons was intended.

This was a special case, stated in the following terms for the decision of the Court. It arose out of an action between Louw van Wijk van der Merwe, a minor, duly assisted by his mother and surviving natural guardian, Elizabeth Cornelia Louw van der Merwe, and Adrian Jacobus Louw van der Merwe, in his capacity as the executor dative in the estate of the late Francois Jacobus van der Merwe:

1. The plaintiff is the minor son of the late Francois Jacobus van der Merwe, of whose estate the defendant is the executor dative, and is also grandson of the late Schalk Willem van der Merwe, in his lifetime a farmer, and his late wife Anna Jacobsa van der Merwe (born Louw) who were married to each other with community of property, hereinafter called the grandparents.

2. By the mutual last will and testament in the Dutch language of the said grandparents, dated the 5th day of April, 1862, they bequeathed after the death of the survivor of them their places or farms called Lokenburg, Koer-demoefontein, Keizerfontein, and Menzies Kraal, all situated in the division of Calvinia, to their three sons named Schalk Willem Jacobus van der Merwe, Jacobus Nel van der Merwe, and the said late Francois Jacobus van der Merwe, for the sum of

seventy-five thousand Cape Guilders, on condition that the said three sons should show them all proper respect and obedience, should remain with them during the lifetime of both or either of them, should assist them, and should give them all the required help in their occupation, or otherwise the survivor of them should have the power to revoke this legacy and bequeath the same to the obedient sons.

3. A true copy of the said Will and Testament, and a correct translation thereof into the English language, are hereunto annexed, lettered "A" and "B" respectively.

4. The said Will and Testament further provided that, in case unexpected (onverhoopt) one of the said three sons, to whom the said four places or farms are bequeathed, after the death of both the said grandparents should come to change the temporal for eternal state (i.e., die), then the bequest of his share or their shares in the said four places or farms, should devolve upon and go over to their sons and the male line (geslacht) for a reasonable sum, who will then be bound and obliged to show the same obedience to the said grandparents till the death of the survivor of them, as has been defined in the proviso to the bequest of the said four places or farms to his or their fathers under forfeiture of the said legacy, for which purpose the said grandparents gave the survivor of them full right to revoke and annul the same by his or her will. The right, however, of the father in the bequeathed four places or farms shall not devolve to the male line (geslacht), otherwise than under the same conditions and provisions against a sale, exchange, or the placing of a stranger in possession or use thereof, as defined therein.

5. The said grandparents died without the said Will and Testament, i.e., the said legacy having been revoked or altered, leaving the said three sons them surviving.

6. Transfer of a third share in each of the said four places or farms, as owned by the said grandparents, was passed by their duly appointed executors testamentary to the said late Francois Jacobus van der Merwe, who married twice, leaving two sons—the defendant by the first marriage, and the plaintiff by the second marriage.

7. The said late Francois Jacobus van der Merwe died on the second day of July, 1903, leaving a will by which he disposed of his immovable property, including the share then possessed by him in each of the said four places or farms.

8. The plaintiff contends that by virtue of the said Will and Testament of the said grandparents, the said late Francois Jacobus van der Merwe was only entitled to a life interest in the said four places or farms, and that upon his death the said four places or farms de-

volved upon his sons, of whom the plaintiff is one.

9. The defendant contends that under the said Will and Testament of the said grandparents a share in the bequest of the said four places or farms devolved upon grandchildren only in case the father of such grandchildren predeceased the testators or the survivor of them; and that the said late Francois Jacobus van der Merwe, having survived his father, the said Schalk Willem van der Merwe, his share in the said properties devolved upon him upon the latter's decease as his own absolute property, and free from the burden of *fidei commissum*, and that he was consequently entitled to dispose of it by will at pleasure, and in the manner in which he did dispose of the same.

Wherefore the parties pray for judgment upon their respective contentions, and for such order as to costs as the said Court may direct.

The original will was in Dutch. The following is an English translation:

To all and every one who shall see this public act, or hear it read, be it known that on this fifth day of the month of April, in the year of our Lord one thousand eight hundred and sixty-two, we, the undersigned Schalk Willem van der Merwe, Carel Aaron son and Anna Jacoba van der Merwe (born Louw), have resolved to make disposition of the property to be relinquished by us on demise, as we do hereby do by these presents, consequently, as we proceed thereto, we revoke first of all—all previous testaments, codicils and other testamentary acts which we have passed previous to the date of these presents, and now, as if making a new disposition, we declare: In the first place to hereby legate, bequeath and bespeak, and that after the death of the survivor of us the following, to wit, our perpetual quitrent farms, Lokenburg, Koerde-moefontein, Keizerfontein and Menieskraal, all situated in the ward Onder Bokkeveld, district of Calvinia, with all that is immovable thereon, to our children Schalk Willem Jacobus van der Merwe, Jacobus Nel van der Merwe, and Francois Jacobus van der Merwe, that is the four farms together, to them, the aforesaid three children, for the sum of seventy-five thousand Cape Guilders, say (fl. 75,000), upon the following conditions and stipulations, however:

(a) That they, Schalk Willem Jacobus van der Merwe, Jacobus Nel van der Merwe, and Francois Jacobus van der Merwe shall show us all respect and obedience owing by children to their parents, and shall remain with us so long as one of us is alive, assist us in all things, and shall give us all the necessary help in their power in the carrying on of our business, the survivor of us to have the right in case one, or the aforementioned three sons should leave us, or

should not offer us the necessary assistance, or should show us the least disobedience, to withdraw the foregoing bequest of the aforesaid four farms, and to cause to devolve upon the obedient or those who are of assistance to the survivor;

(b) That in case one of the hereinbefore mentioned three children to whom, after the death of both of us, the aforesaid four farms are bequeathed, should unexpectedly pass from the temporal to the eternal, then the bequest of his share, or their shares in the said farms shall pass to and devolve upon his sons, and the male line for a reasonable sum—who shall then be held and bound to show the same obedience to us, the testators, until the death of the survivor, as is stipulated in the foregoing bequest of the farms to his or their fathers upon pain of confiscation of the bequest, to which end we give the survivor full right to revoke and annul such in his or her testament. The right of the father to the bequeathed farms shall, however, not pass otherwise to the male line than upon the same conditions and stipulations against a sale, exchange, or the placing of a stranger in possession, or use thereof as stipulated in the aforesaid written.

That in case one of the three should desire to dispose of their shares in the aforementioned farms, he shall not sell, let, exchange, trade with or otherwise dispose of the same to a stranger, but, wishing to dispose thereof, he shall do so to the joint owner or joint owners for a reasonable sum.

That no one of them shall take strangers or tenants on the said four farms unless with consent of the joint sharers, their brothers, in order to prevent as much as possible a rupture of brotherly unity.

And further, it is our wish and desire, notwithstanding the aforesaid bequest, to bequeath and bespeak, as we the testators do hereby bequeath and bespeak, to our daughter Elizabeth Susanna Louw van der Merwe, married to Isaac Jacobus van der Merwe, for the sum of one thousand guilders (fl. 1,000), a portion of the farm Lokenburg, being from the cross furrow below the . . . (unintelligible) along the river down to where the footpath and Oskloof and Lokenburgs river join from there in a straight line on the left side of Zuikerbosch Kloofs point, including all lands south of this line as far as the old line upon this stipulation, however that free drinking water shall be reserved for the general use of the joint sharers where Oskloof footpath joins Lokenburgs river.

And further, it is our wish and desire that our aforementioned daughter Elizabeth Susanna Louw van der Merwe, and her husband, Isaac Jacobus van der Merwe, shall have and retain the right to graze (35) thirty-five head of cattle on the outside farms for the period of

three years after the death of the survivor, and also that the joint sharers of the farm Lokenburg shall be obliged to give our daughter, Elizabeth Susanna Louw van der Merwe, sowing land for (8) eight muids of corn for the period of three years after the death of the survivor. Also, that the said Isaac Jacobus van der Merwe and Elizabeth Susanna Louw van der Merwe shall retain the right for the period of three years after the death of the survivor to the full and free use of the two rooms in front of the threshing floor, and one half of the stable, and the entire loft above the stable, likewise the loft above the rye barn—and for this right the said Isaac Jacobus van der Merwe and Elizabeth Susanna Louw van der Merwe shall be obliged to pay annually to the joint sharers of the farm Lokenburg the sum of three pounds sterling.

And further, we, the two testators, have deemed fit to bequeath and bespeak hereby to our daughter, Elizabeth Susanna Louw van der Merwe the house situate on erf No. 3, at Calvinia, excepting the outside room of the said house, for the sum of four thousand eight hundred guilders.

Further, we bequeath and bespeak to our daughter Elizabeth Susanna Louw van der Merwe, and that for the sum of 100 Ryks daalders, a certain piece of ground called Baviansfontein, being from the beacon of Kooren's Hoogte in a straight line to the beacon of Baviansfontein, and from there as the ridge runs round the kloof, the ridge forming the division, and including Baviansfontein. This bequest to take effect upon the same conditions and stipulations as those upon which the other bequest is made to her.

In case our beloved daughter Elizabeth Susanna Louw van der Merwe should die before her husband Isaac Jacobus van der Merwe then he the said Isaac Jacobus van der Merwe shall retain the right to these bequeathed goods as long as he lives in order the better to be able to bring up and maintain the children upon the usufruct and after his death all these bequeathed goods shall fall to and devolve upon the children already born or still to be born of the marriage of the said Isaac Jacobus van der Merwe with Elizabeth Susanna Louw van der Merwe.

Further we the testators declare to bequeath and bespeak to our beloved daughter Maria Catharina Elizabeth van der Merwe married to Isaac Heremias Visagie as a gift from her parents the outside room of the house situate on erf No. 3 at Calvinia; she shall however not have the right to assume it until after the death of the survivor of us and that the well in front of the said outside room shall be kept free for the use of the joint sharers of the said house.

And we bequeath and bespeak as a

gift to our daughters each the sum of (£100) one hundred pounds sterling to be (paid) in advance out of our joint estate after the death of the survivor.

And further we bequeath and bespeak to the children of our deceased son Jacobus Adrian van der Merwe the same legacy of £100 in advance after the death of the survivor equally with our daughters.

And to the daughter of our late deceased son Carel Aaron van der Merwe named Johanna, married to Abraham Moeton, the same legacy of £100 in advance to be paid after the death of the survivor.

Further, we, the undersigned, declare to nominate and appoint each other reciprocally that is the first dying the survivor of us together with the children already born of this marriage as we hereby do to be the sole and universal heirs of the first dying in equal shares and in case of predecease of one or more of those children then the predeceased's descendants by representation and such to all the property of the first dying movable as well as immovable, acts and credits, inheritances and expectancies nothing whatsoever excepted to be assumed and possessed by them as free, personal and unencumbered property without the contradiction of any-one whomsoever.

We, the undersigned, declare it to be our express wish and desire that the survivor if he or she so desire shall remain in full and undisturbed possession of the entire estate, provided, however, that he or she be held and bound to bring up and maintain in an honourable and Christian way the children already born of this marriage until their majority, marriages, or other approved states, at which time the portion of the same shall be paid out to each of them.

We, the undersigned, declare that the survivor of us shall be held and bound within the period of three months after the death of the first dying of us to have the entire estate properly inventoried and appraised by two competent men of no blood relationship or connection by marriage in order to correctly ascertain each inheritance, which inheritance the survivor shall be obliged to pay out.

Further, we the undersigned declare to nominate each other reciprocally together with our sons, Schalk Willem Jacobus van der Merwe, Jacobus Nel van der Merwe, and Francois Jacobus van der Merwe, likewise our sons-in-law Isaac Jacobus van der Merwe, Isaacs Heremias Visagie, Gert Jacobus van Wijk and Johannes Abraham van Wijk as executors of this our will administrators of our estate and effects and such with power of assumption, substitution and surrogation, wherefore we desire that no one shall interfere with our estate or children to that end excluding all and any officials or magistrates who ex

office might or could interfere therewith.

We the undersigned declare that the aforesaid executors shall not be obliged to file with the Master of the Supreme Court or any magistrate a statement and inventory of our estate.

Finally we the undersigned declare to expressly reserve to ourselves the power and right at all times to alter this our final disposition (except the appointment of heirs) consequently to add thereto or take therefrom as we may be advised either by separate act or at the foot of this document desiring that all alterations so found and under our own signatures shall be regarded as if the same had been literally inserted herein.

All the aforesaid having been read by us we declare this to contain and to be our testament last or final will with the desire that it in all parts shall be valid and take effect as such either as a solemn testament, codicil, *donatio mortis causa* or as may best consist with law notwithstanding any formalities may have been omitted which we hereby regard as having been inserted imploring the extreme assistance of the law.

Thus testated and passed at Calvinia year month and day aforementioned and in the presence of the subscribing witnesses.

Sir H. Juta, K.C., for the plaintiff; Mr. M. De Villiers for the defendant.

[De Villiers, C.J.: The question is whether this is a direct, or a *fideicommissary* substitution.]

Sir H. Juta: Yes, I must admit that the will directs that these substituted heirs must show obedience and respect to the testators from which no doubt it might be argued that the substitution is direct. The will, however, places a restraint on alienation, and that would seem to imply that the instituted heirs were only fiduciaries, and that the substitution was clearly *fideicommissary*.

Mr. M. de Villiers was not called upon.

De Villiers, C.J.: The question to be decided is whether in substituting their grandsons for their sons in the bequest of the four farms in question the testators intended a direct or a *fideicommissary* substitution. After bequeathing the farms to their three sons subject to certain conditions, one of them being that the sons should show obedience to the testators during their lifetime, the will added that if contrary to expectation any of the three sons should die the bequest should devolve on their respective sons subject to the same conditions, including that of obedience to the testators. It was to be expected that the sons would die at some time or another, but it would be contrary to expectations that they should die during the lifetime of their parents the testators. The event, therefore, in which the legacy was intended to devolve on any grandson was the death of any of the

sons during the lifetime of the testators. This view is strengthened by the condition that the grandsons were to show the same obedience as had been required of the sons, which it would only be possible for them to do during the lifetime of the testators. Clearly, therefore, what was intended was a direct and not a *fideicommissary* substitution of the grandsons. All the sons survived their parents, and received transfer of their respective shares of the farms. Subsequently one of the sons died after having by will disposed of his immovable property, but the plaintiff who is his son disputes his right to deal with the farms after his death, and claims a reversionary right to them under the will. This claim could only be validly made if the substitution had been a *fideicommissary* one, but seeing that the substitution was direct, judgment must be given in terms of the defendant's contention. The costs will come out of the estate.

[Plaintiff's Attorney: S. J. Mostert; Defendants' Attorneys: Tredgold, McIntyre and Bissett.]

SUPREME COURT

[Before the Chief Justice (the Right Honourable Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

APPEALS.

REX V. LIEBENBERG. { 1904.
 { July 26th.

Masters and Servants Act—Unlawful detention of child—Right of mother of illegitimate child.

The father of an illegitimate child, four years old, apprenticed it to the appellant without the formal consent of the mother, who objected to the child being apprenticed at that age. The child remained with the mother, and the appellant was informed by the Magistrate of the district, not acting in his judicial capacity, that he was entitled to take possession of the child. He accordingly obtained possession of

the child, and the mother claimed the restoration of the child under section 27, chap. 5, of Act 15 of 1856. The proceedings in the Resident Magistrate's Court were in form of a criminal nature, but there was no verdict of guilty and no sentence beyond an order that the child be restored to its mother.

Held, on appeal, that there was not sufficient ground for disturbing the order of the Magistrate's Court.

This was an appeal from a judgment of the Acting Resident Magistrate of Hope Town, in which the defendant, Christoffel Liebenberg, had been ordered to restore a native male child named Jack to its mother and natural guardian, Sarah Biddulph.

From the record of the Court below it appeared that the defendant had been charged with detaining the child, who was under the age of sixteen, as a servant or inmate of his house, and with refusing to restore the said child to its mother and natural guardian. The Magistrate found that the child was illegally held by the accused, and sentence was that the child be restored to its mother and natural guardian. The defence was that a contract had been entered into between the appellant and the father of the child for service, and that £10 was paid in consideration of the indenture. The child was born out of wedlock.

Mr. Percy Jones was for the appellant; Mr. Howel Jones was for the Crown.

Mr. P. S. T. Jones: My first point is that in this case no criminal offence has been committed. Sec. 27 of Act 15 of 1856 provides civil machinery for the recovery of a child under 16 detained by any person against the will of its natural guardian.

[De Villiers, C.J.: This is not a matter of review. You appeal against the proceedings as irregular.]

We say that the Magistrate was wrong *ab initio*, and that the whole proceedings should be quashed.

[De Villiers, C.J.: Then your whole procedure is wrong.]

It might perhaps have been better if we had asked for review. But see *Shaw v. Shaw* (4 Juta 424), particularly the judgment of De Villiers, C.J. The whole point of that case is that this section gives the Magistrate only civil, but not criminal jurisdiction. See also *Boswell v. Johnson* (1 Roscoe, 16) and *Barendse v. Daniels* (1 Watermeyer 11.) Then as to the merits the evidence

shows that the accused was acting *bona fide*, and that he had no criminal intent.

[De Villiers, C.J.: What right had he to forcibly take the child?]

I do not know that he took the child by force, though no doubt he did bring pressure to bear on the mother. He went to the Magistrate and entered into the usual contract.

[Buchanan, J.: Against the wishes of the mother.]

Yes, that is so.

[Buchanan, J.: The man may have acted *bona fide*, but the child was unlawfully detained. The accused has not shown any right on the merits to have the record quashed.

Mr. H. Jones was not heard.

De Villiers, C.J.: If this had been an application by way of review, an important question might have arisen as to whether the proceedings should have been in the form in which they came before the Court. The case was treated as a criminal case, the accused was charged with contravening section 27, chapter 5, Act 15 of 1886, in that he "did wrongfully and unlawfully detain one Jack, a native male child, under the age of 16 years, as his servant or inmate of his house, and refused to restore the said child to its mother and natural guardian, Sarah Biddulph." The appellant was then certainly arraigned, and he pleaded not guilty, but in giving his judgment, the Magistrate really did not find him guilty; he did not record a verdict of guilty against him; he said that the child was illegally held by the accused, which would have been a correct judgment in case it had been a civil proceeding, and then the sentence did not include any fine or imprisonment upon the accused, but it ordered that the child be returned to the mother, its natural guardian, which also would be a perfectly competent judgment in case it had been a civil proceeding. It is not, however, a case of review, the applicant appeals against the judgment, therefore, I think the Court may now dismiss the objection to the form of the judgment, if substantial justice was done by the judgment. In my opinion, substantial justice was done. It is true that there was a contract made for the apprenticeship of this young child, then four years of age, to the appellant, but the contract was entered into by the father of the child; that father not being married to the mother, it was an illegitimate child; the mother alone had the legal custody of the child, the father had no legal control. Of course, if the mother had so acted in regard to the apprenticeship as to make it contrary to good faith that she should recover back this child, then under the 27th section of the Act the Magistrate could

have refused to order delivery of the child, but it was not clear that the mother did so act as to make it contrary to good faith that she should recover back the child. One thing comes out clearly, and that is that the mother objected at the time to the child being immediately apprenticed, and no time was fixed when she would consent to the child being allowed to be apprenticed. Then the appellant went to the Magistrate, not apparently in his judicial capacity, but in his private capacity. Acting on the private opinion of the then Magistrate, the appellant went and took away the child, apparently without the consent of the mother. That, clearly, he had no right to do; the mother was no party to the contract. The appellant could not have obtained the custody of the child without a judicial order. In the absence of any such judicial order, I consider that the applicant never had the legal custody of the child, and never had the right to keep the child. The order, therefore, of the Magistrate seems to me to be perfectly correct. It is to be regretted that the proceedings took place under his ordinary criminal jurisdiction, but I do not see, considering the form of the proceedings, how this could be brought up as a record against the defendant for a criminal offence. Under these circumstances, I think the appeal should be dismissed.

Buchanan, J., concurred.

[Applicant's Attorney: J. F. Wege.]

REX V. ENSLIN AND MOLL. { 1904.
July 26th.

Game Preservation Act—Notice by owner of land—Best evidence.

In a prosecution of the appellants before a Resident Magistrate's Court for contravention of the 7th section of Act 36 of 1886, a notarial certificate was produced to the effect that the prosecutor, being the owner of the land on which the appellants trespassed, had published in the A. newspaper, circulating locally, a notice, and warning that he was desirous to preserve the game thereon.

Held, that proof of the giving or publication of such notice and warning was indispensable, and that, as the best evidence had not been given, namely, the production of a copy of the

newspaper, the conviction could not be supported.

This was an appeal against a judgment of the R.M. of the Paarl, who had convicted the appellants of contravening Section 7, Act 36 of 1886, and had convicted the accused Enslin of contravening section 4, Act 36 of 1886. The appellants had each been sentenced to pay a fine of £1 in regard to the first charge.

In regard to the first offence, the appeal was brought on the grounds (1) that the requirements of the 7th section of the Act were not complied with, inasmuch as no notice had been given previous to the commission of the offence, personally, or in the “Government Gazette,” or any local newspaper circulating in the district that the complainant, Joseph de Koch, desired to preserve the game on his land; (2) that the conviction was bad in law; and (3) that the evidence did not support the conviction. In regard to the other offence, the ground of appeal was that the evidence did not support the conviction.

From the evidence, it appeared that the two men were seen in the act of cutting a buck's throat on the land of the complainant, and that they were both carrying guns. One of the prisoners, Enslin, had no licence to shoot game. The complainant said that he gave notice in the “Advertentieblad,” which was published during the suspension of “Ons Land” during martial law, warning people against shooting game on his land.

Mr. J. E. R. de Villiers was for the appellants; Mr. Howel Jones was for the Crown.

Mr. J. E. R. de Villiers: Both the accused appeal against the conviction under Sec. 7 of Act 36 of 1886 on the ground that the owner has not given the prescribed notice of his wish to preserve his farm. A paper published in Cape Town is not a “local paper” in the Paarl.

[Buchanan, J.: It would be sufficient if the notice were published in the Gazette; a local paper is a paper circulating in the locality.]

The popular meaning of “local newspaper” is either a paper published in the town or district, or one dealing particularly with local topics. As to the ordinary meaning of the term see Imperial Dictionary under the word “local.”

[De Villiers, C. J. Where is your proof that this notice was inserted in the “Advertentieblad”?]

Mr. H. Jones: I quite admit that the notarial certificate is not evidence, but we have the affidavit of the constable who acted as messenger to the effect that he was unable to procure a copy of the paper.

[De Villiers, C.J.: Has one of the appellants a licence?]

Moll has a licence.

[Buchanan, J.: He did not produce it.]

The Chief Constable says he has one.

Mr. De Villiers: There seems to be no evidence against Enslin on the second count (under sec. 4.) The Magistrate says that there was none, and then proceeds to find him guilty. The evidence all goes to show that Enslin did not shoot the game in question.

Mr. H. Jones: Sec. 4 prohibits the pursuit of game. Enslin was charged under Sec. 4 as well as under Sec. 7.

De Villiers, C.J.: Both the appellants were charged under the first count for contravention of the seventh section of Act 36 of 1886, in that they did kill, catch, capture, pursue, and hunt certain game on the farm of Joseph de Kook, without permission of the owner, the said farm being private property. It is a condition precedent to the prosecutor succeeding in such a prosecution that he should prove that notice and warning had been given, either personally or by letter, or in the “Gazette,” or in a local newspaper, that he is desirous to preserve the game thereon. It was alleged that a notice was inserted in the “Advertentieblad,” which was substituted for “Ons Lands” during martial law. It is contended on behalf of the appellant that the “Advertentieblad,” being issued in Cape Town, cannot be regarded as a local newspaper, and that as there is a local newspaper called the “Patriot,” at the Paarl, notice ought to be published in that paper. It is not necessary, however, to decide that point, because in my opinion there is not sufficient evidence that there was a publication in the “Advertentieblad.” The onus of proving the publication lay upon the prosecutor, and the prosecutor ought therefore to have subpoenaed the publisher of the “Advertentieblad” to prove the insertion of the notice. The best evidence should be produced. The parties apparently thought that the production of a notarial certificate was sufficient, but no such procedure can be adopted in criminal cases. The prosecution should have produced the best evidence, and in the absence of such evidence, there was no sufficient proof of notice. The convictions therefore on the first count in both cases ought to be quashed. In regard to the second count, only one of the appellants was charged, viz., Enslin. It is said on behalf of the appellant that Enslin did not shoot the buck: that it was Moll who shot it, and that therefore Enslin could not be charged with a contravention of the fourth section of the Act in that he did kill, catch, capture, hurt, or shoot at certain game. In my opinion, there is clear evidence that Enslin did hunt and pursue the game. Whether he actually fired a shot is another matter; but both

men went out with a common object. Both were sportsmen, both carried guns, and when the one sportsman, Moll, had shot the buck, the other sportsman came up and cut its throat. One can hardly understand why the buck's throat should be cut, unless the buck were still alive, and it was necessary to despatch it by cutting its throat. However, independently of this, I consider that both went out with the common illegal object, and that both required licences. It appears, however, that Moll had a licence, and he was not convicted on the second count. As to Enslin, he had no licence, and therefore the conviction of Enslin under the second count must stand. The appeal will be allowed on the first count, but dismissed on the second.

Buchanan. J., concurred.

[Appellants' Attorneys: Michau and De Villiers.]

REX V. HAMMERSCHLAG. { 1904.
July 26th.

Liquor licence—Condition—Construction—Lighting of lamp—Closing time.

A condition was inserted in the appellant's liquor licence that a lamp was to be affixed over the door of the licensed premises and kept lit from sunset to closing time. The hours for which the licence was granted were from 7 a.m. to 9 p.m.

Held, that as the appellant was not legally bound to keep his licensed premises open until 9 p.m., the reasonable construction of the term "closing time" was the time when he actually closed his premises, and that if he actually closed his premises on any night before 9 p.m., he could not be legally convicted for not keeping such lamp lit until 9 p.m. on such night.

This was an appeal from a decision of the Resident Magistrate of Kenhardt.

The appellant was charged before the Magistrate with contravening section 5 of Act 44 of 1885 in that he committed a breach of a condition of a liquor licence granted to him. The licence was to sell liquor between the hours of seven a.m. and nine p.m., and a condition was attached to the licence that he should keep a lamp lit outside the bar from sunset until closing time. It appeared that on the occasion of the alleged offence, appellant closed his bar

before nine o'clock and extinguished the lamp. The Magistrate held that "closing time" meant the hour to which the premises were licensed to be opened, and convicted appellant and fined him £3. Appellant contended that he was only obliged to keep the light lit until the time when he actually closed the bar.

Dr. Greer appeared for the appellant; Mr. Howel Jones for the Crown.

Dr. Greer: The appellant was not bound to keep his bar open. The licence is only permissive as far as the legal hours are concerned. It is prohibitive as to any time not comprised within those hours. It was sufficient compliance with the terms of the licence as to hours that anybody could obtain refreshment within the hours by applying for it. If then, the accused had a right to close his bar at any time before 9, what was the use of the light? The light can be needed only either to enable the police to see who is going into the bar or to direct people to it.

[De Villiers, C.J.: If he is bound to keep open to 9, he must burn a light till 9.]

Yes, and if he is not bound to keep open he need not burn it.

[De Villiers, C.J.: The licence authorises the sale of liquor on Sundays. If a man has conscientious objections to serve liquor on Sundays, surely he is not bound to do so?]

Quite so.

Mr. Jones: By the terms of his licence the appellant is bound to supply meals and liquor within certain hours.

[De Villiers, C.J.: Suppose a traveller came at 10 p.m. and asked for food, could not the hotel-keeper supply liquor with it, if asked?]

I submit not.

[Buchanan, J.: A licence is a permission, not a compulsion to sell.]

I was not upon that point, but upon the question of closing time. He may keep open till 9; hence the Licensing Court evidently intended that the light should burn till 9.

[De Villiers, C.J.: If they meant that they could have named the hour; but they have not done so; they only speak of "closing time."]

It is only a reasonable interpretation that the light should burn till 9 o'clock. Were it not for this light, a man might open at all hours, and admit all sorts of characters, as the police would not be able to see what was going on.

De Villiers, C.J.: The condition inserted in the appellant's licence was: A lamp is to be affixed over the door of the licensed premises on the outside, and kept lit from sunset to closing time, except there is moonlight during such hours. Then there is a further provision that the hours in respect of which the licence is granted are from seven a.m. to nine p.m. The prosecution reads this condition as

if it had said that the lamps should be kept lit from sunset to nine o'clock, but it is not so stated, and it was quite competent for the Licensing Court to have made this clear. Instead of fixing nine o'clock, which is the time of closing, and which it would have been very easy for the Licensing Court to do, they used the words "from sunset to closing time." In my opinion the fair meaning of these words is that the lamps should be kept lit from sunset until the time when the appellant actually closed his premises. Another question then arises: Was the appellant bound to keep his licensed premises open until nine o'clock? If he was bound to keep them open until nine o'clock I confess I would have been prepared to hold that he was bound to keep the lamp lit, but I do not consider he was bound to keep them open until nine o'clock. He obtains a privilege to sell until nine o'clock, and is prohibited from selling after nine o'clock, but he is not compelled to sell from seven to nine. If he chooses to close up his bar between seven and nine, I do not think the Licensing Court or the public have any remedy against him. In these circumstances I am of opinion that, as the Licensing Court did not make the condition clear, and as the condition is quite capable of the meaning that he shall only keep a light until the time when he actually closed the bar, the conviction ought not to be sustained. The appeal will therefore be allowed and the conviction quashed.

Buchanan, J., concurred.
[Appellant's Attorneys: Dampers and Van Ryneveld.]

dissolution, to take effect only on payment by the defendant to the plaintiff of two post-dated cheques given to the plaintiff as his share of the partnership assets. The defendant remained in possession of the partnership assets, part of which he sold at a considerable profit, but he failed to pay the amount of the cheques which were dishonoured at their due date.

Held, that the plaintiff was entitled to recover not only the amount of the cheques but the amount of profits actually made by the defendant, pending the actual dissolution of the partnership, after deduction of such portion of the amount of the cheques as had been devoted to the purchase of the goods on which the profit was made.

This was an action brought by Moses Aronstain, cart driver, Cape Town, against Benno Maisel and Maisel Bros., Ltd., carrying on business in Cape Town, for balance of certain dishonoured cheques and account of certain partnership transactions.

The declaration set out that the plaintiff entered into an agreement of partnership with the first-named defendant and the second-named defendants, whereby they were to become partners in the trade of general importers and merchants. It was provided in the said agreement that the plaintiff should contribute £250 in cash to the partnership, and the defendants should contribute £250 in goods, and that any profits and losses should be equally shared between the said partners. On the 22nd and 23rd January, the plaintiff paid to the said first-named defendant two sums of £125 each. Thereafter, it was resolved that the partnership should be dissolved from the 1st March, and Benno Maisel then gave to the plaintiff two cheques for £125 each in return for the money he had paid in. The plaintiff duly presented the cheques, which were dishonoured, and he afterwards applied for provisional sentence in the Supreme Court. Provisional sentence was given by the Court for £65 16s., and as to the balance of £184 4s. the parties were directed to go into the principal case. Plaintiff admitted that he had sold goods of the value of £145 and £39, and said he was prepared to bring these sums into the account. He prayed for an order for a true and correct account of the partnership, debate, judgment for such sums as

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Ex parte BLACKALL. { 1904.
{ July 27th.

Mr. Percy Jones moved, as a matter of urgency, for the substitution of the name of Advocate M. Bisset in place of that of Advocate McGregor, as *curator ad litem* to Mrs. Robertson. Advocate McGregor was unable to act.

The order was amended accordingly.

ARONSTAIN V. MAISEL. { 1991.
{ July 27th.

Partnership—Dissolution—Profits.

The plaintiff and defendant being partners, agreed upon a

may on debate be found to be due to the plaintiff, and costs of suit.

The defendants pleaded in abatement in regard to the suit against the second-named defendants, and said that the first-named defendant, Benno Maisel, ought to have been sued personally in the action. Failing the plea in abatement, the defendants pleaded over and said they admitted the agreement of partnership, payment of the cheques, dissolution of partnership, and so forth, but that it was agreed as a condition of the dissolution at the option of Benno Maisel that the plaintiff should not present the cheques for payment until he (defendant) had completed his contract with Rosenblum and Company, and that he should pay interest at the rate of 8 per cent. per annum. The contract was to be completed on the 1st May, and the defendant availed himself of this privilege. One of the terms of the dissolution was that the parties should have no claim one against the other. Plaintiff, in breach of agreement, presented the cheques for payment on the 1st March. He unlawfully entered on the business premises of the defendant, and removed and sold certain iron for the sum of £145 4s., and appropriated the proceeds to his own use, and failed to pay over to the first-named defendant the said proceeds, or any part thereof. Plaintiff also took possession of a wagon and horse, and sold the same for £39, and similarly appropriated the proceeds to his own use. By reason of this the defendant had been unable to complete his contract with Rosenblum and Co. He admitted that provisional sentence was obtained by the plaintiff for the sum of £65 16s., and said that in view of the sales, which had been made by the defendant of the iron, and horses and wagon, the plaintiff's claim had been fully satisfied. He denied that the plaintiff was entitled to any profits, or to an account. He prayed that the plaintiff's claim be dismissed with costs. For a claim in reconvention he repeated the allegations in his plea, and claimed the following sums: £800, value of goods wrongfully appropriated and sold by the plaintiff, now defendant in reconvention; £500 damages for breach of his contract with Rosenblum and Co., due to the action of the defendant Aronstain; and £500 damages for breach of contract by defendant in commencing business in competition with the plaintiff (Maisel) contrary to the agreement of dissolution of partnership; interest *a tempore morae* and costs of suit.

In replication, the plaintiff denied that his claim had been fully satisfied. For a plea in reconvention he said that the amount for which he sold the iron was a fair value, he denied that through his action the defendant (Maisel) had been prevented from completing his contract with Rosenblum and Co., or that Maisel had suffered any damages thereby, and

he also denied that it was any part of the agreement of the dissolution of partnership that he should not commence business on his own account or in partnership in South Africa within a specified period.

Mr. Gardiner for plaintiff; Mr. M. de Villiers for defendant.

Moses Aronstain (the plaintiff) said he met the defendant Benno Maisel in January this year, and entered into an agreement of partnership. Witness was to put in £250 in cash, and the defendant was to put in £250 in goods. He did not know whether defendant put in anything; he saw no goods. It was provided that each of them was to draw cheques at the bank. Witness never drew cheques. It was also provided that they were each to draw £12 a month salary. Witness got no salary. He was dissatisfied, and it was agreed on the 6th February that they should dissolve partnership. Maisel prepared a letter, which witness signed. The press copy produced by the other side was incorrect.

De Villiers, C.J., asked counsel for the defendant if they had the original letter in Yiddish?

Mr. De Villiers said it had been mislaid.

Witness was examined in regard to the press copy, and he pointed out certain discrepancies from the original. Proceeding, he said that the only arrangement he made at the dissolution was that he was to receive back his £250 on the 1st March, and to have the profits on 3,500 jackets. Maisel had told him that he had made a good profit on the jackets; he bought them for 7d. each, and sold them at 2s. 3d. each, thus leaving a big profit. The jackets were bought from Rosenblum and Co., and paid for on the 22nd and 23rd January. They had also a large quantity of iron, which he sold to Rosenblum and Co. for £145; this had been gathered from various sources by witness and one Rabinowitz. The total expenses in connection with the iron was £60. He sold a cart and horse that had been bought for £50 for the partnership; he got £38 for the horse and cart. He also sold certain dishes for £1 4s. He had paid out certain items on account of the partnership.

Cross-examined: The partnership did not come to an end before they did any business at all. He told Mr. Maisel that he intended to go to Johannesburg and commence business. He denied that he agreed to a restraint of trade. He offered Mr. Maisel £50 profit on his share of the jackets. £50 was paid for the cart and horses, which were sold for £38. They sold the iron to Rosenblum in a lump for £145. Witness asked for the £12, less share of wages, on the 1st February.

By the Court: What right had you to ask for it then? The part-

nership was only established a few days?—Because he was doing me down.

By the Court: When witness entered into the partnership, he thought his partner was an honest man. He suspected him of trying to do him down a couple of days after, when he asked him for money and he refused to give it.

[De Villiers, C.J.: How could you expect him to pay you a month's salary when he had only been with him a week?

Because he drew some of the profits for his own use.

How do you know that?—He told me. How much did he draw?—I cannot say.

Oscar Harding Webster, ledger clerk at the African Banking Corporation, stated Mr. Maisel opened an account in the name of Maisel Brothers and Co., Ltd., on the 22nd January. He paid in £150. Maisel was the only person who drew cheques on the account.

Joseph Aleck Werek, manager of Rosenblum and Co., stated he sold jackets to Maisel for £109 7s. 6d. in January, for which he received a cash cheque. Maisel met witness in the street shortly after, and said he had made a good profit. Witness purchased a quantity of iron from the firm for £145. Maisel said there were 150 tons in it, but there were only about 100 tons. Maisel had a contract with witness's firm to supply them with iron, but he had failed to carry it out.

[De Villiers, C.J.: What kind of iron was it?]

Just scrap iron.

Samuel Rabinowitz stated he was employed by Maisel to gather scrap iron. Maisel went to witness in January and told him he had taken in a partner. After a short time he informed witness that the partnership had been dissolved. Maisel left for Johannesburg. Maisel used to make cheques out in witness's name, which witness cashed, and gave the proceeds to Maisel. On one occasion witness cashed a cheque for £60 for him.

Cross-examined by Mr. De Villiers: Witness was on good terms with Maisel. Witness sued him for £4 12s. 4d., and got a decree for 12s. 4d., with costs.

Moses Aronstain (recalled by Mr. De Villiers) stated he never contested Maisel's right to draw cheques.

Mr. Gardiner closed his case.

Benno Maisel, the defendant, stated that he entered into partnership with plaintiff. He had authority from his company to do so. The company was incorporated in England, and witness was managing director. Plaintiff stopped witness in the street and asked for a job. Witness knew him in England, and said he could give him a job. Plaintiff suggested

that Maisel should take him into partnership, and he would do all the work. Witness was to draw on the account as long as he was in South Africa, and when he left plaintiff was to draw on it. Witness took £500 worth of goods into the partnership. Three days after the partnership was made plaintiff went to witness and said he had just got an appointment on a mine in Johannesburg, and had to dissolve the partnership. Witness left for Johannesburg, and whilst there plaintiff sold all the goods. The goods consisted of iron and metal. Before the partnership witness had collected about 200 to 250 tons of iron. At the time of the sale there was about 400 tons. On February 7 witness gave plaintiff £7 as interest on the £250 to June. He never authorised the sending of the telegram alleged to have been sent from Johannesburg. Witness's contract price for iron was £2 per ton, which was very cheap. He used to send it as ballast on sailing vessels to Hamburg.

Cross-examined by Mr. Gardiner: All the iron he had was sold to Rosenblum, and if the latter said that it only amounted to 100 tons he was wrong. The same day the agreement was signed it was understood that he only was to sign cheques. He denied that he told Rosenblum and Rabinowitz that he sold the jackets for 2s. 3d. each.

[De Villiers, C.J.: Is Maisel Bros. a limited liability company in England?]

Yes.

Mr. Friedlander, attorney, said that he told Mr. Maisel to get the document which was written in Hebrew translated. The document accidentally got mislaid in the office. He could not say whether the document produced was the one or not.

Mr. Goldblatt, sworn interpreter, stated that he translated a document for Maisel, and he was positive that his translation was a correct one.

Cross-examined by Mr. Gardiner: The original was written on stiff paper, and he returned it to Maisel.

Mr. Maxton, engineer, said Mr. Aronstain approached him with regard to a certain quantity of iron. He calculated 425 tons at £2 a ton.

Cross-examined by Mr. Gardiner: Calculating by weight was much more correct than by measurement.

Aaron Yellowitz said that Aronstain told him in February that he had dissolved partnership with Maisel.

The witness Rabinowitz, recalled by His Lordship, adhered to his statement that the cheque for £60 was given to him for the purpose of changing, and he handed the money to Maisel.

Rosenblum (recalled) said that Maisel had a contract to supply his firm with iron, and they held him to his contract.

Mr. De Villiers closed his case.

Mr. Gardiner, for the plaintiff, argued that his client had made a very good

case. If he did not receive judgment on any other portion of his claim he should on the jacket transaction. The jackets were purchased for £109 7s. 6d., and the evidence was that they were sold for a good profit. Maisel had said that he only made a profit of 2d. each, but he would not call that a good profit, and if it was so he had had opportunities of producing his books and also the purchaser of the jackets to prove that, both of which precautions he did not adopt. All the admissions of the defendant went to show that the blankets had been sold, Maisel said, at 8d. profit each, 6d. of which was taken up in expenses, which made a total of £87, rather a large expenditure to incur in a £107 transaction. He submitted that judgment should be given to plaintiff for £100.

Mr. De Villiers (for the defence) contended that Aronstain was not a credible witness. When he applied for an interdict against the present defendant, he stated in his affidavit that Maisel had not put any goods into the partnership, but under cross-examination, he had tried to cover that up. Evidence had been given by an engineer that there was a large quantity of stock at the time the partnership was entered into. He did not think the Court could consider Mr. Rabinowitz as an impartial witness, as, on his own showing, he had had a lawsuit with Maisel.

De Villiers, C.J.: In this case the Court can only deal with the defendant as Benno Maisel, because there is no evidence before the Court of the *bona fide* existence of a limited liability company, known as Maisel Brothers and Co., Ltd. The defendant Maisel has produced a certificate with the Transvaal stamp on it, to the effect that he had been appointed to act *carte blanche*, and with full authority from the company, in all transactions, but that is not legal evidence. In his dealings with the plaintiff, the defendant alone appeared, he taking the whole responsibility on himself of conducting the business. As the company was outside the jurisdiction of the Court, the only course open to the plaintiff was to make the defendant personally a party to the suit. The defendant appears to have acted alone in the matter, and as he is within the jurisdiction and the limited company outside the jurisdiction of the Court, and as there is no evidence as to the powers of the company, or as to the authority which he had from the company, the only course open is to deal with the defendant alone. The partnership was admitted. It appears from the evidence that shortly after the partnership had been entered into, the plaintiff began to distrust the defendant, but he had already given his two cheques for £250, and the money had also been partly used for the purpose of purchasing jackets which were to

form part of the stock-in-trade of the partnership. In February an agreement was arrived at that the partnership should be dissolved, but the date when the dissolution was to take effect was disputed. According to the plaintiff, the dissolution was to take place on the 1st March, and according to the defendant, at once. The cheques that were given by the defendant seemed, however, to support the plaintiff's contention, because they were postdated for the 1st March, and it certainly seemed strange that the defendant, who had agreed to a dissolution early in February should make the cheque payable on March 1. A document had been put in purporting to be a copy of a document alleged to have been written by the plaintiff to the defendant in February. The defendant denied that it was a correct copy of the letter he wrote. Certainly, the explanation to my mind, that he had lost the correct copy is wholly unsatisfactory. He said he gave it to his attorney, and all the attorney could say was—such was possible, but he did not say it was a fact. On an important matter of the kind clearer evidence should be given of the contents of the document. The defendant's evidence does not impress me so favourably as to be accepted without misgivings. For instance, to refer to the telegrams that passed between Rabinowitz and Maisel. They found that Rabinowitz wired to Maisel on the 14th March to the effect that Aaronstain was removing the iron, and that the police could not stop him, and asked to have instructions wired. A wire was received in reply stating it was all right, as Aronstain was a partner. Defendant said that that wire was sent by his agent whilst he was away. If that was so, why was there not some evidence to that effect brought forward? The defendant said he sent a different telegram, but he did not produce a copy. I am of opinion that the plaintiff has clearly shown that he is entitled to succeed in his action. The judgment must on the whole be a rough and ready one, because the Court had not all the data before it to give a judgment founded upon clear details. The claim for £250, the amount of the two cheques, is counterbalanced by the plaintiff selling the iron and the cart and horses, so that no claim can be allowed for that. In respect of the amount due out of the profits of the jackets, there is some dispute, but the Court is satisfied that the sum of £100 would be within the mark after deducting from the amount of the profits so much of the amount included in the cheques as had been devoted to the purchase of the jackets. In regard to the claim

in reconvention, the whole of that claim will have to stand or fall by the validity of the letter to which I have referred, and as I have stated that I am not satisfied with the validity of the letter that claim must fall to the ground. With regard to the claim for iron, the Court is of opinion that the plaintiff has accounted for the money obtained for it, and that he had sold it in the best interests of the partnership. As regards the claim for putting an end to the contract, that also falls to the ground. That disposes of the whole claim in reconvention. The result is that there will be judgment for the plaintiff against the defendant in his individual capacity for the sum of £100, with costs, and upon the claim in reconvention there will be absolution from the instance.

Mr. Gardiner asked for an order with regard to some money in the bank, which had been attached.

The Chief Justice said the attachment would continue until the further order of the Court.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Friedlander and Du Toit.]

WREYMON V. SOLOMON.

Mr. Upington applied as a matter of urgency for the appointment of a commission to take the evidence of Mr. W. T. Olive, Civil Engineer, Cape Town, who was leaving Cape Town on Monday, and who was an important witness in the above suit, which was set down for hearing on the 3rd August. The other side did not intend to offer any opposition to the application. He suggested Mr. J. E. R. de Villiers as commissioner.

The application was granted, the costs to be costs in the cause.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

CIVIL APPEALS.

WILLMER V. RENCE. { 1904.
 { July 28th.

Owner or occupier of land—Dog
—Trespass—Minor—Act 40
of 1889.

*The defendant, a minor, was
sued in a Magistrate's Court*

for damages for shooting the plaintiff's dog while trespassing at night on land occupied by him, and he raised the defence of minority. It appeared, however, that the power to defend had been signed by the defendant, purporting to be assisted by his father and natural guardian, who, as such, also signed the power.

Held, that the power cured any defect in the summons.

Held further, that under the 226th section of Act 40 of 1889, the defendant was entitled to shoot the dog trespassing on property in his lawful occupation and not being under the charge of any person.

This was an appeal from a judgment of the R.M. of King William's Town, by which the appellant, Fred. Ernest Wilmer, had been ordered to pay £10 damages and costs of suit for unlawfully shooting an Irish terrier, valued at £20, the property of Mrs. Rance, the respondent.

The ground of appeal was an exception on the point that the appellant was a minor, and also on the merits of the case.

Evidence taken in the Court below was read, from which it appeared that the dog had been found in the veld among mimosa bushes. It was dead, and, according to the prosecutor's story, from appearances it seemed to have been shot. The dog (Grip) had been fighting with a dog called Spring, and it was alleged that Wilmer had admitted having shot the animal to put it out of its pain. The incident happened in the vicinity of the police camp at Fort White. For the defence, evidence was called to the effect that the plaintiff's dog was injured by Spring, and had its leg broken. The dogs were parted, but Spring went back again, and killed Grip. The story as to shooting was denied. Defendant denied that he had shot the animal, though he admitted having said, "What if I have shot the dog?"

The Magistrate, in his reasons for judgment, said he disallowed the exception taken at the trial as to defendant being a minor, as it appeared to him that the defendant had been tacitly emancipated. Even if that were not so, he had obtained the necessary assistance of his father to defend the action. On the merits of the case, he found that the defendant had shot the plaintiff's dog, and had shown no justification for the act.

He saw no reason to doubt the *bona fides* of the witnesses called by the plaintiff.

Mr. D. Buchanan was for the appellant; Mr. Percy Jones was for the respondent.

Mr. D. Buchanan: The Magistrate overruled the exception as to minority, but see *Jansen v. Wagenaar* (1 Menz. 22).

[De Villiers, C.J.: That was a case of contract. Was not the defendant emancipated, and trading on his own account?]

There is no clear evidence as to that. See *Auret v. Hine* (3 E.D.C., 334).

In this case the defendant was only 19 years of age, and the facts that he earned money for himself and paid for his own clothes do not prove emancipation. *Van der Keesell* (1-8, sec. 4). If he were not emancipated he could not be sued, unless *venia actatus* were first obtained. The police evidence is not *ad rem*, as a minor cannot make an admission, nor can even his guardian do so on his behalf. Now if we exclude the police evidence, there is nothing to show that he shot the dog.

[De Villiers, C.J.: Under what circumstances may a dog be shot?]

If it should be found trespassing within an enclosed space wherein is game or cattle. See, also, sec. 226 of Act 40 of 1889. That section shows that any occupier of land may destroy a dog found trespassing.

Mr. P. S. T. Jones: The Magistrate found as a fact that the defendant had been tacitly emancipated; and, if this finding was correct, the Magistrate's decision follows as a matter of course. If he was not emancipated, he was assisted by his father to appear in Court. As to the facts, we have no direct evidence, but we have the strongest of circumstantial evidence. There is ample evidence that the dog was shot. The accused remained very silent about the matter, and he would not have done so had he not shot the dog. The dog was not trespassing in any enclosed space, and there was no evidence to show that the dog had done any harm.

De Villiers, C.J.: An objection was taken in the Court below to the summons, on the ground that the defendant was a minor, but this defect was in my opinion cured by the power to defend filed in the case. That power is signed by the defendant purporting to be assisted by his father and natural guardian, who as such also signed the power.

The defendant denied having shot the dog at all, and the evidence supported his denial, but in the view I take of this case it is unnecessary to decide whether the Magistrate rightly held on the evidence that the defendant had killed the dog. It is clear that the dog was trespassing on land in the lawful occupation of the defendant, and that the animal was not at the time it met its death in the custody, charge, or possession of its owner, or of any person

whatever. The concluding words of the 226th section of Act 40 of 1889 enact that "it shall be lawful for any proprietor or occupier of land to destroy any dog found trespassing upon the land owned or occupied by such proprietor or occupier." This enactment is subject to the three next succeeding sections of the Act, but they do not in any way qualify the right of the owner or occupier where the dog is not in the charge of any one. The appeal must, therefore, be allowed with costs, and judgment entered for defendant with costs in the Court below.

Buchanan, J., concurred.

[Applicant's Attorneys: Syfret, Godlonton and Low; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

THEUNISSEN V. BURNS. { 1904.
{ July 28th.

Sale and purchase—*Locutio operis*
—Price—Tailor.

The plaintiff, a tailor, having delivered a suit of clothes ordered by the defendant, the latter refused to take it, on the ground that the coat did not fit, and refused to give the plaintiff the opportunity to alter it, so as to make it fit. It was proved that the coat might have been so altered if the defendant had allowed the plaintiff to fit it in the ordinary manner.

Held, that the plaintiff, who tendered the suit, was entitled to recover the price agreed upon.

This was an appeal from a decision of the R.M. of Somerset West, in which he gave judgment against the appellant for £4 5s., being the price of a suit of clothes made by the respondent. The defendant admitted that he agreed to take a suit of clothes, but he contended that the suit did not fit him, and he could not use it, and he tendered to return same. The Magistrate, in his reasons, said the defendant admitted he received a suit, but he declined to pay for it because it did not fit, being too tight under the arms, and short in the sleeves. Although the suit was not a perfect fit, the Magistrate was of opinion that the suit could have been worn without inconvenience. It could have been made to fit, and that view was supported by a practical tailor, viz., one Walter de Vine. The plaintiff was always willing to make the alterations, and in his opinion the defendant took up an unreasonable

attitude in not allowing the plaintiff to make the alterations. Plaintiff had given evidence that it was the custom of the trade to alter a suit if it did not fit. In his opinion, the defendant ought to have allowed the plaintiff to attempt to make

Mr. De Villiers said that the defendant altered the alterations. After that, he might have had reason to reject the suit. The plaintiff was entitled to recover the amount of £4 8s., with costs.

Mr. J. E. R. de Villiers was for the appellant, and Mr. Alexander for the respondent.

Mr. De Villiers said that the defendant was under the impression, as also was Miller, that the suit could not possibly be made to fit him. The Magistrate seemed to misunderstand the first letter, which merely set out that the defendant would show the coat to the plaintiff's traveller.

[De Villiers, C.J.: Does a tailor guarantee the first fit will be a proper one? What is the object of fitting?]

Certainly, there should be a certain amount of fitting, but in this case there was an alteration made afterwards.

[De Villiers, C.J.: Why shouldn't the second alteration be made? It is the defendant's own fault. If he had gone to try on the coat it would have been all right.]

Your Lordship will see that at the time the defendant was very ill. The plaintiff obtained judgment for the whole amount, although there were still serious defects. The Court would never allow one man to be enriched at the expense of another. Counsel submitted that the summons was wrong, as it should have been for work and labour done, and he might have put in a claim for damages for loss of profit.

De Villiers, C.J.: The Magistrate appears to me to have given a perfectly correct judgment. The defendant ordered a suit from the plaintiff, who is a tailor. When the suit arrived the defendant fitted on the coat, and finding that it was a misfit he insisted upon his right to reject the whole suit. The plaintiff offered to alter the coat so as to make it fit, but the defendant refused to give him the opportunity, and returned the suit. The plaintiff then altered the coat, but as the defendant had refused to fit it on in his presence he did not succeed in securing a good fit. Consequently when the coat was fitted on before the Magistrate it was still somewhat tight under the arms, but expert evidence was given that it was quite capable of being so altered as to fit exactly. It is now contended for the defendant that the plaintiff is not entitled to the full price agreed upon, as the coat is not yet a well-fitting coat, but it appears to me that the defendant is estopped from raising this defence seeing that it is his fault only that the coat does not fit. The plaintiff had to supply the material, and

therefore it really is a case of sale and purchase, but even if the transaction were treated as a *locatio operis* the result would be the same. The conduct of the defendant justified the Court below in treating the case as if a proper suit had been made and tendered to the defendant. The appeal must be dismissed with costs.

[Appellant's Attorneys: Dempers and Van Ryneveld; Respondent's Attorney: F. B. Andrews.]

WILSON V. EXCELSIOR BENEFIT SOCIETY.

Friendly societies—Settlement of disputes—Arbitration—Appeal.

The defendant Society was established under Act 7 of 1882, and was never registered under Act 5 of 1892. The plaintiff, a member of the Society, having made a claim for sick pay, which the Society disputed, a special meeting of members was called in accordance with the rules of the Society, to settle the dispute. The meeting decided to pay part of the claim, whereupon the action was brought in the Magistrate's Court for the whole amount.

Held, that the 25th section of the Act of 1892 did not apply and that there was no appeal against the decision of the general meeting which had been properly convened for the special purpose of deciding the dispute.

This was an appeal from a decision of R.M. of Cape Town in an action instituted by the appellant to recover from the respondents £9 7s., being balance of sick money due by the society.

It appeared that the appellant was ill in England from December, 1902, to October, 1903. There was a total claim of £23 4s. 6d., and the society paid £13 7s. 6d. The Magistrate found for the society, and the plaintiff's claim was dismissed. In his reasons for judgment, the Magistrate said it was not disputed that the plaintiff was in full benefit under rule 25 of the society, which provided that all disputes should be settled by an Arbitration Committee. The plaintiff left for England in December, 1902, and returned in October, 1903 but he gave the society no notice of his illness, as required by the rules, until the

1st June, and from that date the society paid him, and for sick payment credit was given by the plaintiff. The view the Court would take of the case would render it unnecessary to decide whether the rules of the society ever contemplated a case like the plaintiff's. One thing was certain. An Arbitration Committee of the society was duly summoned, and by their decision the plaintiff was duly bound in accordance with the rules. The Courts were open to an aggrieved party who could show that the Arbitration Committee acted not in accordance with the law, but the plaintiff gave no such reasons. Then, again, the plaintiff accepted £13 7s. 6d. in full settlement of his claim, and he signed the receipt, from which it was clear the payment was made in settlement. He held that the transaction was final and binding on the plaintiff.

Mr. Burton (with him Mr. Williams) was for the appellant, and Mr. Wilkinson was for the respondents.

Mr. Burton said that the Magistrate's reasons were two-fold. He held that the plaintiff accepted the sum in full settlement, and, secondly, that the arbitration, held under the rules of the society, debarred the plaintiff from having any remedy. He contended that the Magistrate should have gone into the merits of the case, as he was clearly wrong about the settlement, the plaintiff making it clear at the meeting that he would sue for the difference. The rules were framed under Act 7 of 1882, from which there was no appeal, and the Magistrate seemed to have based his decision on that Act. That Act, however, had been repealed by Act 5 of 1892, by which an appeal could be made to the Supreme Court or to the Resident Magistrate of the district.

Mr. Wilkinson said it might save time if he mentioned that the society was registered under the old Act.

[De Villiers, C.J.: That is very important.]

Mr. Burton said he must confess he had not known of that. Counsel then proceeded to argue on the constitution of the Arbitration Committee, and contended, after quoting previous cases, that the committee that adjudicated on this particular case was not properly constituted.

Without calling upon Mr. Wilkinson, the Court dismissed the appeal.

De Villiers, C.J.: It appears to me that the provisions of the 25th regulation have been substantially complied with. If any dispute shall arise, it shall be referred to the Noble Arch, who shall form an Arbitration Committee, consisting of the whole lodge, to decide on the affair. This dispute apparently was referred to the Noble Arch, and they issued a notice calling on all the individual members entitled to be summoned. The members were specially summoned to consider this special case.

In my opinion, if the substantial construction of the regulation was complied with, and notice given to the members that they were to consider this dispute which had arisen, the constitution of the committee was in accordance with the rules. The members were called under this notice to consider this special claim put in by Brother Wilson for eleven months' sick pay, but he failed to acquaint the society according to rule at the time of his illness. The members were called together according to the rules, and the appellant is not entitled to succeed, unless he can show that this particular regulation is no longer in force. Mr. Wilkinson has pointed out that the Act of '92 specially excepts the case of societies established under the former Act, and it is not alleged that this society is enrolled under the new Act. The case must therefore be decided under the Act 7 of 1882 which does not like the 25th section of Act 5 of 1892 permit of an appeal against the decision of arbitrators settling disputes under the rules of the society. The appeal will be dismissed, with costs.

[Appellant's Attorney: H. J. Sonnenberg; Respondents' Attorneys: Silberbauer, Wahl and Fuller.]

BOTHA V. BOTHA.

{ 1904.
July 28th.

Loan—Bailment—Negligence.

The defendant borrowed from the plaintiff a horse, which fell ill on the journey. The defendant's servants left it in the veld for several days, after which it died, but there was no evidence whether it would have been saved with due care and diligence.

Held, that the defendant was bound to take at least as much care of the borrowed horse as he would have taken of his own, and that as considerable negligence had been shewn in the treatment of the horse, the Magistrate was justified in holding that such negligence was the cause of the death.

This was an appeal from the decision of the Resident Magistrate of Barkly East, granting the respondent, who was

plaintiff in the Court below, the sum of £20, value of a horse lent by respondent to appellant, and which the appellant, through neglect, allowed to die.

Plaintiff stated in evidence before the Magistrate that defendant went to him in August, 1903, and borrowed two horses. They were to go to Maclear, and were to be returned after the lambing season was over. Some days afterwards defendant went to plaintiff, and said that one of the horses was dead. Plaintiff was at the time satisfied that the horse had died suddenly, but afterwards, from what he heard, he asked the defendant to pay something for it. It was not correct that the defendant said that the horse was too thin and very poor. In the January preceding, plaintiff cut the horse's hoofs until the blood ran; but when defendant took the horse, the hoofs were sound.

Jasper Johannes Botha (the defendant) stated that he wanted a pack horse, and was advised to ask plaintiff for one, but not to take "Donka" (the horse in question). Plaintiff offered defendant Donka, and defendant asked him how it was. Plaintiff replied that it was poor, but serviceable. Defendant, on seeing the horse, said he was not serviceable, and plaintiff said he would lend defendant a "blue" horse to carry the pack, but that defendant would have to take Donka with him. Defendant did so, but refused to be responsible for Donka. When the horse died, defendant told plaintiff, who said, "Let him kick." Nothing was then said about paying for it.

Mr. D. Buchanan appeared for the appellant, and Mr. Burton for the respondent.

After hearing counsel in argument on the facts:—

De Villiers, C.J.: The Magistrate had to decide two points: first, what was the contract with regard to the horse; and, secondly, did the defendant take due care of the horse. As to the contract, the Magistrate practically found that it was a loan for the convenience of the defendant, and there was evidence to support the finding. The plaintiff and his witnesses stated that the defendant required both horses, and that it was only after considerable doubt that he allowed the defendant to have the two horses. Therefore, the Magistrate was right in saying it was a loan for the benefit of the defendant. It is clear that the defendant was bound to take at least the same care of the horse as he would of his own. The evidence showed that on August 17 the horse broke down, and that on August 23 it was alive. In the interval it was the duty of the defendant to do everything he could to save the horse. He was not doing his duty in leaving the horse to its fate. It was possible that if the defendant had gone to the rescue of the horse it might not have died. The de-

fendant seems to have been very careless in the matter, and left the horse to his servant, and after he got notice from the servant that the horse was in that condition, he did not take the pains or trouble to save the horse. It seems that there were facts before the Magistrate to justify him in finding as he had, and as that was so, the Court will not disturb his judgment. The appeal will be dismissed, with costs.

Buchanan, J., concurred.

[Appellant's Attorneys: Syfret, God-linton and Low; Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

MORITZ V. MURRAY. } 1904.
} July 28th.

Sale and purchase—Warranty of quality—*Quantum minoris*.

The defendant having bought a quantity of eggs from the plaintiff, asked him not to deliver them at once. The plaintiff kept the eggs, ready packed, for about fourteen days, and then sent them to the defendant, who found that some of them had gone bad and had them publicly sold at the plaintiff's risk.

Held, in an action by the plaintiff for the price, that although the plaintiff must be held to have warranted the eggs to be fit for the purpose for which they had been intended, this warranty did not extend beyond the time when the defendant ought to have accepted delivery, and that the defendant was not entitled to deduct from the purchase price the difference between such price and the amount realised at the public sale.

This was an appeal by the defendant, from a decision of the Resident Magistrate at Robertson, in which he awarded the plaintiff a sum of £27 10s., the value of a quantity of eggs purchased by defendant from plaintiff.

The appellant stated that the eggs which he purchased from respondent were not good eggs. He could tell a good egg from a bad one, by the weight, colour, and by holding it up to the light. The eggs which he purchased were guaranteed by respondent to be fresh, but on arrival in Cape Town they were found to be bad, and in some cases rotten. They were sold for £10 6s., which

appellant tendered to respondent, but he refused to accept it.

The Magistrate, in his reasons for judgment, said that it was clear that the plaintiff was the proper party to sue. The defendant must have been aware that the bulk of the eggs were 10 or 12 days old, and there was no proof of notice having been sent to the plaintiff as to the condition of the eggs.

Mr. Close appeared for the appellant, and Mr. W. P. Buchanan for the respondent.

Mr. Close, having been heard in argument on the facts; without calling on Mr. Buchanan, the Court gave judgment.

De Villiers, C.J.: There are, I suppose, few articles of food which vary in quality as eggs do. They undergo a daily deterioration from the time they are laid until they are no longer fit for consumption as food. In the present case there was no warranty to sell fresh laid eggs. The seller was, however, bound by the nature of his contract to warrant the eggs to be free from such defects as would make them unfit for the use for which they were intended. The defendant bought them for the purpose of resale, and the plaintiff must be held to have warranted them to be in a good and merchantable condition. There is evidence that fourteen days after the eggs were tendered some of them had gone bad, but at the time when they were so tendered the plaintiff says they were good, and there is no evidence to contradict his statement. The fact that some of them were bad fourteen days after does not prove that they were not perfectly good at the time when the defendant ought to have accepted them. The Magistrate properly held that the defendant should pay the full price of the eggs without any deduction by way of *quanti minoris*, and the appeal must therefore be dismissed, with costs.

[Appellant's Attorneys: Herold and Gie; Respondent's Attorneys: Findlay and Tait.]

FRYER V. ESTATE PETERSEN.

Executor—Agent—Authority—Estoppel—Costs.

The plaintiff having supplied goods to one B., who purported to buy them on behalf of the executor of P.'s estate along with goods bought by B. for the children of P., rendered an account to the executor, but there was nothing in the account to call the executor's attention to the fact that it included goods for P.,

Held, that the executor was not liable for goods supplied to B. after such account had been rendered to him.

This was an appeal from the decision of the R.M. of Colesberg, a case in which the plaintiff claimed for £31 4s. 11d. from William Davis, the executor of the estate of Mrs. Petersen, for goods sold and delivered at the defendant's request. The defendant tendered £28 0s. 4d. in full settlement. The balance of the order had been for Miss Burgen, who had only authority to purchase goods for the children. The Magistrate, in his reasons for judgment, said that he believed that the defendant in no way held out Miss Burgen as his agent, and when the defendant was made aware of the fact that Miss Burgen was purchasing goods, he repudiated any liability except for such articles as authorised by him for the children. There would be judgment for the amount tendered, without costs.

Mr. W. P. Buchanan was for the appellant, and Mr. Russell was for the respondent.

Counsel having been heard in argument,

De Villiers, C.J.: "The defendant is sued as the executor of the estate of Mrs. Petersen for goods supplied to the estate after the death of Mrs. Petersen. It is quite clear that the plaintiff, the tradesman who supplied these goods, can only recover the price of goods if he was authorised by the executor to supply them. In the present case there is no proof whatever of any authority given by the defendant to the plaintiff to supply Miss Burgen with goods. But it is said there was such a previous course of business as to practically estop the defendant from denying that Miss Burgen was entitled to order the goods. There is no evidence of such a previous course of dealing. In the account relied upon, the goods might have been equally for the children or Miss Burgen. There was no such previous course of dealing as would lead the plaintiff to believe that Miss Burgen was an agent of the executor to buy on his behalf. I consider there was a considerable degree of negligence on the part of the plaintiff in assuming that Miss Burgen had this authority. The plaintiff must have known that Miss Burgen was not one of the family. She was not one of those for whom the executor was bound to provide clothes, and it was the plaintiff's duty, before he supplied Miss Burgen with goods, to inquire from the executor whether he was justified in supplying Miss Burgen with goods. The defendant was willing to pay for all articles supplied to the children, and costs to date. It is said there was a tender of

costs up to the date of trial, and that the Magistrate should have given costs. "Costs to date" is capable of a double meaning, but moreover, the Magistrate was not bound to accept it. He had a judicial discretion in the matter. It appears to me that the Magistrate came to the conclusion that the plaintiff ought not to have held the executor liable for goods supplied to a person who had no claim on the estate. In my opinion; therefore, the appeal must be dismissed, with costs.

[Appellant's Attorneys: Syfret, Godlonton and Low; Respondent's Attorney: S. S. Hutton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1904.
 { Aug. 1st.

Mr. W. P. Schreiner applied for the admission of Henry Godfrey Lewis as an advocate.

The application was granted.

Mr. W. P. Buchanan made application on behalf of William Schalk van Niekerk to be admitted as an attorney and notary.

The application was granted.

Mr. Burton, on behalf of Petrus Lion Cachet, applied for his admission as an attorney and notary.

The application was granted.

Mr. Alexander applied for the admission of Eleazar Lyons as a translator.

The application was granted.

Mr. W. P. Buchanan, on behalf of Thomas Chalmers Robertson, applied for his admission as a translator.

The Court granted the application.

PROVISIONAL ROLL.

CONDES V. SOPHIE.

Mr. P. Jones applied for provisional sentence on a mortgage bond for £800, together with interest at 6 per cent. from 14th January.

The application was granted.

SAN GEORGES V. EPSTEIN.

Mr. Rainsford applied that an order for sequestration of the defendant's estate

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be made absolute. He also applied to have Mr. G. W. Steytler appointed *curator bonis*, the costs of the application to be paid out of the estate.

The application was granted.

WIBEY V. FISH.

Mr. Russell applied for provisional sentence on a mortgage bond for £1,800, with interest at 6 per cent. from the 1st January last.

The application was granted.

REID V. FISH.

Mr. J. E. R. de Villiers applied for provisional sentence on a mortgage bond for £350, with interest at the rate of 6 per cent. from the 1st January last.

Granted.

ESTATE ZAHN V. VOLK.

Mr. Sutton applied for provisional sentence on a mortgage bond for £400, £2 6s. 6d. insurance fees, and interest at 6 per cent. from the 1st September last.

Granted.

ALING V. DURANDT.

Dr. Krause applied to have an order of the sequestration of the defendant's estate made final.

Granted.

HERMAN V. UHRBROCK.

Mr. Van Zyl applied for provisional sentence on three promissory notes, amounting in the total to £203.

Defendant appeared in person, and said he did not admit the debt. He purchased certain farms from the plaintiff on the instalment system. He paid a quarter of the money down, and thought he had three years to pay the rest, but three months after taking possession he was called on to pay another instalment. When he signed the promissory notes he did not understand what he was signing.

De Villiers, C.J., said that if the defendant thought he had any defence he would direct him to go to an attorney and consult him. He could not understand why the defendant signed the promissory notes. He would have to give provisional sentence for the amount claimed, with costs.

LANGHOVEN V. KELLER.

Dr. Greer applied for provisional sentence on a mortgage bond for £830, with interest at the rate of 6 per cent. from January last.

Granted.

POWER V. O'DRISCOLL.

Mr. Pyemont applied for provisional sentence on a mortgage bond for £500, with interest at the rate of 6 per cent. from January last.

Granted.

SMITH V. PFISTER.

Mr. Sutton applied for provisional sentence on a mortgage bond for £600, with interest at 6 per cent. from the 1st January last.

Granted.

CITY TRAMWAYS CO. V. SINGH.

Dr. Rainsford applied for a decree of civil imprisonment against the defendant for an unsatisfied judgment of the Court, allowing the plaintiff £137, together with costs, less £50, paid on account.

The defendant appeared in person, and said he had a house in the Gardens, which plaintiffs could have attached had they wished.

[De Villiers, C.J.: Is the house mortgaged?]

Yes.

[De Villiers, C.J.: Have you any proposal to make?]

The defendant said he would pay £3 a month for six months, at the expiration of which time he would satisfy the plaintiff's demand.

The Court granted the application, but suspended execution as long as defendant should pay £3 a month.

NETHERLANDS BANK OF SOUTH AFRICA V. GORDON AND CO.

Mr. Roux applied for provisional sentence on two promissory notes; one for £206 5s. 6d., which fell due on the 7th July, and the other for £187 10s., which fell due on the 22nd July.

Granted.

DEMPERS V. SAALMON.

Mr. De Waal applied for provisional sentence on two mortgage bonds, one for £450, dated November 26, 1903, and the other for £500, dated December 15, 1903, with interest at 6 per cent.

Granted.

DEMPERS V. SAALMIN.

Dr. Greer applied for provisional sentence on a mortgage bond for £400, with interest at the rate of 6 per cent. from January last.

Granted.

ARDERNE V. MCNAUGHTON AND ANOTHER.

Mr. Jones applied for provisional sentence on a mortgage bond for £2,150

against the first defendant, and for provisional sentence against the second defendant, who acted as collateral security for McNaughton.

Granted.

ELLIOT BROS. V. BARTLETT

Mr. Schreiner moved for provisional sentence on two promissory notes for £859 and £81 respectively.

Granted.

SEARIGHT AND CO. V. ATTMORE.

Dr. Rainsford applied for a provisional order of sequestration to be superseded.

Granted.

ILLIQUID ROLL.

LATEGAN V. HOLM AND { 1904.
ANOTHER. { Aug. 1st.

Mr. De Waal applied for judgment, under Rule 329d, for £65, rent due.

Granted.

LOTTER AND CO. V. DE WIT.

Mr. Struben applied, under Rule 319, for judgment for £850 for goods sold and delivered.

Granted.

EDWARDS V. MYBURGH.

Mr. Jones applied for a decree, under Rule 329d, for £24 17s. 7d., for goods sold and delivered.

Granted.

WAR DEPARTMENT V. WAHL.

Mr. Jones applied under Rule 329d, for judgment for £36, less £20 paid on account, being the amount paid by plaintiff to the defendant through error.

Granted.

STEPHAN BROS. V. MYBURGH.

Mr. Roux applied, under Rule 329d, for judgment for £66 7s. 3d., amount due for goods sold and delivered.

Granted.

LUYT V. ALLNUTT.

Mr. Russell applied, under Rule 329d, for judgment for £30, amount due for rent.

Granted.

SHUNN V. S.A. COLLEGE COUNCIL.

Mr. Upington, who appeared for defendants, asked to have judgment signed against plaintiff, who had failed to appear.

Granted.

MASMDKEY V. TABLE BAY HARBOUR BOARD.

Mr. Jones asked to have judgment signed against plaintiff, who had failed to proceed with the case.

Granted.

GOODEHAM V. ESTATE HUTT.

Mr. W. P. Buchanan applied for an order directing the defendant Wilhelmina Gertrude Hutt, in her capacity as executrix of the estate of the late Vincent Arthur Hutt, to give transfer to the plaintiff of certain property which he had purchased from the deceased for £1,585.

Granted.

WOOLFF, HEINEMAN AND CO. V. GORDON.

Mr. Lewis applied, under Rule 329d, for judgment for £8 4s. 6d. for goods sold and delivered.

Granted.

JURITZ V. PAYNE.

Mr. Pyemont applied, under Rule 319f for judgment for £35, amount due for goods sold and delivered.

Granted.

DYASM V. NORTJE.

Mr. Van Zyl applied, under Rule 329d, for judgment for £22 9s. 11d., amount due for goods sold and delivered to one Eckard, of whose estate the defendant was executrix.

The Registrar said a certificate of the defendant's being appointed executrix had not been filed.

The application was granted, subject to the certificate being produced.

S.A. BREWERIES V. DE VILLIERS.

Mr. J. E. R. de Villiers applied, under Rule 329d, for provisional sentence on a sum of £44 16s. 9d., amount due for goods sold and delivered.

Granted.

TOWN COUNCIL OF CAPE TOWN V. THOMAS.

Mr. Alexander applied, under Rule 329d, for judgment for £7 4s. 4d., amount due for rates.

Granted.

TOWN COUNCIL OF CAPE TOWN V. ABRAHAM.

Mr. Russell applied, under Rule 329d, for judgment for £21, amount due for rates.

Granted.

TOWN COUNCIL OF CAPE TOWN V. BOYCE.

Mr. D. Buchanan applied, under Rule 329d, for judgment for £25 17s. 5d., amount due for rates.

Granted.

STABLEFORD V. RIMMEL.

Mr. M. de Villiers applied, under Rule 319, for judgment for £26 9s. 6d., amount due for board and lodgings.

The defendant, who appeared in person, denied that he owed the amount claimed, and stated he only owed plain amount due for board and lodging.

The case was allowed to stand over to enable defendant to file a plea.

**REHABILITATIONS. { 1904.
Aug. 1st.**

Mr. Pittman applied for the rehabilitation of William Abraham Smit, whose estate was sequestrated in May, 1895.

Granted.

Mr. W. P. Buchanan applied for the rehabilitation of Hendrik Jacobus van der Westhuisen.

Granted.

Mr. W. P. Buchanan applied for the rehabilitation of Henry Beckley, who was adjudged a bankrupt in August, 1896. He drew the attention of the Court to the Master's report, which was unfavourable.

De Villiers, C.J., having perused the Master's report, said he could not grant the application, but gave leave to apply again in six months.

Mr. W. P. Buchanan moved for the rehabilitation of Jan Abraham Haarloff. Counsel said that the estate was sequestrated on the 30th January, 1894. The debts proved were £217 17s., and the assets £74 13s. The distribution and law costs amounted to £148 2s. 4d., so that creditors had to pay £73 odd. There was nothing unfavourable in the Master's report.

Granted.

Mr. Pyemont moved for the rehabilitation of Harold William Elston. There was a certificate from the Master as to the requisite number of creditors having consented.

Granted.

Mr. W. P. Buchanan moved for the discharge of sequestration against the estate of Benzal Kaplan, a scheme of composition having been accepted. At the third meeting there were four credi-

tors present, but another creditor was not there. Since that there had been a consent paper signed by Prince, Vincent and Co., the remaining creditor, but as their representative had not been present, the Master refused to give the certificate.

[De Villiers, C.J.: How can I help you?]

Well, an expression from the Court might help us?

De Villiers, C.J.: The provisions of the Ordinance must be complied with. There will be no order. You must compel the Master to give the certificate.

GENERAL MOTIONS.

Ex parte DAVISON. { 1904.
Aug. 1st.

Mr. Upington moved, as a matter of urgency, for leave to attach certain money belonging to one Arthur Weston. The petition set out that the respondent had been a bookkeeper in the employ of the petitioners, and that he had left for England after judgment had been obtained against him in the Magistrate's Court, at Queen's Town, for £24 1s. 3d. He had about £300 on deposit in the Queen's Town branch of the Bank of Africa, and it was believed if the bank was not interdicted from parting with the money respondent would withdraw it by cable. Counsel asked for an interdict against the bank, and also for an order authorising the Messenger to attach certain money to satisfy the judgment with costs.

Order granted in terms of the second prayer, the order to be telegraphed to Queen's Town, with costs.

BARRET V. BARRET.

Mr. M. Bisset moved to make absolute a rule calling on the respondent to restore conjugal rights, failing which, to show cause why the bonds of marriage should not be dissolved.

Rule made absolute.

Ex parte GIBSON.

Mr. Roux moved to make absolute a rule *nisi* granted under the Derelict Lands Act, granted on July 5.

Rule made absolute.

Ex parte MALHERBE. { 1904.
Aug. 1st.

Registration of title—Prescription.

The applicant bought one-eighth of a farm and entered into occupation. He after-

wards sold one-sixteenth and remained in occupation of that portion. The total period of his occupation exceeded 30 years. After the applicant had sold one-sixteenth, it was discovered that the person from whom he had bought was the registered owner of one-sixteenth only. The applicant obtained a rule, calling on persons claiming the one-sixteenth, to show cause why the applicant should not by reason of his occupation for over 30 years be registered as the owner of the one-sixteenth. The owner of the one-sixteenth in question was dead, and his heirs did not oppose the application. A person claiming to have derived a title from such owner opposed, but as he showed no better title than the applicant, the rule was made absolute.

This was a motion to make absolute a rule *nisi* granted on the 20th May, under the Derelict Lands Act. It appeared from the petition that in 1872 the petitioner purchased one-eighth share in a certain farm at Frenchhoek from one John Douglas, of which he obtained transfer. In 1891 he sold one-half of his share, and in March last he sold his remaining sixth, but the Registrar of Deeds declined to pass transfer, because the said Douglas had originally only one-sixteenth share in the farm. Petitioner had caused search to be made in the Deeds Office, and had found out that Homan, De Villiers, and Douglas, who had transactions in the farm, were not particular about passing transfer.

The answering affidavit of Helena le Roux set out that the petitioner had obtained transfer of an eighth share from Douglas in error, who had also in error, obtained transfer from De Villiers. She denied that the petitioner had ever made use of one-eighth of the farm since 1872. She bought the share from the executors in 1894. The affidavit of Johannes Homan corroborated the statements in the affidavit of Mrs. Le Roux. Dr. Krause (for the applicant) applied that the rule be discharged, and that his client be registered as the owner of the share.

Mr. J. E. R. de Villiers appeared for Edward Christian le Roux, to oppose the motion, and to apply for the discharge of the rule.

The replying affidavit of the petitioner set out that he bought his

share in 18972, and in 1891 he sold one-half of his share, and he never was aware that his title was defective. In 1896 he attended several meetings of shareholders of the farm, at which all the shareholders were represented for the purpose of deciding the principle on which the grazing should be regulated, and there never was any objection to him. It was not until his application to the Court was mentioned that Helena le Roux claimed the share.

Mr. Schreiner, K.C. (for the respondent Helena Le Roux): The petitioner may have had the right to occupy one-eighth of the farm if he could have shown prescription. But mere occupation is not enough to prove prescription: there must be adverse occupation. He did not possess *pro domino*. In point of fact, certain claimants would seem to have occupied 15-16th of the farm. Hauman, sen., took over the farm in 1831, and died the same year. J. S. Hauman had a grant of the farm, but took no practical steps till 1830.

[De Villiers, C.J.: You trace through the Haumans, but not from them: that is your weak point.]

[After further argument on the facts, Mr. Schreiner continued.] The applicant cannot claim by prescription, as he has since 1891 been only a joint tenant. No joint tenant can prescribe as against his co-tenant. He had never had any adverse user as of right. A joint owner cannot prescribe against a co-owner within sixty years.

Mr. J. E. R. de Villiers (for E. C. Le Roux): We claim to have a right to show cause against the rule nisi being made absolute.

[De Villiers, C.J.: But what is your defence?]

We are the registered owners of one-eighth. If he did not occupy it it is not derelict.

Dr. Krause (for applicant): Since 1872 we have occupied a portion of the farm.

[De Villiers, C.J.: What evidence is there to show that this was occupied by you as of right?]

The transfer deeds of the property.

[De Villiers, C.J.: The whole point is, is your occupation preferent to your title from Hauman?]

Their whole claim seems to be based on a mere presumption. Even in 1896 the petitioner is recognised by the co-owners as the owner of 1-16th. No cause has been shown why Mr. Le Roux is entitled to any portion of the farm.

Mr. Schreiner, in reply, dealt chiefly with the facts of the case, and contended that Malherbe could have no prescriptive right. In conclusion he referred to *Smith and Others v. Martin's Executor Dative* (16 S.C.R., 148).

De Villiers, C.J.: Two points have been relied on in this case, the first is the fact that the petitioner had obtained transfer of one-eighth of the farm, and had transferred one-sixteenth, and was,

therefore, entitled to remain in possession of one-sixteenth; the other is that the petitioner from the year 1872 to 1891 made use of and occupied one-eighth part of the farm, and that from that date up to the present one-sixteenth. It was mainly upon the second part of the application that I was induced to grant a rule. That rule now stands, and that rule can only be discharged upon an application of a person who can show that he or she has a better title than the applicant. The person in whose name the property is registered has not come forward at all. If Hauman or his executors had come forward, and opposed the application, I should have had more difficulty in dealing with the case. I have to deal with people who are just as much strangers to the original owner as the petitioner is. In order to show that Mrs. Le Roux has a right to this property, it is alleged that the insolvent Hauman had acquired a right to the full one-eighth share by virtue of his ownership of Labrie, and that he purchased this share. When he became insolvent, he re-acquired the right, and subsequently this right was sold to the present respondent, Mrs. Le Roux. There is no evidence, however, that the insolvent did acquire the right. He did not claim as heir to the former heir, whose will was silent as to the property. That is an important point, because probably at the time he had not acquired transfer. Now, there is nothing whatever to show that the insolvent had ever acquired any right to this property. It is said that he had this farm Labrie, and he had a right to a share in that property by virtue of his ownership of Labrie. It is clear that if he was entitled to transfer it would have been passed, but none has been passed, although it is alleged he was entitled to one-eighth share. In my opinion, on the statements made on behalf of the respondents, there is nothing to show that the respondent would have any right to claim this property as against the executors of Hauman, the original owner to whom this property was transferred. The respondent, therefore, in my opinion, has no better title than the applicant. I think that in all right and justice the petitioner shows that he had more right to the transfer than any of the parties. As to the claim of the other owners, represented by Mr. De Villiers, I do not see what *locus standi* they have in the matter. The rule will be made absolute, with costs.

Mr. Schreiner asked the Court to reserve to his clients the right to bring an action in the matter.

De Villiers, C.J.: I think the respondents have brought forward everything they could. If I thought that by postponing the matter any injustice would be prevented, I should certainly grant the request, but I do not, therefore the application will be refused.

De Villiers, C.J., subsequently said it would save trouble and expense if the rule were given in regard to a sixteenth share.

Mr. Schreiner said he had no instructions on the matter.

[De Villiers, C.J.: Well, if you wish it, I can make a rule calling on all concerned as to the sixteenth of a share of the property returnable on the 31st August.]

Mr. Schreiner: As your lordship please.

Potter (August 18). The rule was made absolute.

[Applicant's Attorney: V. A. van der Byl; Respondents' Attorneys: For H. H. L. Roux, Walker and Jacobshon; for E. C. Le Roux, Michau and de Villiers.]

LAITE AND CO. V. GOLDSMID.

Mr. W. P. Buchanan applied for an order interdicting the defendant from removing, selling, alienating, or otherwise disposing of certain printing material.

The application was granted.

TANCRED V. BEUKES.

Dr. Greer, on behalf of the plaintiff applied for an order authorising the attachment of certain property. He explained that the Court ordered the defendant on the 14th October last to give transfer and conveyance to plaintiff of certain property in the Calvinia district, but he had failed to do so. Plaintiff now asked for an order to attach the property.

Granted.

TANCRED V. BEUKES

Dr. Greer said that this was a similar application to the previous one, except that the property was different and the purchase price was £45. The affidavits were exactly similar.

Order granted.

Ex parte MAREE.

Dr. Greer moved for the appointment of a curator in the interest of two minors, and suggested that the petitioner be appointed curator. The Master stated that a report was unnecessary.

Order granted.

Ex parte VAN DER MERWE.

Mr. P. Jones moved for leave to execute a mortgage bond to pay for certain repairs to property in the estate of petitioner's late husband. The Master's

report set forth that it would not appear that the petitioner was not justified in raising the loan. She could have done so under the mutual will on her own portion. The repairs (counsel said) were necessary for the upkeep of the building.

De Villiers, C.J., said that at present he was not prepared to overrule the Master's report. Counsel could present a fresh application.

KUIL V. UNION-CASTLE MAIL CO.

Mr. Gardiner moved for leave to sue the respondents in *forma pauperis* for damages for the bite of a dog.

Granted, Mr. Gardiner to take the reference.

ROSEBANK MATCH CO. V. JONKOPINGS OCH VULCANS TANDSTICKSFABRICKS AKNEBOLAG.

Trade mark - Similarity of trade marks—Decision of Registrar.

This was an application upon notice of motion calling on the respondents to show cause why a certain trade-mark should not be interdicted and why the respondents should not be called upon to pay the costs of the application. Affidavits were put in showing the similarity between the diamond as used by the respondent and the star as used by the applicants. The Registrar did not think there was any sufficient similarity to deceive purchasers. Mr. Schreiner (for the applicants) having been heard in argument on the facts, without calling upon Mr. Close (for the respondents).

De Villiers, C.J., said he was not prepared to disturb the decision of the Registrar. It appeared to him there was no such similarity between the two designs as to mislead any person with average intelligence, and the application would be refused, with costs.

Ex parte MARSH.

Mr. W. P. Buchanan moved for leave to cancel a certain mortgage bond, and for the appointment of George William Steytler to the estate as trustee.

Order granted.

ROSENBERG V. WORTHINGTON.

Mr. Upton moved for leave to attach certain landed property, and for leave to sue the respondent by edictal citation. The respondent was indebted to the petitioner for £70. He was at present in Europe, and owned certain property at Sea Point.

Order granted, returnable 21st August.

Ex parte MEYER.

Will—Ord. 15 of 1845.

The Court granted an order, recognising the validity of a certain will which, per incuriam, had not been signed on each leaf.

Mr. J. E. R. de Villiers moved for an order as to the validity of a certain will. The parties, through ignorance or inadvertence, failed to sign each leaf of the will, but the first leaf, which contained the essence of the will, had been duly signed.

Order granted, with costs out of the estate.

DORMEHL V SCHOLTZ.

Mr. Russell moved for leave to sue the respondent by edictal citation for the interest on a certain mortgage bond, and for leave to attach the property.

Order of attachment granted, with leave to sue by edictal citation, returnable first day of next term, one publication in "Ons Land," and one in an English newspaper, with leave to serve the edict with notice of trial.

TAYLOR V. TAFNACH.

Mr. Russell moved for leave to attach certain property of the respondent, and for leave to sue the respondent by edictal citation.

Order granted, personal service to be effected, failing which, publication as in the last case.

THOMPSON V. THOMPSON.

Mr. Upington moved for an order ordering the respondent to pay to the applicant a sufficient sum of money to enable her to proceed with her action for divorce and to maintain the children.

An order was granted, calling on the respondent to pay £25 to the plaintiff's attorneys to enable her to prosecute her action, and that the respondent should pay £5 per month for maintenance until the action was decided.

Ex parte SCHOEMAN.

This was an application on behalf of Gabrina A. Schoeman, widow of the late W. H. Schoeman, for leave to raise £120 on the mortgage of certain property bequeathed to her children, in which property she had a life interest. The money was required to meet certain liabilities of the estate and also for the support of petitioner and her children.

The Master's report concluded by saying: "I think the application should be granted, but I am afraid petitioner will find it difficult to meet the interest on the bonds."

On the motion of Dr. Greer the Court granted an order as prayed.

Ex parte COGHLAN AND OTHERS.

This was an application on behalf of James Coghlan and seven other major heirs of the late Malachy Coghlan and Mary Coghlan, asking the Court to direct (1) that a certain farm bequeathed to the children of the said Malachy and Mary Coghlan should not be sold until the youngest of the four minor heirs should become of age or marry (2) that the rent obtained from the said farm should be used for the maintenance and education of the three younger minors (the eldest was 20 years of age), until they should become of age or marry (3) That should the rent be found insufficient for such purpose the farm should be sold, and the interest from the invested proceeds applied as aforesaid (4) That in the event of one or more of the minors marrying or becoming of age or dying before the others, and the rent aforesaid being more than sufficient for the maintenance and education of the minor or minors, the amount of such surplus should be paid into the estate, or otherwise be paid towards the support of any of the present minors, who although then of age may yet be unmarried and in need of it.

The Master's report was as follows: "The will directs the estate to be equally divided among the children at the death of the survivor. If the estate were realised and the proceeds divided, the interest to be derived from the shares of the minors would not be sufficient for their maintenance and education, I think the proposed agreement would be more beneficial to the minors, and that the application may be granted; but the tutor who approves of the arrangement, and to whom the surplus rents should be paid, should lodge an account and produce proof annually that the minors are receiving their education at the Convent School in terms of the agreement.

On the motion of Mr. P. S. T. Jones the Court granted an order in terms of the Master's report.

Ex parte SNYMAN AND ANOTHER.

This was an application on behalf of the widow Brege E. Snyman and Frederik A. Snyman for leave either (a) to pass a second mortgage bond for £350 at 6 per cent. on certain property, or (b) to pass a first mortgage bond for £500 on the said property for the pur-

chase of stock for the farm, and also (in the event of leave being granted to raise £500) to pay off an existing mortgage of £150. The heirs were all majors, and all consented to either of the proposed arrangements.

The Master stated that he saw no objection to the application being granted.

On the motion of Mr. Rainsford the Court granted an order as prayed.

Ex parte SUNDSTROM.

This was an application on behalf of one Harry Sundstrom, of Mowbray, for an order authorising the Registrar of Deeds to allow the petitioner as natural guardian of his minor child to pass transfer to himself of certain property from the said minor. The property had been purchased by the petitioner, and was transferred to his minor daughter in error. He now wished to have it transferred to himself in order that he might be enabled to raise money thereon for the purpose of building a house upon it. The Master recommended that the petition be granted.

On the motion of Mr. Joubert the Court granted an order as prayed.

Ex parte COGHLAN AND OTHERS.

Mr. Gutsche moved for an order authorising the Master to pay out certain money in terms of his report.

Order granted, the Master to be satisfied as to the sworn appraiser.

HEDDON V. SAWKINS.

Mr. J. E. R. de Villiers applied for an order authorising the respondent to submit certain disputes to arbitration, with costs.

Order granted.

CORDES V. VAN WEENEN.

Mr. P. Jones moved for an order attaching certain property in order to found jurisdiction.

Order granted, citation returnable September 12, personal service to be effected, failing which, one publication in the "Star."

CORDES V. PULVERMACHER.

Mr. P. Jones moved for leave to sue in the same terms as the last motion.

Order granted, one publication in the "Natal Witness," failing which personal service.

THE MASTER V. ESTATE GOLDBERG.

Mr. Nightingale applied for an order compelling the trustee to file a liquidation account with costs.

Order granted.

THE MASTER V. ESTATE ALEXANDER.

Mr. Nightingale said this was a similar application to the last.

Order granted.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

VAN DER SPUY V. VAN DER (1904.
SPUY. (Aug. 2nd.

This was an action for restitution of conjugal rights, failing which, divorce, instituted by Mrs. Aletta van der Spuy against her husband.

Wm. Thomas Birch, clerk in the Registrar Office, produced the marriage register.

Mr. Gardiner appeared for the plaintiff; the suit was undefended.

The plaintiff said she was married to the defendant on the 7th April, 1880. After marriage, she lived with the defendant for some two years, at his farm at Koeberg. The defendant misconducted himself in several ways, giving way to drink. They afterwards lived in Cape Town and Johannesburg. In 1893 witness had to come to Cape Town to live with her mother, as the defendant did not support her. She came down with the defendant's consent. She had lived in Cape Town ever since. Defendant came to see her, and he said that when times got better she was to go back. She had not seen the defendant since that time, nor had she had any request from him to go back. Witness had had to support herself and child by dressmaking. She believed the defendant was now employed in the Civil Service. She did not know where the defendant was at present. Witness had no estate. She believed the defendant had no estate.

Decree of restitution granted, with costs, calling on the defendant to return to or receive the plaintiff on or before the 15th September, failing which, rule

to issue calling on defendant to show cause on the first day of next term why a decree of divorce should not be granted with costs, and plaintiff declared entitled to custody of the child of the marriage, with leave to serve in the same manner as directed in regard to citation.

Postea (October 17.) The rule was made absolute.

SMITH V. SMITH.

A similar action was brought by Elizabeth Smith, of Cape Town, against her husband, who was last heard of in Johannesburg. Mr. De Waal appeared for the plaintiff; the defendant was in default.

Wm. Thomas Birch, clerk in the Colonial Office, produced the marriage register.

Elizabeth Smith (the plaintiff) said she was married to the defendant in community of property at Wynberg, on the 4th December, 1900. Defendant was a baker. They lived happily for about a year. The defendant then left her because of a quarrel. She told him not to stop out in the evening, and he said that if she did not like it he would leave her. Defendant stayed in Wynberg for a few months after he had left her. She wrote to the defendant, but he made no reply, and she then sued him for maintenance, and he was committed for 14 days. After he had been liberated from prison, he went to Johannesburg. He had not since communicated with her. Witness had no property.

Decree of restitution granted, with costs, the defendant to return to or receive the plaintiff on or before the 15th September, failing which, rule to issue calling on the defendant to show cause on the first day of next term why a decree of divorce should not be granted, rule to be served in the same manner as directed in regard to the citation.

Postea (October 17.) The rule was made absolute.

HILDEBRANDT V. HILDE- { 1904.
BRANDT. { July 2nd.
{ Oct. 17th.

Malicious desertion — Divorce —
Willingness to return.

In an action brought by the wife against the husband for divorce on the ground of malicious desertion, it was proved that after the service of the rule on him, he called on the wife and offered to receive her back, but she refused to see him.

Held, in the absence of proof that the offer was accompanied by words or conduct which would justify the plaintiff in refusing the offer, she was not entitled to a decree of divorce.

This was an action for restitution of conjugal rights, brought by Mrs. Clara Hildebrandt, of Wynberg, against her husband, Eugen Wm. Hy. Hildebrandt, the plaintiff also claiming custody of the children of the marriage. Mr. Alexander was for the plaintiff; the defendant was in default.

Clara Hildebrandt (the plaintiff) said she was married to the defendant at Maritzburg, Natal, in 1889. They lived together at Polela, where defendant was court messenger. Defendant afterwards came in 1895 to this colony, and was employed at the Breakwater. He then went to the Forter Reformatory as head warder. He was next appointed gaoler of Wynberg, and witness was appointed matron, and she was still acting as matron of the Wynberg Gaol. Defendant got six months' leave of absence in April of last year. Defendant left power of attorney with Mr. White. He went by the Norman up the East Coast. She received sundry letters and telegrams from him. On the 29th April she received a wire from him saying, "Am off; letters posted." She had heard nothing further from the defendant. Witness also spoke to certain letters which had since been received by Mrs. Lena Burr, sister of the late assistant matron of the gaol, from the latter, who had gone away to Natal about two months before witness's husband.

By the Court: The defendant gave her £5 on the day he left. He made over to Mr. White all right to his salary, but witness was not aware of it at the time. The defendant had owed money to Mr. White.

A clerk in the R.M.'s office at Wynberg produced a copy of letter from defendant, applying for leave of absence, and resigning his appointment.

A decree of restitution was granted, with costs, the defendant to return or receive the plaintiff on or before the 15th September, failing which rule to issue calling on the defendant on the 15th October to show cause why a decree of divorce should not be granted, and why the plaintiff should not be declared to have custody of the minor children, service to be in the same manner as directed in regard to citation.

Postea (October 17.)

Mr. Alexander asked for a decree of divorce and custody of the minor children of the marriage.

According to affidavits and letters read, defendant (the husband) was ordered to return, and on August 3 he returned to

Wynberg, and sent a sum of £11, which plaintiff returned, as it was utterly inadequate to support her and her children. Defendant (plaintiff stated) had not got any employment, and was not able to provide for her. Counsel read certain correspondence, and said that although defendant had made a vague assertion of his willingness to go back, he was not in court to-day, and had not shown that he was able to provide for his wife. Counsel submitted that defendant's offer to return was not *bona fide*, or he would have been there to-day.

De Villiers, C.J.: An order has been made on the defendant to return to or to receive his wife, failing which a decree of divorce would be granted. For the plaintiff to succeed in obtaining a decree of divorce she must prove that the defendant has refused to return to or receive her. I quite agree that an offer to receive or live with the plaintiff accompanied by words or conduct which would justify the plaintiff in refusing the offer would not relieve the defendant; but no such words or conduct have been proved in the present case. The plaintiff herself says that on the 3rd August, 1904, the defendant returned to Wynberg, her place of residence, and sent her £11, which sum she refused, as being totally inadequate for the maintenance of herself and children, and that he had also attempted to see her. Here, at all events, the man sent £11—it might be all he had—and the wife scornfully refused to see him at all. We have Hildebrandt's statements as to what had taken place, and there was a letter written by her attorneys to the plaintiff's attorneys on the 13th September, in which it is stated: "We are instructed to record the fact that the defendant has returned to the plaintiff, but the plaintiff refused to see him, or to allow him to enter the premises occupied by her." Well, that was a most extraordinary attitude for a wife to take up. She brings an action to compel the defendant to live with her or to receive her, and she then refuses to see him. Under the circumstances, I think there was a *bona fide* desire on the part of the husband to see his wife, and there was an absolute refusal on the part of the wife to see her husband. It could not have been a *bona fide* action to compel the husband to return to the wife, if the wife, when the husband did return to her, refused to see him. The application must be refused, with costs.

GIDDINGS V. GIDDINGS.

This was an action brought by Hannah Maria Giddings, of Cape Town, against her husband, James Giddings, for restitution of conjugal rights, failing which for a decree of divorce.

Mr. W. P. Buchanan appeared for the plaintiff; the defendant had been barred from pleading.

Wm. Thomas Birch, clerk in the Colonial Office, produced the marriage register.

Hannah Maria Giddings (born Abel) said she was married in community to the defendant at Malmesbury on the 31st March, 1887. Defendant was a schoolmaster. For a few months they lived at Hopefield. Then they moved to Claremont, where defendant was master at St. Saviour's School. He afterwards opened a school on his own account at Claremont. At a still later date they went to Australia, and then returned to this colony. Witness opened a boarding-house in Cape Town. Her husband failed to contribute towards her support. About the end of August, 1901, he left her to go to East London in search of work. Since that time he had not contributed towards her support. He was a piano tuner, and was travelling about the country.

A decree of restitution was granted, defendant to return to or receive the plaintiff on or before the 15th September, failing which rule to issue calling on the defendant to show cause on the first day of next term why a decree of divorce should not be granted, service to be in the same manner as directed in regard to citation.

PARKER V. PARKER.

This was an action for restitution of conjugal rights, failing which a decree of divorce, brought by Katherine Parker, of Cape Town, against her husband, George Parker. Mr. M. Bisset was for the plaintiff; the defendant had been barred from pleading.

Wm. Thomas Birch, clerk in the Colonial Office, produced the marriage register.

Katherine Parker was called, but she failed to put in appearance.

The case was ordered to stand over.

At a later stage, plaintiff appeared, and gave evidence. She stated that on the 28th September, 1898, she was married to the defendant, George Parker, at St. Luke's Church, Salt River. Up to January, 1902, they lived happily together, when her husband went up-country to get his discharge. A few days after he left, he sent a postcard, but subsequent to his sending money for three months, she received no communication from him. There was one child of the marriage, aged five years.

[De Villiers, C.J.: There was no quarrel between you?]

No, my lord.

Decree of restitution of conjugal rights granted, the defendant to return or receive the plaintiff by the 15th September, failing which the defendant to show cause by the first day of next term why

a decree of divorce should not be granted, the plaintiff to have custody of the child, and personal service to be effected.

SUTHERLAND V. SUTHERLAND.

This was an action for restitution of conjugal rights, failing which a decree of divorce brought by Mrs. Charlotte Sutherland, of Cape Town, against her husband, one McDougall Sutherland, who was believed to be residing at Bulawayo. Mr. D. Buchanan appeared for the plaintiff; the defendant was in default.

Charlotte Sutherland (the plaintiff) said she was married to the defendant in March, 1894, at St. Andrew's, Somerset-road, Cape Town. They resided together in Cape Town for a while, defendant being head waiter in the Civil Service Club. Subsequently the defendant left her, and went to Johannesburg, and remained for eight months. He afterwards went twice to Bulawayo, and stayed for some time. In December, 1900, he returned to her, and they had a quarrel, as witness had complained of some letters that she had found in his box written by another woman. He left her, and had since gone to Bulawayo.

A decree of restitution was granted, the defendant to return to or receive the plaintiff on or before the 15th September, failing which, rule to issue calling on the defendant to show cause on the 15th October why a decree of divorce should not be granted, and why defendant should not be declared to have forfeited the benefits in community, rule to be served in the same manner as directed in regard to citation.

**ROBERTSON AND CO. V. } 1901.
HEATHORN. } Aug. 2nd.**

Servant — Salesman — Salary — Misconduct.

By a contract entered into between the plaintiffs and the defendant in England, the former engaged the services of the latter as a salesman in this Colony for three years at a monthly salary, and agreed to pay for his passage to the Cape, with a condition that in case he should leave without sufficient cause before the expiration of the three years, the plaintiffs should be entitled to a refund of the passage money. After serving for two years, the defendant was discovered to have concealed a sum of money which, as salesman,

he ought to have put into the till.

Held, that this was an act of misconduct which justified the plaintiffs in dismissing the defendant, that they were not liable for his current month's salary, and that they were entitled to a refund of the passage money.

This was an action brought by Robertson and Co., ironmongers, Plein-street, Cape Town, against Leslie Heathorn, ironmonger's assistant, Cape Town, for payment of certain passage-money advanced, and a further sum alleged to have been received for the plaintiffs by the defendant, and not duly accounted for.

The declaration set out that the defendant entered into a contract with the plaintiffs for three years' service as ironmonger's assistant. The plaintiffs paid his passage money, £24 3s. In the course of his employment the defendant had from time to time received sums amounting to £20 in payment of various articles belonging to the plaintiffs that he had sold, and which it was his duty to account for and hand over to the plaintiffs. This the defendant had unlawfully failed to do. The defendant was dismissed from the plaintiffs' service on the 26th May. Plaintiffs claimed forfeiture of the sum of £24 3s., passage-money, and also that the defendant be ordered to pay the sum of £20, moneys belonging to the plaintiffs that he had failed to account for and hand over.

The defendant, in his plea, said that he received the said sum of £20 for goods sold on behalf of the plaintiffs, but he denied that he had unlawfully failed to pay over the said sum. He also said that he was wrongfully and unlawfully, and without good cause dismissed from the plaintiffs' service on the 26th May, without receiving any salary for that month. He said that he had faithfully carried out his duties under the contract. He had been receiving £12 a month wages. He prayed that the plaintiffs' claim be dismissed, with costs. In reconvention, he claimed £10, as and for salary due to the 26th May, and £104 for damages sustained by the aforesaid breach of contract and wrongful dismissal. The defendant had contracted for three years, and had actually served two years and three months.

The plaintiffs, as a plea in reconvention, admitted having paid no wages to the defendant for May, but said that defendant was entitled to no wages, as he had been dismissed.

Mr. Close (with him Mr. M. Bisset) was for the plaintiffs; the defendant was represented by Mr. W. P. Buchanan.

John Blake, an assistant of the plaintiff firm, said that on the 26th May an assistant named Duke made a report to him in regard to Heathorn. Later in the day, witness saw the defendant. Heathorn's duty was to sell goods, and if he sold anything for cash it would be his duty to hand the money to the clerk in charge of the cash register. He taxed the defendant as to a sale he had made of a ball valve. He asked the defendant where the money was. Heathorn replied, "Upstairs." Further pressed, the defendant said that it was left there because the girl said she might want to change the article, and he would leave the money there until he saw whether she changed it. Witness and Heathorn went upstairs, and ultimately they proceeded to some fixtures, where the cash was covered with fittings. The amount was 3s. 6d. He told the defendant he ought to have put the money in the till. Defendant said, "Oh, I am not the only one that does it." Witness challenged him to mention a single case that he knew of. The defendant then said that he could not mention any particular case, but he had thought they did. Witness said that it would be impossible to continue the defendant in the firm's service.

Cross-examined: He did not know of any other case of misappropriation by the defendant except the one he had mentioned. The defendant came out from Home with good credentials. Defendant was engaged at £10 a month. He had not given satisfaction; he had not carried out his duties in a business-like way, he was somewhat neglectful. They had no anxiety to get rid of the defendant. He did not say the defendant purposely embezzled; he said that the money was where it ought not to be. Previous to this case, money had been found among goods in the store. They had had a watch placed, but they could not discover who removed the money.

Waller Duke, assistant, employed by the plaintiffs at their Plein-street store, said that on the 26th May he saw the defendant with a little girl upstairs. The little girl went away with a parcel, and Heathorn went to the back part of the department. The little girl went away, and paid no money. Witness went to a desk near the cash till, and kept a watch, but the defendant paid nothing into the till. Witness had had occasion to report a previous sale by Heathorn. Heathorn was, in consequence, removed to another department.

By the Court: It was a well-known rule in the establishment that cash should be at once placed in the register.

Charles Henry Macdonald, book-keeper in the plaintiff firm, corroborated the evidence of Mr. Blake. He said he told the defendant that it was evident this misappropriation had been going on systematically, and that it

would be best to make a clean breast of the matter. Defendant made no reply.

Cross-examined: The amount of £20 could not be definitely proved. They claimed that sum as an approximate amount. They could not check every small sale in the shop. They dismissed the defendant because they thought he was not honest, and this was one of the proofs.

Charles Murphy, manager of the plaintiff firm, said that he was absent through illness on the 26th May. He was waited upon by the defendant, but witness could not see him, and defendant then saw him on the 30th May. Witness told him that he had violated the confidence of the firm, and that they could employ him no longer. He told the defendant that he ought to have gone upstairs and brought down the ball-valve. He told the defendant when he entered the firm's service that he must pass money into the till at once. He also informed the defendant he had had suspicion of him for twelve months.

Cross-examined: It was not after they had a suspicion of the defendant that they increased his salary. He saw the defendant take out the parcel of brackets, but he did not say anything, because he was willing to give the defendant every chance. It was untrue that a few men had been dismissed on account of the depression; they would not dismiss a man on that account.

Mr. Close closed his case.

For the defence,

Leslie Heathorn (defendant) stated that he was engaged in London to come out to the plaintiffs' employ. He had good testimonials from Home. There was never any complaint made to him about his work, neither was there any mention made to him about the transaction over a basket. It was true that he took away some articles in his lunch basket, but he paid for them. They had not in stock the particular valve that the little girl wanted, and he suggested to her that she could have the article on approbation. He left the money at the place from where he took the valve. After dinner, he saw them go to the till, and then he was asked to go to the office, where he explained to Mr. Blake that the money was upstairs. It was not correct to say that it was covered up. When mention was made about two shillings that had previously been missed, he said that he was not the only one liable to take the money. He had earned no money for three months, and had suffered damage through having to dispose of his furniture.

Cross-examined by Mr. Close: He contradicted Mr. Blake's statement that the money was hidden. The money was

left there by mistake while he was screwing on the valve.

By De Villiers, C.J.: He put the money underneath the shelf from which he took the valve.

Cross-examination continued: Witness said he could not explain why he did not tell Mr. Murphy that he had paid for the brackets he took from the place.

Re-examined by Mr. Buchanan: Any clerk might easily have gone to the same place for a valve directly afterwards.

[De Villiers, C.J.: Why didn't you put the money in your pocket?]

Witness: I didn't think of that.

[De Villiers, C.J.: Why did you tell Mr. Blake that you put the money on the shelf in case the girl came back?]

Witness: I didn't tell him that, my lord. I merely said that the girl might come back.

Mr. Blake (recalled by his lordship) stated that the defendant said nothing about forgetting to put the money in the till. The defendant must have moved the fittings to place the money where he did. Defendant had to push the fittings back to get the money.

Mr. Macdonald (recalled by his lordship) stated that the defendant said that he put the money beside the fittings in case the girl came back with the article.

Mr. Buchanan closed his defence, and counsel having been heard in argument on the facts,

De Villiers, C.J.: The decision in this case must depend entirely upon the question whether the conduct of the defendant was such as to justify the plaintiffs in dismissing him. If the putting away of the money was a mere act of forgetfulness on the part of the defendant, I quite agree with Mr. Buchanan that it would not be such an act of misconduct as to justify dismissal. The defendant's case in court to-day is that it was a case of mere forgetfulness. He says that he sold the articles to the girl, and put the money into the pigeon hole beneath a place where the articles were, and forgot all about it, and forgot to put the money into the till. Unfortunately, however, this statement is quite inconsistent with the excuses which the defendant made both to Blake and Macdonald. When confronted with them, he said he put the money there because there was a possibility or probability of the articles being returned and of the money being required for repayment for the articles. The two statements therefore are wholly inconsistent, and this fact goes far to show that it was an improper act on the part of the defendant in putting the money there, and that the object was to remove the money for his own purpose when there was no longer any probability of his being searched personally on the premises in order to ascertain whether the money was on his person. The evidence shows

that the rules of the establishment were clear and distinct that the salesmen were bound, immediately after making a sale, to place the money in the till, and I don't well see how large establishments like Robertsons could be carried on unless some rule of that kind were strictly enforced. The defendant was informed on entering the service of the plaintiffs that this was one of the rules of the establishment, and he knew therefore it was his duty on receiving money from any customer to deposit it forthwith in the till, but on the 26th May, 1904, he did not perform this duty, and the sole question is, was it a mere case of forgetfulness, or a deliberate act? If it was forgetfulness, the plaintiffs are in the wrong. If a deliberate act, the defendant is in the wrong, because if it was a deliberate act it could only have been with a view to dishonesty. The defendant's own statement is that the money was placed there, and not hidden, but placed there openly, where it could be seen by anyone. The statement of Blake is in direct conflict with this. He went with the defendant upstairs to see where the money had been placed. He looked over the shoulder of the defendant when he reached the place, and he saw there were some fittings placed upon the money, and that these fittings had been removed before the money could be got. Well, if this is true, it was an act of concealment—an act of deliberate concealment, which could only have been for improper purposes. The position of a salesman in an establishment of this kind is a very confidential one, and the owners of the establishment have to depend mainly upon the honesty of the men they employ, and in proportion to the confidence placed in such persons must also be the honesty of the persons so employed. It would be a dangerous thing in commercial establishments if such a thing were to be overlooked on the part of any salesman employed, and treated as a minor offence, and as no misconduct at all. In my opinion, therefore, the concealment of the money was for an improper purpose; it was, therefore, misconduct, which the plaintiffs were quite justified in treating as a cause of dismissal. If this cause of dismissal was good, it was, in my opinion, an act equivalent to leaving the service of the plaintiffs. The clause therefore of the contract, in my opinion, does come into operation, and the plaintiffs are entitled to recover £24 3s., which they advanced in order to enable the defendant to come to this country. The only other question is whether the defendant is entitled to recover any portion of his salary? The misconduct took place during a current month, and, in my opinion, as the misconduct was of such a nature as to justify the immediate dismissal and to amount to an act of leaving the service, the plaintiffs are not liable, in accordance with the decision of the case of *Bassamradoo v.*

Morris (6 Juts 28) for any portion of the current month's salary.

The judgment of the Court will be for the plaintiffs in convention for £24 3s., and in the claim in reconvention, with costs.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: Mostert and Son.]

GENERAL MOTION.

Ex parte ARONSTEIN.

Mr. Gardiner moved as a matter of urgency for an order for the attachment of the respondent, Benny Maisel, who was expected to leave the Colony. On the 27th July last a judgment was obtained against him for £100, and the taxed costs amounted to £69 7s. 1d., in addition to a sum of £1 9s. 6d. for the issue of a writ. The judgment was given against him in his individual capacity, and certain goods in Roelandstreet to the value of £15, or £20, had been attached. His client was informed that the respondent intended going to Johannesburg without making any provision as to the payment of the judgment, and he prayed for an order for the arrest and detention of Maisel until he gave satisfaction as to the payment of the money, and also for an order declaring executable £41 13s. 11d., to the credit of Maisel Bros., in the African Barking Corporation.

An order was granted on three conditions: (a) That the proceedings for civil imprisonment be forthwith instituted; (b) that the order for arrest be discharged on the defendant paying or giving security for the payment of the judgment, and costs; and (c), that the respondent be at liberty to apply for the discharge of the arrest. There would be no order as to the £41 13s. 11d., until notice had been given to the respondent.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION.

{ 1904.
Aug. 2nd.

Mr. Burton applied for the admission of Arthur R. O'Brien as an attorney.

The application had been adjourned from the previous day as a certificate had not been received from the Secretary of the Law Society, Cape Town. Mr. Burton now read a communication from the secretary of the Incorporated Law Society, Cape Town, stating that the Law Society had no objection to Mr. O'Brien being admitted as an attorney.

The application was granted.

TRIAL CAUSE.

YOUNGHUSBAND V. BROCKLEBANK.

Mr. Burton appeared for the plaintiff. The defendant appeared in person.

Mr. Burton said the defendant was called from pleading. The action was for £113 12s. 6d., composed as follows: £93 12s. 6d. was claimed for wages due, and £20 for wrongful dismissal. The declaration of the plaintiff stated that the defendant was lessee of the Altona Hotel, Woodstock. On or about April 6, the defendant engaged plaintiff as manager of his bar at £8 per month. The defendant wrongfully dismissed plaintiff from his service, for which he claimed £20.

The defendant said he admitted the claim for wages, but did not admit the second claim, as he contended he did not dismiss plaintiff.

The Court made an order, giving judgment for the claim for wages, with costs.

RAGANELLI V. LIPSCHITZ. { 1904.
Aug. 2nd.
" 3rd.

Building contract — Branch — Penalty—Extras.

In this action the plaintiff claimed £180 9s. for work and labour done, £100 damages sustained by plaintiff by reason of defendant failing to keep him supplied with building material, and £100 damages for wrongful dismissal, amounting in all to £380 9s., with costs.

The plaintiff's declaration stated that he was a contractor carrying on business at Cape Town, and the defendant resided at Middleburgh. By an agreement entered into on the 29th October, the defendant through his agent, Mr. Wiener, contracted to employ plaintiff to do the whole of the excavators', masons', and bricklayers, and drainers' work in connection with the erection of certain four two-storied and two one-storied buildings situate in Cornwall-street, Woodstock, and to pay plaintiff the sum of £542 for the completion of the erection. In breach of the agreement the defendant on or about the 5th April refused to allow plaintiff to continue the erection of the buildings. By that wrongful act, plaintiff suffered damages to the extent of £200. Plaintiff had at all times been willing to complete the erection of the buildings. Beyond the work mentioned in the agreement, plaintiff claimed as extras for work done and performed at the request of the defendant the sum of £80 9s.

Defendant's plea and claim in reconvention stated that he admitted the agreement was entered into. One clause of which was that the work was to be completed by the 1st of March, under a penalty of 10s. for every day

that the work remained incomplete thereafter. That plaintiff was to give his personal attention to the work, and in case of default, the defendant would be entitled to cancel the agreement, and give the work into other hands. Defendant held that he had carried out his part of the contract. Plaintiff did not complete the work by the 1st March, and that he executed what work he did do in an unworkmanlike manner, and that he wasted the material. Defendant paid plaintiff £396 for work done by him, and the completion of the work had, through plaintiff's negligence and improper work, cost defendant £215 11s. 3d., making a total of £611 11s. 3d. Further, in consequence of plaintiff not completing the work for 70 days after the date agreed on, defendant was entitled to recover £35. Therefore, there was a sum of £97 11s. 3d. due to defendant.

Plaintiff's replication stated that he admitted he did not complete the work by the first of March, but that defendant had not hitherto made any claim against him. The cause of the work not being proceeded with was because defendant did not keep the material supplied. Plaintiff admitted receiving £392.

Mr. Pyemont for plaintiff; Mr. Gardiner (with him Mr. Roux) for defendant.

Joseph Raganelli (the plaintiff), stated he was a builder and contractor and surveyor. He had been in Cape Town two years. He entered into agreement with the defendant to carry out certain building work for £542. He based his estimate on the plans which were shown to him by the architect. He proceeded with the work. Witness engaged a man named Bopener to do the inside plastering, and a man named January to do the outside plastering. He engaged him in February. He was only at work three or four days for want of material. Bopener completed the inside plastering by the end of February. He was not paid at once, because the defendant stopped payment. Bopener was paid on the 16th March. Scaffolding was necessary to do the outside plastering. Defendant was to supply all material. The work could not be proceeded with, because the defendant failed to give the scaffolding. Witness spoke to the architect, and he told him he could claim from £15 to £20 from defendant, because of his failure to supply the material. In February disputes arose with defendant, because he was not supplying sufficient money weekly. The contract was broken, and defendant asked witness to sign a paper to the effect, but he refused to do so. Just before that witness advertised in the "Cape Times" for plasterers, and got one named Myer, who did not do the work satisfactorily, and was dismissed. Another man was engaged to

complete all the plastering work. A few days after witness saw the defendant's agent, who said the work had been given to another contractor, because witness had been negligent. Witness told him that he had entered into a contract with plasterers, and would get on with the work. The agent then tried to prevent witness going on with the work, and said that if he went on the ground, he would assault him. Witness notwithstanding the threats went on the building. Witness did that to assert his right to the work. He then left and consulted a lawyer on the subject. At that time the plastering, cementing, and drainage of both buildings had to be completed. Witness had a man to do that work at £65. The defendant showed witness a number of changes in the plan which he required made. In some instances witness followed the design in the plan, but had to take it out again. The extra concrete on the stocks was also ordered by the Town Engineer.

[Buchanan, J., here intimated that he would probably have to send somebody to inspect the building.]

Witness (continuing) said that the amount of the extras had been added to each weekly claim of the £392, received by him, £24, was on account of extras.

Cross-examined by Mr. Gardiner: Witness had originally claimed £290 and £500 damages. He could not tell the value of the work done since that. It was not true that the balustrade was taken down because of its being inferior work. The scaffolding was masons' work, but the architect did not tell witness that he would have to do that work as part of the contract. Witness did not expect to make a large profit out of the price he tendered. When witness was busy building, he required at least 50,000 bricks a week. The Building Inspector did not tell witness to take a wall down. Witness denied that for a whole week in March he did not do more than 2½ hours' work on the building. It was not a fact that witness was always quarrelling with his workmen and discharging them. Defendant's agent told witness that if he entered on the works he would get the plasterer to knock him down. Witness did not know that a man named Viller had received £120 for finishing the work for witness.

Jacobus Bopener stated he was a master plasterer, and during the month of February undertook a sub-contract for plastering the inside of the house in question. He did not begin plastering at once. Plaintiff did not pay witness, so he went to defendant's agent and asked for payment. The latter sent him to the architect, who assured him he would get the money. Witness got the money on the 16th March. Plaintiff wanted witness to do the outside

plastering, but he was afraid to do it, because he feared he would not be paid. A man named January did it, but left it.

John Adams stated he was assistant to last witness. He corroborated his evidence.

Mr. Pyemont closed his case.

William Harrison Gray stated he was an architect, and had been in practice in Cape Colony sixteen or seventeen years. The agreement was entered into in October, and work, which was commenced in November, was kept up well for a fortnight, after which it fell off. Plaintiff was repeatedly quarrelling with his staff and changing his men. Witness never saw a shortage in the supply of material. Witness weekly advised Mr. Wiener (defendant's agent) as to the amount to be paid to the plaintiff. Plaintiff had received £396 on account, which was rather more than he was entitled to. Certain work which had been done had to be taken down and replaced. Owing to plaintiff not conducting the work properly, plaintiff consented to a man named Viller taking the work over and completing it. Viller started at once on the work and stuck at it. He got the balance (£80) which was due to the plaintiff. Witness did not order the plaintiff to leave the works. Witness considered that through the plaintiff's negligence large number of bricks were broken. The plaintiff used 324 barrels of cement, and he should not have used more than 200. Cement was 12s. 6d. per barrel.

Thos. L. Wood stated that he had examined the work, and considered nothing should be allowed for scaffolding, as that was part of the plaintiff's duty. The plaintiff, he thought, was entitled to £1 16s. for the work on the windows, £7 for the grates, and £4 10s. for the fire wall, making a total of £13 6s. The value of the work to be completed on the 28th March last, as pointed out to him, would be about £98, made up as follows: Plastering, £60; yards, etc., £15; drainage, £15; and sundries, £8.

W. H. Gray (cross-examined by Mr. Pyemont) stated that the plaintiff's testimonials, he believed, were good. During the first fourteen days the men fairly well understood their work as regarded the concrete and brickwork. The levelling was not done by the plaintiff himself. At the time of taking the contract, the plaintiff did not ask him for specifications. Witness went over the work each Saturday, and made a note of what was done. He arrived at 324 barrels of cement from the account sent in by Messrs. Small and Morgan. The wall in the back yard was not originally shown on the plan, but it was paid for. He was not aware that Mr. Vyner paid any sums on account of extra concrete. It was usual to say all scaffolding to be pro-

vided for by the contractor without extra charge, but that was not put into the contract. The plaintiff was not asked to sign a paper giving over the plastering to Mr. Villa. A memorandum was drawn up to the effect that Villa should do the "bossing" of the plastering, and that Joseph Angelitta should do the work for £80. The work which the plaintiff did was bad right through. Witness had been practising in this colony as an architect and surveyor for six years, and in England for twenty-five years.

Re-examined by Mr. Gardiner: One of the windows at the back was decreased in size, and the expert had allowed for that.

By Buchanan, J.: £103 11s. 6d. was paid to Villa for work that should have been done under the contract.

Horace Vyner stated he acted for the plaintiff in the contract. Witness was on the works all the time. Plaintiff said he had taken a cheap contract on, and asked witness to help him. It was clearly understood that witness was to be paid for clearing the site. Raganelli was on the work regularly at first, but later on he seldom appeared. At the interview at the end of March, he saw Raganelli and Villa, and Mr. Gray asked him if he minded if the latter finished the work, and witness said he did not mind as long as the work was done. Five or six days afterwards, Raganelli came down, and said he would dismiss the men, whom he called from their work, but witness impressed on them to remain. He never noticed the men stop for want of material. He had been offered £7 10s. each for the houses on the 1st March and £14 for the shop and house.

Cross-examined by Mr. Pyemont: He did not know Villa before the 29th March. Witness paid the money to Gray, who distributed the money among the workmen. He did not think that Villa had a paper in his hand at the interview. The defendant was not asked to sign any document.

Joseph Villa stated that he introduced Raganelli to Gray in order that he might get work. At the interview at the end of March, he suggested that Angelitta should take over the plastering for £80, and this Raganelli agreed to, and the money was to be paid to Mr. Gray. Witness got nothing for his services.

Cross-examined by Mr. Pyemont: At the interview Mr. Gray had a little memorandum for Raganelli to sign, but the latter refused to sign it. All that was on the paper was with regard to the deduction of £80.

Wm. Ryan, cartage contractor, stated that he contracted for the conveyance of material to the building, and he always noticed plenty of stuff on hand for the work.

George Wm. Rowley, building inspector. Woodstock, stated that for the first three weeks everything went all right, but after that he had frequently to complain to anyone he found on the building. There was always plenty of material on the premises.

Cross-examined by Mr. Pyemont: About March 8 he had to complain about the wall. It was altered about the 18th. The wall was built most irregularly, the bricks not being properly laid.

John Mitchelmore, builder and contractor, stated that the job could have been done with 200 barrels of cement at the outside.

The plaintiff, recalled, by Mr. Pyemont, stated that he did not ask Wiener to clear the site. The clay which Wiener used for daga gave him a lot of trouble. Witness cleared the rubbish from the cottages. He estimated 210 casks of cement were used on the job.

Cross-examined by Mr. Gardiner: He could not say how many casks Villa used to finish the work. Wiener was never asked to clear the site.

By Buchanan, J.: There was no necessity to clear the site for the cottages.

Mr. Gardiner closed his case, and counsel having been heard in argument on the facts,

Buchanan, J. said the plaintiff, according to the contract produced, dated the 9th October last, agreed to do the plastering and other work in connection with the erection of certain cottages and shops for the defendant for the sum of £542. He complained that on the 5th April he was wrongfully prevented from completing his contract, whereby he suffered damages in the sum of £200, and he claims £200 damages and £180 9s. for work and labour done. According to the terms of the contract, the work was to be done in a thorough and workmanlike manner, and to the satisfaction of the architect, Mr. Gray. Moreover, the contractor was to give his personal attention to the work, and in case of any default, it was lawful for the proprietor to cancel the agreement and give the work into other hands. The work was to be completed by the 1st March next ensuing, but the plaintiff was at the buildings until the 28th or the 29th March. At an interview in Mr. Gray's office, on the 29th, plaintiff admitted his inability to complete the work. Mr. Villa had introduced plaintiff to the architect, and as a fellow countryman he came forward to assist plaintiff. The plaintiff then agreed to hand over the work to Villa, so there was no breach on the part of the defendant. The amount of the contract was £242, but, in carrying out the contract, the plaintiff did certain extras. These extras were £7 for a fire place, £1 16s. to build up the windows at the back of the house, and £4 10s. for a fire wall, making £13 6s., as estimated

by Mr. Wood. The plaintiff alleged there might be a great many other extras, but after hearing Mr. Wood, I have no doubt there were no such extras. One of these extras was for the erection of scaffolding. There was no mention in the contract about scaffolding, and Mr. Wood stated that that was part of the plaintiff's duty. Moreover, Mr. Gray said he had told plaintiff to allow for the labour in his original tender. Nothing could, therefore, be allowed on that claim. The utmost the plaintiff could be allowed for extras was £15 6s., which, with the contract price, made a total sum of £555 6s. Against that he had received £396 in cash, and Mr. Wood estimated that the work undone amounted to £98. The amount actually paid to Villa to complete the contract was £103 11s. 3d., and the defendant was entitled to add to the £396, making £499 11s. 3d., which being deducted from the contract amount left a balance of £55 4s. 9d. That would settle the claim in convention. The defendant claimed damages in reconvension. In the first place, he claimed for cement which he contended had been unnecessarily used in the work done by plaintiff. On that point I do not think that the evidence is at all clear, and I cannot admit that claim. There was another claim for levelling the ground, which the defendant said was not done by the plaintiff. By the contract the plaintiff undertook to level the ground where necessary, but he says that it was not necessary to do more than he did. It appears that some levelling was done, with the object of getting the sub soil, which was extracted and used for building material. I should have liked better evidence on that point, but, in the absence of evidence, and considering that Mr. Wood, who was on the spot, did not recommend the payment of the claim, I am not prepared to allow anything on that item. There only remains the claim for £35 for not completing the work at the stipulated time. Here there was clearly a breach of contract on the plaintiff's part. He was to finish the house by the 1st March, but he was at the work until the end of March, by which time he entered into a sub-contract to complete the work by the 1st May. On his own showing the plaintiff did not expect to complete the work till then, and I will take that as the date when the work might reasonably have been finished. It has been said that these damages should not be allowed, because there were certain extras. Well, I admit that extra work might do away with a time penalty in a building contract, where it was shown that the extra work was of such a substantial nature as to prevent the work being completed in proper time, but the extras in this case are so trifling, and not sufficient to prevent the completion in due time of the contract. Taking 31 days up to the 1st May, at ten shillings

a day, that would make £30 10s. Deducting that from £55 4s 9d. would leave a balance of £24 14s. 9d. in favour of the plaintiff, for which judgment will be entered, with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

TRIAL CAUSE.

TEMPEST V. TEMPEST. { 1901.
Aug. 3rd.

This was an action brought by Clara Tempest, of Cape Town, against her husband, Alfred Tempest, a butcher, for restitution of conjugal rights, failing which divorce, on the ground of malicious desertion. Mr. Gardiner appeared for the plaintiff; the defendant was in default.

Clara Tempest (the plaintiff) said she was married to the defendant at Bradford on the 27th August, 1897. Defendant came out to South Africa in March, 1898, intending to obtain employment in Cape Town. Witness understood that he had obtained a situation with Tregidga's, the butchers, and she followed him to the Cape in December, 1898. They lived together at Newlands until September, 1899. Defendant was then arrested on a charge of embezzlement of his employers' moneys, and he was convicted, and sentenced to four months' imprisonment. When he was liberated from prison, witness saw him about the beginning of 1900. The defendant joined the Railway Pioneers and other corps. Witness saw the defendant on the disbandment of the corps. In January, 1903, he came to Cape Town. He then went to Port Elizabeth in search of employment, but returned to Cape Town again, and afterwards proceeded to Johannesburg. Witness was at that time supporting herself as a waitress at the Hermitage Hotel. The defendant obtained employment in Johannesburg, but told her to remain in Cape Town until he sent for her.

Correspondence which had taken place was read.

Witness (proceeding) said she had not seen the defendant since he was in Cape Town in 1903. He was in the habit of asking her to go to Johannesburg when he was out of work, but when he had employment he said nothing.

A decree of restitution of conjugal rights was granted, with costs, defendant to return to or receive the plaintiff on or before the 15th September, failing which rule to issue calling upon the defendant to show cause on the first day of next term why a decree of divorce should not be granted, with costs, service to be in the same manner as directed in regard to citation.

Postea (October 17.) The rule was made absolute.

BRINK V. AVENANT.

Mr. Burton (with him Mr. Van Zyl) appeared for the plaintiff; Mr. Schreiner, K.C. (with him Mr. Gardiner), appeared for the defendant.

Mr. Burton said he had to apply for a postponement of the hearing. It was extremely unfortunate, because this was a country case, and the witnesses had come in for hearing, but he had to put in an affidavit by the plaintiff's attorney, Mr. Van Ryneveld (Messrs. Dempers and Van Ryneveld), who stated that a most material and important witness for the plaintiff was Mr. Izak Meiring, surveyor, of Worcester. A certificate was annexed from Dr. Hugo, of Worcester, saying that Mr. Meiring was confined to his bed with a feverish attack, and would be unable to travel for some days. The question, said counsel, was one as to the ownership of a certain strip of land, which the parties respectively claimed as their property, and the declaration in the case was based upon a plan of this property framed by Mr. Meiring, as the only person who could explain the position to the Court.

Mr. Schreiner said that his client was not a wealthy farmer, and he had had to bring witnesses from Sutherland, Swellendam, and Worcester.

[De Villiers, C.J.: It is most unfortunate that all this expense should have been incurred and wasted. I am afraid your client will have to pay the costs.]

Mr. Burton said that it was unfortunate for the plaintiff that his chief witness should not be present, because in all other respects his case was ready. He thought the costs should abide the result.

Mr. Schreiner contended that the costs of the day should in any event be borne by the plaintiff, who was responsible for the set-down. The costs ought not, he submitted, to be put on the small man.

Mr. Burton, replying to the Court, said he could not, in justice to his client, go on with the case, and lead the evidence that he had in court, leaving over the evidence of Mr. Meiring until another day.

The order of the Court was that the case should be postponed, the plaintiff to pay the costs of the day, and leave granted to the plaintiff to join as co-defendants the owners of any land interested in fixing the boundary.

FRIEDMOND V. SOLOMON. { 1904.
Aug. 3rd.

Negligence — Neighbouring proprietor—Injury to property.

This was an action brought by Johannes Friedmond, merchant, Loop and Waterkant streets, Cape Town, against Joseph Solomon, also of Cape Town, owner of certain premises adjoining the plaintiff's, to recover a sum of £29 in respect of damage alleged to have been done to certain musical instruments in consequence of building operations negligently and carelessly carried on by the defendant, his servants, or his agents.

The plaintiff's declaration stated: 1. That he was a merchant in Cape Town, and defendant a resident there, and owner of certain property separated from plaintiff's premises by a party wall. 2. That in or about July 1903 while building on his land defendant so negligently carried on his operations that rain and other water was wrongfully and unlawfully caused or allowed to flow from defendant's premises to plaintiff's premises, flooding the same. 3. By reason of the said negligent conduct certain goods belonging to plaintiff were in part totally destroyed, and in part seriously damaged by water and the dampness occasioned thereby. Plaintiff estimates his damage at £29 10s. 5d., for which defendant is liable, but which he refuses to pay.

Wherefore plaintiff claims: (a) Payment of the said £29 10s. 5d. as and for damages (b) interest on the said sum *a tempore morae* (c) alternative relief (d) costs of suit.

Defendant's plea: 1. Admits par. 1 of the declaration. 2. He admits that in or about July 1903 certain building operations were carried on on his said property. 3. He denies negligence or that plaintiff's goods were destroyed or damaged by water owing to his negligence. 4. He has no knowledge of any such damage, and is not liable therefor. Save as above he denies paragraphs 2 and 3.

Mr. W. P. Buchanan (with him Mr. Van Zyl) for plaintiff; Mr. Burton for defendant.

Johannes Friedmond, merchant, corner of Loop-street and Waterkant-street, said he was a seller of musical instruments. Next door to his premises was the defendant's building. There was a common lane running behind from Waterkant-street. There were main water pipes from the defendant's building emptying into the lane. The lane

was now cemented, but it was not formerly. Witness became owner of his premises in 1900, and had them rebuilt. There were cellars below his premises underneath the level of the ground, but not below the level of the lane. He had his musical instruments on shelves in the cellars. Solomon rebuilt his premises from about February to September, 1903. Before that time witness had had no water or dampness in his cellars. During Mr. Solomon's operations water found its way on three different occasions into the cellars of witness's premises. He found water coming in from the next door basement on May 28. Solomon was excavating a cellar alongside the party wall and the lane. There was a foot of water in the excavation near the party wall. Water was soaking through the party wall. On the 20th July more water came through the party wall, the water this time being all over the cellar. The wall was very damp all along. The water could not possibly flow down the lane, on account of the rubbish which had been left about. He had frequently complained to the defendant about the way in which the operations were being carried out. On the 20th July some of the instruments were destroyed, and others were a good deal damaged. A lot of the mischief had been done by the dampness.

Cross-examined: He did not claim for any damage that may have been done in May. He did not take the damaged goods away on the Sunday. He had these goods packed in a case on Solomon's account. The other goods had been repaired, or sold at reduced prices. He had sold about one-third.

Witness (replying to the Court) said he was musical, but he believed Mr. Solomon was not musical.

Further cross-examined: The cellar was not damp in the ordinary way.

Austin Cook, architect, Cape Town, also gave evidence as to examinations he had made of the premises, and said he found water trickling down the party wall into the plaintiff's cellar.

In cross-examination, he said water could not get in from any other place but the party wall.

Henry Alexander Paterson, a builder, stated he was called on as an expert to examine the place. The party wall was quite damp, and there was about an inch and a quarter of water at the foot of the stairs. The water was oozing through the party wall. Witness examined the drains, and found them running quite clear.

Cross-examined by Mr. Burton: Witness said he showed the state of the place to Olive, who passed no remarks about it. The water would pass through any party wall that might be erected.

Arthur Littlefield stated that at the time of the occurrence he was a shop

assistant to the plaintiff. He found the water oozing through the wall on the morning of the 25th May. Witness sorted out the damaged goods. A large number were damaged.

Frederick Friedmond, son of plaintiff, also gave evidence as to the damage sustained. He found that most of the goods packed on the lower shelves were injured. He made out a list of the articles damaged, and only charged "landing prices."

Richard Gascoyne Anderson stated he carried on the business of music-seller in Loop-street. He was called in to see the damaged articles, and he considered the plaintiff had put a very low estimate on them.

Mr. Buchanan closed his case.

Joseph Solomon (the defendant), stated he first heard from the plaintiff in May that the water was oozing into the place. Witness a couple of days later saw the plaintiff and Mr. Cook examining his property. They told him that the rain was percolating through the wall. Witness went with them to the basement of plaintiff's house. They examined it closely, but could not see where the water came through.

Cross-examined by Mr. Buchanan: The statement made by plaintiff to the effect that witness refused to examine the place was incorrect. Witness took up the position that the builders were responsible.

Joseph Rosenberg stated he was an architect, and had superintended the erection of defendant's house. The excavations were properly carried out. During the wet season the water in the basement of defendant's building was not more than one inch deep.

Frank Murray stated he built the house for the defendant. In August, witness examined the place, and found that the party wall was damp, but the concrete floor was dry. There was no water at the plaintiff's side of the floor.

The plaintiff, recalled, stated that he had to carry the water in the basement in both May and July out by means of buckets. On the last occasion there were 35 buckets. About half of the water soaked away. He made a mistake in his direct evidence, when he stated there were three feet of water, he meant inches.

Mr. Burton closed his case, and counsel then proceeded to argue on the facts, after which

De Villiers, C.J.: The plaintiff claims damages for injury alleged to have been done to musical instruments through the negligence of the defendant in allowing water to congregate in his basement, which percolated through the wall to his (the plaintiff's) basement. It appears that the basement of the defendant's shop, in which he stored musical instruments, was something like five to six feet be-

low the surface of the surrounding ground. The basement of the defendant's house was also of the same depth, but owing to the sloping nature of the ground, the basement of the defendant's property was about six inches higher than that of the plaintiffs. According to the plaintiff there had been some injury done in May. The water forced itself through, and about a foot of water stood there. It, however, appears that there was not much damage done then. The damage was done at a subsequent date—in July. Under examination-in-chief, the plaintiff said that such a quantity of water came in between the Saturday and Monday as to cover three feet. His own witness put it at three inches. The plaintiff was recalled, and said he made a mistake, and that he meant three inches. He also said that there was about one foot earlier in the day, but that it had soaked through the ground. That was his final statement, after repeatedly giving different versions. It is quite true that water will go downwards, but if there is sufficient pressure behind it, it will go upwards. The question that arises is was there sufficient pressure to force it through. In my opinion there was not sufficient pressure to force so large a bulk of water through the party wall as to fill the basement to the extent of one foot. Therefore, that large quantity of water must have come in some other way, and if it did not come through that plug-hole. The only other way it can be accounted for is that the pressure of the water in the saturated sub-soil all round the building may have been sufficient to force the water through. I am quite satisfied that the damage was not caused by the water oozing from the defendant's side. It seems to me wholly incredible that a foot of water could have been forced to percolate by a pressure of six inches. The plaintiff, therefore, in my opinion, has not proved his case. Mr. Olive, an intelligent witness, who is wholly impartial, did not find that great dampness which would have existed if this large quantity of water had come through. He is a trustworthy person, and great reliance is placed by the Court on his evidence. There will, therefore, be absolution from the instance, with costs.

[Plaintiff's Attorney: P. M. Brink; Defendant's Attorneys: Van Zyl and Buissinne.]

PRICE AND CO. V. WEBNER.

Plea—General denial—Exception.

The defendant by his plea referred to each paragraph of the declaration and denied the allegations therein contained.

Held, there was no ground for

exception taken to the plea, but the costs of the exception were allowed to stand over until it should appear at the trial whether or not every allegation was intended to be denied.

This was an argument on an exception taken by the plaintiff to the defendant's plea.

The declaration of the plaintiff stated that he carried on business at Cape Town as a house furnisher. At the special request of the defendant, plaintiff supplied him with furniture for £196 13s. 1d. Defendant paid £100 on account, and refused and neglected to pay the balance. In or about February plaintiff, at the special request of the defendant, supplied him with more furniture, to the value of £44 0s. 1d., but defendant refused to pay for that.

The defendant's plea specifically denied all the paragraphs of the declaration.

Mr. Gardiner appeared for the plaintiff, and Mr. Alexander for the defendant.

Mr. Gardiner held that defendant did not comply with Rule 330d of the Court, which stated that it was not sufficient for a defendant in his plea in convention, or for a plaintiff in his plea in reconvention, to deny generally the allegations alleged by the declaration, as the case might be, but each allegation must be dealt with specifically.

Mr. Alexander submitted that his client had dealt with each paragraph specifically.

His Lordship inquired if the defendant denied that he got the furniture.

Mr. Alexander replied in the affirmative.

His Lordship: Does he deny that he paid £100?

Mr. Alexander: Yes.

De Villiers, C.J.: The defendant, by his plea, has specifically denied the allegations in each paragraph of the declaration. He has not repeated *verbatim* the particular allegations which he denies, but by referring to the different paragraphs, he must be taken to have denied the allegations contained in each. The defendant takes a risk upon himself by adopting this form of plea, for he must be held also to have denied the payment by him to the plaintiff of a sum of money as alleged in the declaration. At the trial the Court will be in a better position to judge whether the plea is not really an evasive one, and the question of costs will stand over until then, but the exceptions to the form of the plea must, for the present, be overruled.

Thereafter amended declaration and plea were filed, and on the 26th October, 1904, judgment was given for plaintiffs, with costs, including the costs of the ex-

ception, it being admitted in the amended plea that £100 had been paid on account.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorney: F. Andrews]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION.

{ 1904.
{ Aug. 4th.

Mr. W. P. Buchanan moved for the admission of Henry George Willmot as an attorney and notary.

Application granted and oath administered.

PROVISIONAL ROLL.

ESTATE BOYES V. COETZEE.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £110, with interest at the rate of 9 per cent., the bond having become due by reason of no interest having been paid; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

DE WAAL AND CO. V. COLYN.

Mr. De Waal moved for provisional sentence on a promissory note for £10 3s. 5d.

Order granted.

ARDERNE V. BENNAN.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent, provisional order having been given on the 15th July.

The defendant said that the bond on which the petitioner had taken proceedings was not yet due. He could not appear to oppose judgment at the time, because of an accident.

The matter was ordered to stand over, pending production of the bond.

Subsequently the bond was produced, and the Court granted an order for final adjudication.

HEYDENRYCH V. FRAME. } 1904.
 } Aug. 4th.

Provisional sentence—Conflict of evidence.

The plaintiff sued defendant on an acknowledgment of debt signed by her as surety and co-principal debtor on behalf of her husband (an insolvent). The husband alleged that this debt had been paid, and in this he was supported by the affidavit of another deponent, but no receipt was produced.

Held, that provisional sentence must be refused and the parties directed to go into the principal case.

This matter was standing over from May 14th (14 C.T.R., 377) pending the production of further affidavits by the defendant. The plaintiff sought provisional sentence for £146, on an acknowledgment of debt.

The affidavit of J. A. Reid, a member of a firm of solicitors in Glasgow, acting for the trustees of the late Thomas Frame (father of A. K. Frame) stated that on the 20th August, 1895, there was laid before a meeting of the said trustees a letter from Messrs. Reid and Nephew, solicitors, Cape Town, applying for an advance of £1,000 on behalf of A. K. Frame, to extricate him from his then difficulties, and afford him an opportunity of retrieving his position, and strongly urging his trustees to come to his assistance. Certain communications took place, and in the end the trustees advanced a sum of £1,000 to free A. K. Frame, and those dependent on him, from financial difficulties.

The affidavit of Alexander K. Frame, of Claremont (husband of the defendant), stated that on the 2nd of December, 1893, he borrowed from the plaintiff the sum of £200 sterling, for which he gave a written acknowledgment for £230, principal and interest. The acknowledgment was annexed to the affidavit, and was signed by the defendant, Johanna Margaret Frame (born Duminy). The money was to be repaid in certain instalments. The acknowledgment was also signed by A. K. Frame, as surety and co-principal debtor. He made payments from time to time, and there were several renewals. On the 5th February, 1896, the balance due from him to the plaintiff, was £146, for which amount the acknowledgment was given that was now sued upon. He denied that he asked the plaintiff not to include the amount owed to him by his wife in the statement that he made out. The advances made to him by his

father's trustees were made in order to clear the defendant as well as himself from financial difficulties. He admitted that he was indebted to the plaintiff in the sum of £300. He complained of the high rate of interest charged by the plaintiff on the loan of £200, and said he did not wish his father's trustees to know that he had been foolish enough to borrow money at the rate of 30 per cent. per annum. As to the £300, he consented to grant three drafts of £100 in place of all the other documents in view of plaintiff agreeing not to accept the full amount of his claim. The old documents were destroyed.

The plaintiff's answering affidavit stated that the £200 borrowed from him on the 2nd December, 1893, was lent to the defendant, and the said A. K. Frame simply signed as surety. With regard to the interest, it was true that he charged at the rate of 2½ per cent. per month. He contended that the interest was none too high, considering the great risks he ran of losing the principal, and the trouble he was put to. He did not think anyone else in Cape Town would have granted the defendant more favourable terms for the loan. He denied absolutely that the defendant was not the principal debtor. He did not know anything about a payment having been made by the Frame trustees to clear the defendant's indebtedness. At the time no reference was made by A. K. Frame or Reid and Nephew about settling the defendant's indebtedness to him. Deponent said that he had only brought the action, because the period of prescription was approaching.

Mr. Burton for plaintiff; Mr. McGregor for defendant.

De Villiers, C.J., said it would be interesting to know how much the parties had actually paid to the plaintiff in principal and interest.

Mr. Burton said that he could not know how much had been paid, but he would remind his lordship that this question of an exorbitant rate of interest might be carried too far. It must be borne in mind that the defendant had practically no security to offer, and that the loan involved a good deal of trouble.

Counsel having been heard in argument on the facts,

De Villiers, C.J., said I am bound to attach considerable weight to the statements made by Mr. Wilson, who was a clerk in the employ of Messrs. Reid and Nephew at the time the statement between the plaintiff and defendant was made. Application had been made to the trustees in Scotland for money to enable Frame to settle all his liabilities. At that time his liabilities were direct as well as indirect to Heydenrich. He was liable directly for notes signed by himself, and also for notes that he had signed as

surety. It is clear that the intention of Frame at the time was to obtain money from the trustees, to enable him to pay all his debts. In obtaining the money on behalf of Frame, he considered that he was obtaining money to free him from all liabilities. The trustees so understood it, it appeared to me that Frame so understood it, and Mr. Wilson, the clerk of Reid and Nephew, also so understood it. And he went further, and said that the plaintiff himself must have so understood it. He (Mr. Wilson) said: "In consequence of communications, the said Alexander K. Frame handed me a cheque for £993 odd to settle the liabilities of himself and his wife (the above-mentioned defendant). Acting on behalf of Reid and Nephew, who entrusted the whole transaction to me, I notified the above plaintiff to forward his full claim to me for adjustment. The plaintiff handed me his account to March, 1896, and on the 5th March, 1896, I paid him £300 on account, and later on gave him £55 his account included all liabilities of defendant and her husband. 14s. in full settlement of balance. In thus paying the plaintiff, I took it that The clerk made a mistake—and I take it a serious mistake—in not obtaining a proper receipt from Heydenrych. There may have been at the time reasons why the original document should not be sent to Glasgow, and at all events here was a definite statement made by a clerk of Reid and Nephew, which, if it were true, would put an end to the plaintiff's claim. The plaintiff himself denied it; but in a matter of this kind, where there is a direct conflict of evidence, it would be a great advantage to hear and see the witnesses personally. No doubt there is another point, somewhat against the defendant, and that is that on the last occasion it was stated that the documents and receipts had been forwarded to Glasgow. An application was made to the Court for postponement, in order to enable the defendant to get these documents from Glasgow. The documents had now been sent, and they did not support Frame's statement, but the very fact that he was then so confident that if the documents were obtained showed, at all events, that the defendant believed at the time that the documents which had been sent to Glasgow would assist him. On further consideration, the defendant said now that after the payment of the £350, the documents were destroyed by the plaintiff in his presence. It is to be regretted that that statement was not made before. At the same time, if the statement were true the defendant ought to have an opportunity of confirming that statement before the Court. Under all the circumstances, I think this is a case in which the Crown may fairly order the plaintiff to go into the

principal case, in order that the facts may be fully investigated by the Court. The order of the Court will be that the plaintiff go into the principal case, costs to abide the result.

[Plaintiff's Attorney: V. A. van der Byl; Defendant's Attorneys: D. Tennant jun.]

ESTATE LANDSBERG V. RAHMAN AND AHMED.

Mr. W. P. Buchanan moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

MYBURGH V. AMARDIEN.

Mr. J. E. R. de Villiers moved for provisional sentence on two mortgage bonds of £650 and £50 respectively, with interest at the rate of 6 per cent. per annum from the 1st January, 1904, and for the property specially hypothecated to be declared executable, bond having become due by reason of the non-payment of interest.

Order granted.

MURRAY AND CO V. HORNBURGH AND BARRE.

Mr. M. Bisset moved for the final adjudication of the defendants' estate. Mr. W. P. Buchanan appeared to oppose on behalf of the defendants, and asked for a postponement pending an action to be brought by his clients against one Gilbert Windgate for the recovery of £1,094 7s. 4d., which they alleged was owing to them by reason of a sub-contract, which they held from Windgate. It would not be to the benefit of the creditors to sequestrate the estate. The liabilities were £600, and outstanding accounts amounted to £1,094. Counsel contended that under the Ordinance his lordship had discretion to delay the final adjudication.

[De Villiers, C.J.: Is the plaintiff prepared to give the defendants an opportunity of bringing their action?]

Mr. Bisset: The plaintiff wishes to arrive at some finality in the matter, but I have no instructions on that point.

[De Villiers, C.J.: If the plaintiff doesn't consent to the superseding of the order, I do not see how I can help the defendants. Better let the parties consult, it may be to the benefit of both.]

Subsequently, Mr. Bisset said he had seen his clients who did not see their way clear to consent to a supersession of the order. Accordingly he must press for an order for final sequestration.

Mr. Buchanan said that plaintiffs were really sureties for the performance of the work undertaken by the defendants. If defendants' claim was a good one,

then their assets were three times in excess of the liabilities. It was true that an act of insolvency had been committed, but he submitted that notwithstanding this, it was competent for a debtor to prove that his assets were sufficient to discharge his liabilities.

[De Villiers, C.J.: Why don't they pay? That is the best test of their solvency.]

Mr. Buchanan said it might be that the assets were not readily available.

De Villiers, C.J., said the Court might authorise the Master to appoint a curator, with power to proceed with the action. If it were true that defendants had a good claim it would be very hard that they should be declared insolvent.

After further argument,

De Villiers, C.J.: On the whole, I think the case ought to stand over until Thursday. By that time, counsel for the defendants will be in a position to state definitely what they intend doing. I am afraid that if a curator were to bring this action it would necessitate continual applications to the Court. There would be a difficulty about money to prosecute the action, and the simpler course would be that the estate should be sequestered, and that the trustee should bring the action, and if he succeeds there will be a balance to be paid to the insolvents.

The case was ordered to stand over until Thursday next, the Chief Justice remarking that in the meanwhile the plaintiff could reconsider the matter.

Postea (August 11th). Final adjudication granted.

KICHNAN V. MARAIS.

Dr. Greer moved for provisional sentence on a promissory note for £20. Since the proceedings had been instituted he understood that the principal sum had been paid, and he now asked for costs.

Granted.

PURCELL, YALLOP AND EVERETT V. PFAFF.

Mr. Gardiner moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £26 12s. 4d., together with £7, and 8s. 6d. costs.

The defendant appeared in person, and stated that he owed other money. He could only offer 10s. or 15s. a month for the first few months.

[De Villiers, C.J.: That's a small sum!]

I couldn't do any more than £1. I will be able to pay more when things get good.

[De Villiers, C.J.: Are you prepared to swear you have no means?]

Yes.

Decree of civil imprisonment granted, with costs, to be suspended upon payment of 15s. for four months, and after that £1 per month, until the debt is satisfied. The first payment to be made on the 15th August.

GORDON AND ANOTHER V. FOY.

Mr. P. Jones moved for judgment for £500 on a mortgage bond, with interest at the rate of 3 per cent. *per annum*. The bond has become due by reason of non-payment of interest, and counsel also asked that the property specially hypothecated be declared executable.

Order granted.

FORREST V. ALEXANDER.

Mr. Sutton moved for provisional sentence on a mortgage bond for £600, with interest, and to have the property specially hypothecated declared executable.

Order granted.

FIELD AND CO. V. LEWIN.

Dr. Greer moved for the final adjudication of the defendant's estate.

Order granted.

ILLIQUID ROLL.

MIDDLETON V. PORTER AND } 1904. BARENDORF. } Aug. 4th.

Mr. P. Jones moved for judgment under Rule 329d, for an order compelling the defendant to give transfer of certain land and buildings at Plumstead. The plaintiff had fulfilled the conditions of sale. Counsel also asked for judgment for £16. for rent of the buildings, which had been collected by the only authorised agents of the defendants.

Order granted.

VAN DER HOFF V. PADDON.

Mr. Sutton moved for judgment, under Rule 329d, for £58 12s. 6d., quitrent and stamp duty, with interest and costs.

Order granted.

COLONIAL GOVERNMENT V. CONNOLLY.

Mr. Nightingale moved for judgment, under Rule 329d, for £240 10s., quitrent and stamp duty due to the Colonial Government.

Order granted.

BASSON V. VAN EKENEN.

Mr. Van Zyl moved for judgment, under Rule 329d, for £35, the value of cart and horses, with interest and costs of suit.

Order granted.

MAMEWEEKE V. OLINSKI.

Mr. Pyemont moved for judgment, under Rule 329d, for £157 6s. 8d. for goods sold and delivered, with interest and costs.

Order granted.

WELLS V. WELLS.

This was an application for an order declaring the respondent of unsound mind. The affidavits of Dr. Dodds and two other medical men, who had examined the defendant William Wells, stated that although the respondent, who was at the Valkenberg Asylum, had got over the most acute symptoms, yet at present he was incapable of managing his own affairs.

Mr. Struben appeared for the applicant, and Mr. Gutsche represented the curator *ad litem*.

[De Villiers, C.J.: Are you satisfied as to his insanity, Mr. Gutsche?]

Yes, my lord, I cannot oppose this application. I would suggest that a son of the defendant's by a previous marriage be appointed as curator, jointly with his wife, Hanna Wells.

De Villiers, C.J., said he did not think there should be any division, and he would appoint the son, Wm. Chas. Wells, of Salt River, as curator of person and property.

BLACKALL V. ROBERTSON.

This was an application for an order declaring the respondent of unsound mind, and for the appointment of a curator in the administration of the estate. By a previous order the Court had allowed the matter to be proved by affidavit, and the affidavit of Dr. Jane Waterson, the medical attendant, set out that Mrs. Robertson was in her 91st year, and suffered from brain weakness, due to advanced age. There was no probability of an improvement. Other affidavits set out that the respondent was so weak that she could not write her name or distinguish one document from another.

[De Villiers, C.J.: Has she any property?]

Mr. Jones: Considerable property, my lord.

[De Villiers, C.J.: Whom do you suggest as curator?]

Mr. Jones: Mr. Roos, my lord.

Mr. M. Bisset: I am also advised

that Mr. Roos would be a suitable person. I have seen Mrs. Robertson, and am satisfied she should have a curator appointed.

An order was granted declaring the respondent incapable of taking care of her property, and appointing Mr. Roos as curator.

GENERAL MOTIONS.

Ex parte METELEERKAMP. { 1904.
Aug. 4th.

Mr. W. P. Buchanan moved to have a rule *nisi* granted under the Derelict Lands Act made absolute.

Rule made absolute.

NGONO V. COLONIAL GOVERNMENT.

Transkeian Territories — Governor's Proclamation — *Ultra vires*.

The Governor, acting under powers conferred on him by Statute, issued a Proclamation, whereby it was enacted, inter alia, that in case a certain general rate assessed in the Transkeian Territory should remain unpaid for a period of three months, it should be lawful for the Magistrate to issue his warrant, authorizing the levy of the amount by sale of the goods and chattels of the defaulter. The petitioner being in default, some of his goods were attached under such warrant, whereupon he applied for an interdict, restraining the sale on the ground that the enactment was ultra vires.

Held, that the provision as to levy of goods was within the power of the Governor in regard to rates actually due.

The Proclamation further enacted that should the proceeds of the sale be insufficient to meet the payments due, the defaulter shall, on conviction, be liable to be punished as an idle and disorderly person.

Held, that until the petitioner had been proceeded against under this part of the Proclamation, the Court was not in a

position to decide as to its validity.

This was an application for an interdict against the Colonial Government. From the applicant's affidavit it appeared that he was a native peasant farmer, resident in Qumbu, in the district of East Griqualand, and occupied land under the system known as the Communal Tenure System. The petitioner was still a taxpayer, and he also paid hut tax. On the 13th May, His Excellency the Governor issued a proclamation, which was duly published in the "Gazette," under which a system of local government was established in the Native Territories, including the district of Qumbu. Petitioner never admitted the legality of the said proclamation, and he never agreed to come under the operation of such law, and he had always challenged the right of the Governor to make such a law. Notwithstanding his protests, the Colonial Government, through the Resident Magistrate, had seized certain goods and chattels, belonging to the petitioner, and he prayed for an order restraining the Colonial Government from selling or disposing of the goods and chattels, and if sold, for an order restraining them from parting with the money, pending an action to be brought to determine the legality of the seizure, and of the proclamation itself.

Mr. Burton was for the applicant, and the Attorney-General appeared for the respondent.

Counsel said that the property of the applicant had been summarily seized under Proclamation 152, of 1903. That proclamation extended the operation of Proclamation 352, of 1894, providing for the establishment of Councils for the administration of local affairs in certain districts in the territory of the Transkei, and embraced and amended the first proclamation which provided for the establishment of these Councils, and made the proclamation applicable to certain districts in the Transkei Territories, including the district of Qumbu, of which the applicant was a resident. There were provisions for the establishment of these district Councils, first of all for the administration of local affairs, and then for the establishment of a general Council to administer the affairs of the various districts together. Then came the portions of the proclamation to which he wished to refer: the portions dealing with the general rate. Section 19 provided that it shall be lawful for the Governor to levy an annual rate to be paid by every native occupier of land or of a hut. The next section defined that the rate shall be not less than 10s., and shall be due and payable at the offices of the Resident Magistrate of the several districts. Then sec-

tion 21 provided that in case the rate shall remain unpaid for a period of three months from the date on which it becomes due, the operations of clause 25 shall be deemed to apply. Clause 35—and it was the terms of this clause which applicant really wished to have decided—provided that it shall be lawful for the Magistrate to issue his warrant requiring the Messenger of the Court to levy and raise the amount by sale of the goods and chattels of the person making default. Should the proceeds of such sale not be sufficient to meet the payments due, or should the person in default not be in possession of any property, he shall, if found at any time at any place within the district, be taken and deemed to be an idle and disorderly person and on conviction thereof shall be subject to the provisions of the Vagrancy Act, and shall be liable to the penalties therein prescribed, and on a second or subsequent conviction shall be liable to be imprisoned, and kept to hard labour for a period not exceeding twelve months, provided that on payment of the rate he shall be relieved from this operation of the section.

Mr. Burton said the question was whether, under the powers given by Act 29, of 1897, Parliament could be taken to have given the power to the Government by proclamation to make a law, which he submitted was inconsistent with the general principles of the law of this country. He contended that what this clause did was to make a substantive criminal offence of the non-discharge of a civil liability.

De Villiers, C.J.: Shouldn't you wait until the mischief is done; until he is declared an idle and disorderly person?

I submit that a summary seizure of his goods has introduced a method of procedure which is also not in accordance with the general principles of our law. I say at once that my case with regard to that is not so strong as in the case of being convicted as an idle and disorderly person. Here there was power given to make a summary seizure without notice being given to and a demand made on the person affected, whereas under the law of the Colony it was required that a demand should be made before the Magistrate could issue a warrant in respect of rates. This proclamation did not provide for the giving of notice; it merely provided that if the tax were not paid within three months of its becoming due, the Magistrate should order the seizure of his property.

The Attorney-General pointed out that section 35 was taken word for word from section 36 of the Glen Grey Act. The Governor was given the additional power of applying any part of the Glen Grey Act to the Native Territories. The provisions were exactly similar in both

Acts, excepting that in one instance the tax was 5s., and in the other 10s.

De Villiers, C.J.: The Legislature has conferred large powers of legislation upon the Governor in regard to the Transkeian territories, and by Act 29 of 1897 these powers were clearly defined. It is there enacted that the Governor may by Proclamation repeal, alter, amend and modify the laws, statutes, and ordinances now in force within the Transkeian Territories, Tembuland, and Pondoland, and make new laws applicable to the said territories, and may repeal, modify, and amend the same. Acting under these powers, the Governor has, by the 35th section of the Proclamation now in question, read in connection with the 21st section, enacted that in case the general rate shall remain unpaid for a period of three months from the date on which it becomes due, it shall be lawful for the magistrate to issue his warrant requiring the Messenger of the Court to levy and raise the amount by sale of the goods and chattels of the person making default. On behalf of the petitioner, it is claimed that the Governor had no power to make such a provision. In my opinion, however, such a provision is by no means inconsistent with the general powers which the Legislature intended to confer upon the Governor. Similar powers have been conferred in this country on local bodies, and even therefore if this rate for the purposes of which this levy is allowed is treated as merely a local rate, I consider that the Governor has ample power, under the authority vested in him, to make provisions of this kind. The petitioner does not allege that the rate is not due, except so far as he denies the validity of the proclamation together. Mr. Burton, however, contended that the consequences of non-payment are so serious that he is entitled to object altogether to this clause coming into operation. In my opinion, however, the objection should be made when there is any attempt to put the objectionable part into operation. Now, the part which Mr. Burton contends is really the objectionable part is as follows: Should the proceeds of such sale not be sufficient to meet the payments due, or should the person in default not be in possession of any property, he shall, if found at any time at any place within the district, be taken and deemed to be an idle and disorderly person, and on conviction thereof shall be subject to the provisions of certain acts—which practically make it a criminal offence—and shall be liable to the penalties therein prescribed, and on a second or subsequent conviction shall be liable to be imprisoned and kept to hard labour for a period not exceeding twelve months. Well, those provisions are certainly very drastic, but the difficulty has not arisen yet. The petitioner has not yet been treated harshly under this part of the section, and therefore the time has

not yet come for the Court to express any opinion on the point, although I am bound to say this: that, seeing that similar provisions are contained in the Glen Grey Act, it would probably be a difficult matter for the petitioner to succeed even with this second and more serious objection. Judicially, however, I am not in a position to express any opinion on the second objection. Petitioner has not yet been treated as an idle and disorderly person, and this question does not yet arise for decision. The only question which does arise for decision is whether the levy is illegal. In the absence of any statement by the petitioner that the money is not owing, I am not prepared to say that it is illegal. The application must therefore be refused.

I think the applicant should pay the costs.

Sampson, A.-G., K.C., said that, as the costs were small, and as the applicant had come to the Court, and not taken the law into his own hands, Government would not press for costs.

[Applicant's Attorneys: Zietman and Bosman.]

ILAUM V. GERHARD AND HAY.

Mr. Gardiner moved for leave to sue *in forma pauperis*. Counsel mentioned that the respondents resided in Russia.

A rule *nisi* was granted, returnable on November 1, personal service to be effected.

[Before the Chief Justice (the Right Honourable Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

B.S.A. ASPHALTE CO. V. } 1904.
CAPE TOWN GAS CO. } Aug. 4th.

This was an application on notice of motion calling on the respondents to show cause why a certain trial case should not be postponed for a period of three months. From Counsel's statement it appeared that it was alleged that the Gas Company had broken contract with the plaintiff company in regard to the supply of coal tar. The Court ordered the parties to go to trial, and the plaintiff then filed his declaration. The main point in the case was the supply of coal tar to Messrs. Nuttall, a competing firm, and now the defendants had given an assurance not to supply them. The application was based on the ground that the principal witness for the defence was in such a state of health that he could not even be examined on commission. The affidavit of Dr. Lansberg set out that Mr. Edward Patrick Reilly, the manager of the Gas Company, was suffering from nervous prostra-

tion, and was unfit to give evidence. He had ordered him to take a long sea voyage. The affidavit of Mr. Buissinne, attorney, set out that it would be impossible to go to trial without Mr. Reilly's evidence.

The affidavit of Dr. Hewat stated that Mr. Reilly was suffering from complete nervous prostration, as the result of a gas explosion. Mr. Reilly, in his affidavit, stated that he was unable to do any business, and, as a result of his state of health, the board of directors in England had granted him three months' leave. He was desirous of taking a sea voyage round the East Coast on August 6, and expected to return to Cape Town early in November.

The answering affidavit of Andrew Allen, managing director of the plaintiff company, set out that Dr. Hewat was a local director of the company. He had frequently seen Mr. Reilly since the accident, and believed he was enjoying good health. The proceedings had been pending some time, and Mr. Reilly had ample opportunity to prepare his evidence. Since the explosion Mr. Reilly had attended a meeting of the S.A. Brickfields Company, and was able to criticise the affairs of the company. He believed that Mr. Reilly was leaving for England in connection with the business of the Gas Company, and, in any case, his evidence was not very material. The books of the defendant company could be inspected and reported upon by an accountant. Nuttall and Co. were still being supplied with coal tar, and to have the proceedings delayed meant further loss to the plaintiff company.

The affidavit of George Gee set out that when the defendant complied with the discovery order it would be found that Mr. Reilly's evidence was not very material.

The replying affidavit of Mr. Reilly set out that Dr. Hewat was not a local director of the Gas Company. He was not leaving for England on the company's business. No coal tar had been supplied to Nuttalls since the 2nd July, 1904, or to any other competing firm.

Mr. Schreiner for the applicants (defendants in the action); Mr. W. P. Buchanan for respondents.

Mr. Buchanan pointed out that Mr. Reilly himself had admitted that he attended a meeting of shareholders and criticised the balance-sheet. There was no reason why it could not be arranged to take his evidence on commission.

[De Villiers, C.J.: Perhaps he would not be able to undergo cross-examination at your hands?]

Mr. Buchanan said he could not see how he could be very hard on Mr. Reilly. He was able to give help in filing the plea, and moreover, all the facts of the case must be in the hands of his attorneys. There were plenty of officials who knew the affairs of the

company, and he did not see how Mr. Reilly's evidence was material to the case.

De Villiers, C.J.: If I thought that a postponement of the case would seriously prejudice the plaintiffs I certainly would not consent to it, but it appears to me there is no reason to fear any prejudice from a postponement for about three months. It is not alleged that the defendant company is not well able to pay any damages that may be awarded for past and future breaches. It is not alleged that the plaintiff company is in any serious or immediate want of the money. Therefore, I consider three months' postponement cannot seriously prejudice the plaintiffs. The defendants allege that it is absolutely necessary to have Mr. Reilly's evidence in person, and that the medical evidence is to the effect that he is in such a state of nervous prostration he could not give his evidence—such evidence as he would if in a proper state of health. Under the circumstances, the Court will grant the postponement. There is also a practical consideration which should not be lost sight of. For instance, it is not likely this case will be heard before the November term owing to the state of the list. If the case were set down even now, it is not likely it would be heard, and the chances are it would be postponed until the November term. Upon the whole, the Court is of opinion that the case should be postponed until the first Tuesday in November, and the costs of this application will be costs in the cause.

KELLY AND CO. V. HEERMANN.

Mr. Schreiner, K.C., moved as an unopposed motion for the appointment of a commission to take evidence of certain witnesses in the Transvaal.

Mr. W. P. Buchanan, who appeared for the plaintiff, suggested that the commission should be a joint one, and that it should be expedited.

Application granted, on condition that the defendant proceeds as expeditiously as possible with the commission, with leave to examine witnesses on both sides, the Assistant Resident Magistrate of Petersburg to act as commissioner; costs to be costs in the cause.

APPEAL CASE.

MABONA V BLACKBEARD. { 1901.
Aug. 4th.

Master and servant—Authority—
Delict—Damages.

*The defendant being sued in a
Magistrate's Court for the*

illegal seizure of the plaintiff's ox, raised the defence that he had committed the act in the performance of his duty as the servant of B.

Held, that as the act complained of was in its nature a tort or delict against a third person, the defendant was liable whether or not liability also attached to his master.

This was an appeal from a decision of the Resident Magistrate of Middle-drift, in which the plaintiff's case was dismissed, because he sued the defendant's servant instead of the master.

From the record in the Court below it appeared that the applicant summoned one William Blackbeard to recover a certain ox, valued at £18 10s. The defendant put in a plea that he was the wrong person to be sued, as he was merely acting on behalf of Henry Blackbeard, in whose employ he was engaged as a clerk. The evidence of Wm. Blackbeard showed that the plaintiff was indebted to Henry Blackbeard in the sum of £10, and he took the ox in question. The Magistrate dismissed the case, because he held that the defendant was not the right person to be sued.

Mr. Close for the appellant. Respondent in default.

Mr. Close: The Magistrate has assumed that if a servant commits a tort only the master and not the servant is liable. The master is not always liable for torts committed by his servant. Here the servant was acting outside the scope of his authority. See *Pothier on Obligations* (p. 463). As to the English law see *Broomes Legal Maxims* (p. 843), where he treats of the maxim *Respondent superior*. With regard to Colonial cases, see *Binda v. Colonial Government* (5 Juta. 284). A man may at his own choice elect to sue either the tort-feasor or his employer. The case should be remitted back to the Magistrate for trial on the merits; into which he does not appear to have entered.

De Villiers, C.J.: For the purpose of this case, it must be assumed that the seizure of the ox was an illegal seizure. The seizure was effected by the defendant, and he is liable for this illegal act of his. The Magistrate seems to have been somewhat misled by the law, which allows the master, under certain circumstances, to be sued for the torts of his servant. Where the servant acts within the scope of his authority, the matter is liable, but the fact that the master is liable does not free the servant from liability. He can only lawfully obey the lawful commands of his master, and if he com-

mits an act which in its very nature is a tort or delict against a third person, he is equally liable for damages to such person. The principles laid down by Voet (17-1-6) as to mandatories are equally applicable to servants. The ox was seized according to the summons, on the plaintiff's property, and if the facts are there correctly stated the defendant should have known that he was doing a wrongful act. The Magistrate, therefore, erred in allowing the plea in abatement, and the appeal must be allowed with costs in this Court. The case will be remitted to the Magistrate to be decided on its merits, and the costs below will be costs in the cause to be decided by the Magistrate.

Buchanan, J. concurred.

[Appellant's Attorneys: Syfret, God-lonton and Low.]

GENERAL MOTIONS.

LONDON AND WESTMINSTER BANK AND OTHERS V. RECEIVERS OF THE GRAND JUNCTION RAILWAY AND OTHERS, AND OFFICIAL LIQUIDATOR OF THE GRAND JUNCTION RAILWAY V. RECEIVERS OF THE GRAND JUNCTION RAILWAY AND OTHERS.

Mr. McGregor (with him Mr. W. P. Buchanan) was for the applicants, Mr. Schreiner, K.C. (with him Mr. Upington), was for the first respondents, and Mr. Close (with him Mr. Bisset), was for the respondent Hills.

Mr. McGregor said the application was for leave to appeal to the Privy Council against a recent decision of the Supreme Court. As the appeal was likely to be delayed for a couple of years, he thought the Court might give some expression of opinion as to the distribution of the funds.

De Villiers, C.J., said there was no application to that effect before the Court. An application at any future time would be considered, but there would only be leave granted at present, subject to the ordinary conditions, to appeal to the Privy Council.

Mr. Schreiner pointed out that there had been absolution from the instance in the previous cases, and he thought his clients should have their costs in the meanwhile.

De Villiers, C.J., said the Court could order execution as to costs, when security could be given.

Mr. Schreiner thought the appeal should be expedited. It ought not to be left hanging over.

De Villiers, C.J.: We have no control over the Privy Council. They may expedite it as much as they like, but it won't be heard for two years.

Ex parte SAVAGE AND SONS, LTD.

Mr. Schreiner, K.C., moved for an order authorising the registration of a certain bond in the name of the applicants. In 1898 the applicants took over the business then carried on by Wm. Savage and Sons, but a certain bond for £10,000 remained unregistered under the name of the old firm. It was through a mistake of an articled clerk that the bond was not registered in the Deeds Office, King William's Town.

Mr. Schreiner: The bond would have been registered at King William's Town but for the necessary delay. We now wish to have the new bond registered under Ord. 3 of 1827.

[De Villiers, C.J.: The only question is whether notice ought not to be given to Vrede and Sons.]

There is now no Port Elizabeth firm of that name.

A rule was granted, calling on Wm. Savage and Sons, of East London, to show cause on the last day of term why a. order should not be granted as prayed, the firm named to be informed that if they did not appear to show cause, there would be no costs.

HUMPEL V. HUMPEL.

Dr. Greer moved on behalf of the plaintiff—the wife—for removal of the trial to the Circuit Court at King William's Town.

The Court granted the order, subject to notice being given to respondent, who is at present confined in the Pretoria Gaol.

KRUGER V. PRICE.

Mr. Close moved on behalf of Price for the discharge of a certain interdict in terms of a consent paper.

Granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

COHOON V. COHOON.

{ 1904.
Aug. 5th.

This was an action brought by Amelia Kathleen Cohoon, of East London, against her husband, supposed to be in Johannesburg, for restitution of

conjugal rights, failing which, a judicial separation, with maintenance at the rate of £10 a month. Mr. McGregor appeared for the plaintiff; the defendant had been barred from pleading.

Amelia Kathleen Cohoon (the plaintiff) gave evidence. She said she was born in this colony. On the 10th October, 1894, she was married to the defendant at the Church of the Immaculate Conception, in Johannesburg. She was then a hospital nurse, and her husband was a guard in the service of the C.G.R. They were married in community of property. They first lived in Johannesburg for two months, and afterwards at Viljoen's Drift, where they lived four years. Afterwards they resided at Kroonstad for some months. Then they went to Port Elizabeth, and resided there six months. After that the defendant left for Beira, where he had got a position as guard on the railway. Witness went to Durban with him, where it was arranged that he should send or come for her. She stayed there for 12 or 18 months. He only once communicated with her, and he then sent her £2. Witness supported herself by nursing and assisting in a shop. She saw him about 12 months after he had gone to Beira; they remained together at Durban for six months. The defendant deserted her at East London close upon three years ago; witness was now engaged in nursing.

By the Court: The defendant would be able to pay her £10 a month. She did not know where the defendant was. He was in Johannesburg when she last heard of him. She would be satisfied if he paid her £5 a month.

Decree of restitution granted, with costs, defendant to return to or receive the plaintiff on or before the 15th September, failing which, rule to issue calling upon defendant to show cause on the 20th October why a judicial separation should not be granted, with £5 a month for maintenance, until a further order of Court, personal service to be effected, if possible, failing which, one publication in the "Johannesburg Star."

Postea (October 20th). The rule was amended and the return day extended to November 30th. Defendant to show cause on December 12th.

Postea (December 12th). The rule was made absolute.

MIHALY V. MOSKOVIK.

Fraud on mortgagee—Bogus receipt.

This was an action brought by Mina Mihal, a widow, carrying on business as a general merchant at Wynberg, against her son-in-law, Wm. Moskovik, builder and speculator, of Wynberg, to recover certain debt.

The declaration set out that the plaintiff lent and advanced to the defendant sums amounting in all to £215, and that the defendant had purchased and the plaintiff had sold and delivered articles of general merchandise for £10 11s. 2d. The defendant had repaid £60, and the plaintiff had demanded the balance of £155 from him, but this he neglected and refused to pay. The plaintiff therefore claimed payment of £155, balance of capital of loans, and of £10 11s. 2d., price of goods sold and delivered, together with interest *a tempore morae*, alternative relief, and costs of suit.

In his plea, the defendant said that he received a sum of £180 from the plaintiff for safe custody, but as to the smaller sums, which went to make up the balance of the £215, he said that he supplied goods to the plaintiff. He had tendered to the plaintiff the balance of the money that she handed to him for safe custody, after he had previously returned £60 to her. She refused the tender. He prayed that the claim should be dismissed. For a claim in reconvention, the defendant said the plaintiff owed him a sum of £194 14s. for work and labour done, materials supplied, and cash advanced at her special instance and request. He claimed the said sum of £194 14s., together with interest *a tempore morae*, alternative relief, and costs of suit.

Mr. Buchanan (with him Mr. Sutton) was for the plaintiff; Mr. Percy Jones was for the defendant.

Mr. Buchanan said that the plaintiff's contention was that the defendant owed her £166; defendant admitted that he owed her that amount, but said that she owed him a larger amount. He submitted that the onus of proof was on the defendant.

Evidence was then called for the defendant.

Wm. Moskovik (the defendant) said he was a builder residing at Wynberg, plaintiff being his mother-in-law. At the time plaintiff and her other daughter, Sarah, were staying with witness and his wife. The plaintiff came out in May, 1903. While they were living together certain money amounting to £180 was handed to his wife for safe custody, the money was paid into his account in the bank, and the deposit slip was entered in the plaintiff's name, so that they would know how much was hers. He did not open a separate account for the plaintiff. He erected a building for the plaintiff the price being £150. About two months after he deposited the money she asked him to let her have £60, he drew this amount and handed it to one Hirsch, upon Mrs. Mihaly's instructions. As to the balance of £120, about the commencement of September she hired a shop at £10 a month in Main-road, Wynberg, taking with her her other daughter, Sarah. The plaintiff took £20 for rent and furniture;

witness's wife gave her the money. Sarah had some ground in Constantia-road, and the plaintiff talked about building a shop on the land, but nothing then came of the matter. This was before he made the payment of £20. Witness said he could not erect the building for £120, and plaintiff said she could get somebody to do the work for that amount. He handed her a cheque for £120, but she declined to accept it, and he thereupon destroyed the cheque. In September plaintiff and her daughter left him, and lived at the shop in the Main-road. He got some timber for the shelves at the shop on behalf of the plaintiff, and spent £5 14s. There were no counters in the shop, and plaintiff asked him to lend her two that he had in his shop. He lent her two scales, glass jars, and a dressmaking figure. These had not been returned to him, and, as a matter of fact, had been sold by the plaintiff, when she gave up the shop. He valued these goods at £12. Witness stood security to the merchants for £50 on behalf of the plaintiff. He withdrew subsequently. In October the plaintiff approached him with a view of building a shop on the vacant ground, according to a modified plan drawn by his brother. In the meantime he had bought a portion of the old Barracks in Cape Town, that he had to pull down within a specified time. The plaintiff pressed him to proceed with her building, but he refused to do so, and she then said that, unless he built it, he must return her money. He gave her a cheque for £100, but this was not drawn against his account. He had no communication with the plaintiff's daughter as to the building. About Christmas time he had finished at the Barracks, and the plaintiff approached him again in regard to the building. He had some good old material, and he agreed to erect the building for £150, for the plaintiff, on her daughter's ground. He had £100 in his possession, and it was agreed that the plaintiff should pay him the balance in two instalments. He erected the building, and instalments were paid to his wife of £30, £2, and £3. He had certain groceries from plaintiff in lieu of the payment of the balance. Plaintiff let the shop, and house for £6 a month. The incoming tenant wanted counters, verandah and other things, and witness put in a partition and counter on the plaintiff's instructions at a charge of £7. He claimed that there was a balance due to him of £29 2s. 10d.

Cross-examined by Mr. Buchanan: Sarah Mihaly was the wife of a man living in Hungary. In October, 1902, he sold her a portion of ground in Constantia-road for £650. The deeds said that she was to give him a mortgage bond for £350. She did not pay him the £300. She had paid him the £350. The bond was in favour of a Mrs.

Laurie. He had not claimed the difference of £300 from Sarah Mihaly. Sarah Mihaly was living at the house with him, and his children, while his wife was in England. He denied that improper relations took place between Sarah and himself, or that he was the father of the child Sarah had given birth to. Witness denied that he ever admitted being the father of the child, or that he had promised to build a house for Sarah. He admitted that he paid Mrs. Bouchall for taking charge of Sarah. At the time of this occurrence, witness had over £300 in the bank. The counters were worth more than £12. Witness put in new counters, for which he claimed £7. It did not surprise him to know that they sold them for 26s. On the 1st March witness gave a receipt to Mihaly for £350, as the amount due on the building. He did not receive that amount. He only got £250.

[De Villiers, C.J.: This receipt was given to enable the plaintiff to get a mortgage on the property.]

Yes.

[De Villiers, C.J.: And this is simply an attempt to defraud others. It is a scandalous fraud. I see the receipt is made out in the name of "S. Mihaly."]

Subsequently Mr. Jones said he thought he would be able to throw a little light on the case. The defendant said he had been approached by the plaintiff and Sarah Mihaly to enable them to raise money on mortgage, and in consequence the receipt for £350 was given.

[De Villiers, C.J.: This man is a party to the attempted fraud.]

Mr. Jones said he would like to hear what the plaintiff had to say.

[De Villiers, C.J.: If this man is a party to the fraud he will not get a penny.]

If your lordship thinks that, of course I will have to withdraw. I knew of this receipt before the case came into court. The defendant really did this because he was asked to do so by the women.

[De Villiers, C.J.: If a couple of women who know nothing of business can induce a business man like the defendant to act like this, I look upon him as a criminal.]

Then, my lord, there is no good going on with the case.

[De Villiers, C.J.: You can do so. But after his statement about that receipt, I cannot give judgment in his favour.]

This receipt was given to enable the women to raise money on the property. The defendant says the property really cost him more than he agreed to build it for.

[De Villiers, C.J.: That is not the receipt for what he built the place for.]

Let us ask the plaintiff is she paid this amount.

[De Villiers, C.J.: No, she has not. The defendant is bound to this receipt, and he admits being a party to a fraud.]

Then I fear the counter-claim must drop, and we must submit to what your lordship will rule. Your lordship will have to make a ruling as to costs.

De Villiers, C.J., said he had to decide for whom the house was built. The defendant's case was that it was built for Mrs. Mihaly, and the plaintiff's was that it was built for Sarah. He did not want to hear the present witness further cross-examined with regard to this receipt.

In the face of your lordship's remarks, I do not see how I can go on with the counter-claim.

[De Villiers, C.J.: There is no reason why you should not go on with your case.]

With your lordship's permission, I shall cross-examine the plaintiff and Sarah Mihaly as to the circumstances under which this agreement was signed.

Annie Muskovik, wife to the defendant, corroborated the direct evidence given by him.

Cross-examined by Mr. Buchanan: Witness went on a trip to Hungary. When she returned, Sarah gave birth to a child. Witness denied admitting to Mrs. Bouchall that her husband was the father of the child. Witness wanted to send her sister back to Hungary, but she would not go, because she said she had as much claim on defendant as witness had.

Mr. Jones objected to the questions with regard to the adultery, as he contended they had nothing to do with the case. There had already been an action in the Magistrate's Court, in which Sarah Mihaly claimed £20 from a person for spreading the report that defendant was father of the child.

De Villiers, C.J., said that the question as to whom the property was built for was influenced by that point.

Makri Moskovik, civil engineer, brother of the defendant, stated that he made the plan produced for Mrs. Mina Mihaly. The building was to be for Mrs. Mihaly. His brother offered to erect the building cheaper than witness.

Cross-examined by Mr. Buchanan: He did not know that the building was for Sarah.

Mr. Jones closed his case.

Mr. Buchanan called the plaintiff.

Mrs. Mina Mihaly, who stated that when she arrived here in May, 1903, she had £180, which she handed over to the defendant. In August Moskovik came down to see her about the shop in the Main-road. The defendant said that he would build a shop for her daughter, and allow her a certain amount of money per month, in order to make amends for his misdeed. He had only paid £60 out of the £180 belonging to witness. She lent her daughter £30, but that had nothing to do with the purchase price of the building.

Cross-examined by Mr. Jones: The defendant admitted that he was the father of the child. She denied that

Mrs. Moskovik gave her £20 to buy furniture and to pay the rent. Her daughter received the rent of the shop. She denied that the house was to be erected for her for £150, and that she should pay £30 when the building was window high. She did not ask him for the £120, so that she could get somebody else to build the house. She did not give goods because she could not pay the account on the building.

Maggie Williams, a servant, stated she heard Mrs. Mihaly ask Muskovik for her money, and Moskovik told her in Yiddish that he would give it to her soon, and that he would build a house for Sarah.

Cross-examined by Mr. Jones: Witness understood Yiddish.

[De Villiers, C.J.: I will not hear any more evidence.]

Mr. Jones said he would like to cross-examine Sarah Mihaly.

His lordship consented.

Sarah Mihaly (examined by Mr. Buchanan) said the house was built for her by Muskovik, because he got her into trouble. He gave her the receipt produced, and only paid him £15 for furniture and fixtures. Witness did not ask him to make the receipt out for £350.

Cross-examined by Mr. Jones: The receipt for £15 was only for fixtures and work he did after the building was completed. Witness did not try to raise money on mortgage on the place. Witness bought the land on which the house was erected from defendant for £300. Witness, when she went to Worcester, left the receipt and transfer with Mrs. Muskovik, and when she returned they were lost. Defendant told her she need not bother about the receipt, as he would not ask for the money again. Witness sued Mrs. Cohen in the Magistrate's Court for defamation of character. Mrs. Cohen said witness was living with Muskovik; that was not a fact, as she had not lived with him.

By the Court: Defendant was the father of her child. She was a married woman. Her husband lived in Hungary, and she left him because he ill-treated her.

Counsel were then heard in argument on the facts.

De Villiers, C.J.: The plaintiff in this case claims £155, money given by the plaintiff to defendant, and a sum of £10 11s. 2d for goods supplied. The defendant admits having got £180 in his hands for the purpose, he said, of depositing it in the bank on behalf of the plaintiff. He has also received divers sums of money, amounting to £35. As to the shop account, the defendant seemed to doubt the accuracy of it, but he did not dispute it. That would make, altogether, a sum of £225 11s. 2d., received by the defendant from the plaintiff. These amounts having come into the hands of

the plaintiff, it lay on him to show that he had returned the money or given the equivalent for the money, by his services. He has clearly proved that £60 has been repaid. In regard to the other items, such as timber, scales, counters, etc., I am inclined to allow £5. As to the other sums which the defendant claims to set off, and which by claim in reconvention, he seeks to recover from the plaintiff, the decision of the Court on these items depends on the question whether the house in Constantia-road was built by the defendant for the plaintiff, or for her daughter. The plaintiff was the mother-in-law of the defendant, and Sarah was his sister-in-law. It seems that during his wife's absence in England, Sarah had lived in his house, and had become pregnant. I am quite satisfied from the evidence given by Sarah that the defendant was the cause. That being so, it seems to me an extremely likely thing that the defendant would wish to assist her. It is only to be hoped that that was his desire, after having brought her into that condition. She previously bought land from him, and she managed to raise a sum of £350 on mortgage, and as to the balance of £300 she said she paid that to the defendant. But that point is immaterial for the purpose of the present action. The point is that the land and buildings belonged to Sarah Mihaly, and the presumption is that anyone in assisting in building a house on that land assisted the person who owned it, and not anybody else. That is the presumption in the present case. There was also the probability that as the defendant had been the cause of the sister-in-law being in that unfortunate condition he would assist her. Those circumstances would, in my opinion, have been sufficient to justify the Court in holding that the defendant had undertaken to build the house for Sarah and not for his mother-in-law. But the evidence of the plaintiff, is confirmed by the document which has been produced, dated the 18th March, 1904, which showed an indebtedness to the defendant, not by the plaintiff, but by Sarah of £350 for buildings and £15 for counters, etc. The receipt stated that the amount of £350 had been received from Sarah. The defendant had this document put into his hands, and said, "Oh, this was a mere make believe." According to his own account, this document was drawn up for the purpose of inducing the mortgagee to lend a further sum of money to Sarah on the security of the property, and he added that these women had perjured him until he gave it. I utterly disbelieve the story. I do not believe that a man in the position of the defendant—a man who admitted that he had managed to get properties so as to have landed properties rated at £23,000—would be such

a fool as to be misguided by two women, one an aged mother-in-law and the other a sister-in-law, whom he had seduced. I consider his action in that matter a fraudulent one. It was an attempt on his part to enable this poor wretched woman to defraud other creditors, and I will bind him down to that document in which he admitted that he built for Sarah, and not for his mother-in-law. He had endeavoured at one time to defraud others, but now tried to defraud his mother-in-law. The judgment of the Court is for £225 11s. 2d., less £60 received on account, with costs.

[Plaintiff's Attorneys: Herold and Gie; Defendant's Attorney: H. Wrench.]

TOOCH V. LE ROUX.

Lessor and lessee—Cancellation of mutual liability—Construction.

By agreement of lease the lessor was to be allowed to make improvements on the leased premises and to deduct the rent from the amount thus expended. While the lease was running, the lessor and lessee mutually agreed to the cancellation of the contract of lease, and reciprocally agreed to release each other from any further liability in respect thereof.

Held, that the effect of such release was to discharge the lessor from any claim for expenditure on improvements made before the date of cancellation.

This was an argument on exceptions. The declaration was as follows:

1. The plaintiff and the defendant both reside in the division of Oudtshoorn.

2. By a written agreement of lease dated the 14th February, 1901, the defendant let to one William J. A. Beckett, certain land and buildings known as "The Toll," situated in the division of Oudtshoorn, for a term of five years, commencing on the 1st January, 1901, and ending on the 31st December, 1905, at a rent of £10 per month; the plaintiff craves leave to refer to the several conditions of the said lease, when produced at the trial.

3. By one of the said conditions, it was agreed that the said Beckett should effect certain specified improvements to

the said land and buildings, and should advance all the cost and expense of such improvements, and that for the repayment of such cost and expense, the said rent should be considered as a payment on account, and as a set-off until such cost and expense should be liquidated.

4. In pursuance of the said agreement, the said Beckett occupied the said land and buildings, and effected specified improvements thereto, at a cost and expense amounting at the end of August, 1903, to a total sum of £602 2s. 1d.

5. On the 27th August, 1903, the said lease was cancelled by mutual consent between the defendant and the said Beckett, by reason whereof there remained due and owing by the defendant to the said Beckett the sum of £279 16s. 1d., being the said sum of £602 2s. 1d., less the sum of £322 6s., rent for two years and eight months, as will appear more fully from a detailed account rendered to the defendant, which the plaintiff craves leave to produce at the trial.

6. Thereafter, on or about the 15th February, 1904, the said Beckett, for valuable consideration, lawfully ceded and assigned to the plaintiff, and for the plaintiff's benefit, all his right and title in and to the said debt of £279 16s. 1d., owed to the said Beckett by the defendant.

7. All things have happened, and all conditions have been fulfilled, necessary to entitle the plaintiff to claim from the defendant the said sum of £279 16s. 1d., but the defendant refuses to pay the same, or any part thereof.

Wherefore plaintiff prays for: (a) Judgment in the sum of £279 16s. 1d.; (b) alternative relief; (c) costs of suit.

Defendant's plea stated:

1. He admits paragraph 1.

2. As to paragraphs 2 and 3, plaintiff admits that on the 14th February, 1901, he entered into an agreement of lease in writing with W. J. A. Beckett, otherwise as to the true terms and conditions thereof, defendant craves leave to refer this Honourable Court to a copy of the said lease.

3. Defendant denies that the cost of the improvements at the end of August, 1903, amounted to £602 2s. 1d., but otherwise admits paragraph 4.

4. Defendant admits that on the 27th August, 1903, the lease was cancelled by mutual consent of the parties thereto, but otherwise denies paragraph 5. Defendant says that the cancellation was made in the terms set forth in the indorsement written on the original lease, and signed by the lessor and the lessee.

5. According to the true construction of the provision in the said indorsement that the lessor and lessee should be released from all further liability in respect of the lease, the defendant contends that he is not liable to the late lessee or to the plaintiff for the amount claimed in the present action or any

part thereof, by reason that such amount if due was due at the time of the said cancellation, and liability therefor was discharged by the said indorsement.

6. Defendant has no knowledge of the allegations in paragraph 6, and does not admit the same. Defendant had no notice or knowledge of the said cession.

7. Defendant denies paragraph 7. And for a further plea, should this Honourable Court not uphold the defendant's contention as set out in paragraph 5 above, the defendant says:

8. He craves leave to refer to paragraphs 1, 2, 3, 6, 7, above.

9. In terms of the lease agreement it became and was the duty of W. J. A. Beckett, as a condition precedent to produce to defendant vouchers for the work done, but he has wrongfully and unlawfully failed and neglected to do this, and defendant contends that any action by Beckett or by plaintiff to recover money due in respect of the alleged balance owing by defendant is premature until the said duty has been complied with.

10. The defendant denies that the improvements and alterations have been effected upon the cheapest possible scale as required by the aforesaid agreement of lease.

11. The defendant is ready and willing and hereby tenders to debate the accounts and to pay such sum of money as may be found upon such debate to be due.

The following is a copy of the lease: Agreement made and entered into between Gabriel J. P. le Roux, jun., hereinafter called the lessor, and William J. A. Beckett, hereinafter called the lessee, both of Rietvley, in the division of Oudtshoorn.—Whereas the lessor agrees to lease certain business premises known as The Toll, or Rietvley, for a term of five years, commencing 1st January, 1901, and ending 31st December, 1905, upon the following terms and conditions: The lessee to pay an annual rental of one hundred and twenty pounds (£120) sterling per annum, which sum shall be a payment on account of certain improvements to the premises now in occupation of the lessee, viz., to build a bar room, take down the present room used as a bar, to continue the verandah to end of stoep facing the stables, to build a wall suitable to carry on the business of a bar for the use of coloured persons, to erect bedrooms in open space between present dwelling-house and cottage, and to carry out the verandah as far as the present outside bedrooms, all cost and expense of such work to be advanced by the said lessee, and for the repayment of such outlay the monthly rent of ten pounds (£10) sterling per month shall be as a set-off until such expense has been liquidated. The lessee agrees and promises to have these alterations done in a proper and workmanlike manner, and upon the

cheapest possible scale, and shall produce for the information of the said lessor vouchers for the work done at the expiration of this agreement. And in consideration of this outlay the lessee shall have the option of renewing this lease for a further period of five years, computed from the 1st day of January, 1906, at a rental of one hundred and fifty pounds (£150) per annum, provided that the lessee retains the services of Mr. D. W. Beckett. And the lessor agrees that the lessee shall have grazing rights on his farm Rietvley for five sheep or goats, two horses, two head of cattle, firewood and water for domestic purposes free of charge. And it is further understood between the contracting parties that the premises shall be handed to the lessee in good order, and that at the expiration of this lease the property shall be handed to the lessor in like good order. We, the undersigned, hereby mutually agree to the cancellation of the above contract, and reciprocally release each other from any further liability in respect thereof.

Mr. J. E. R. de Villiers for plaintiff.
Mr. Close for defendant.

Plaintiff excepted to paragraph 6 of the plea as bad in law, vague and embarrassing, and constituting no answer to plaintiff's claim.

Counsel having been heard in argument,

De Villiers, C.J.: Under the contract of lease, the plaintiff agreed to let to Beckett premises upon the following terms: "That the lessee should pay the annual rental of £20 per annum, which sum shall be payment on account of certain improvements to the premises now in occupation of the lessee, who is to build or make certain additions, and for the repayment of such outlay a monthly rent of £10 per month shall be as stated until such expense has been liquidated." After this lease had run for some time, and after Beckett had made certain improvements, a cancellation was effected in the following terms: "We, the undersigned, hereby mutually agree to the cancellation of the above contract, and reciprocally agree to release each other from any further liability in respect of it." This is signed on behalf of the lessee and the lessor. In my opinion these words have only one meaning, and that is, that not only is the contract to be cancelled, but there is to be no claim by the lessee for improvements made before the cancellation of the lease. If the words "future liability" had been used, there would, no doubt, have been considerable force in the argument for the plaintiff. But the words actually used are "further liability," which are wide enough to include not only future liability, but liability already reciprocally incurred. The contract itself did not contemplate any payment by the plaintiff for improvements beyond the deduction of rent. The contract having

been cancelled, rent was no longer payable, and as the lessee was a party to the cancellation, he could not thereafter claim the right to recover the amount previously expended by him on improvements. For these reasons, I am of opinion that the exceptions must be overruled, with costs.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorneys: Tredgold, McIntyre and Iisset.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

REX V. CHARTERIS. { 1904.
 { Aug. 8th.

Act 36 of 1902—Living on earnings of prostitution—Bribery—Interpretation of Statute.

A public officer charged with the duty of prosecuting or detecting offenders who corruptly accepts money or other valuable consideration for refraining from the performance of such duty is guilty of an offence at Common Law, but is not liable to prosecution for living on the earnings of prostitution in contravention of the 33rd section of Act 36 of 1902.

This was an appeal from a conviction by the A.R.M. of the Cape. From the record of the Court below it appeared that the appellant had been convicted of a contravention of section 33, sub-section 1 (a) of the Act 36, 1902, in that on certain specified dates he, being a male person, did wrongfully, unlawfully, and knowingly live wholly or in part on the earnings of prostitution, and received from one Max Harris and divers prostitutes divers sums of money, which he well knew were the earnings of prostitution, and which sums of money he did wrongfully and unlawfully convert to his own use and treat as part of his own property. The appeal was brought on two grounds: (1) that the conviction was against the weight of evidence; (2) that the facts alleged by the witnesses for the prosecution do not in law constitute a criminal charge.

Mr. Van Zyl appeared for the appellant; Mr. Nightingale was for the Crown.

Mr. Van Zyl said that, as to the first ground of appeal, he would like to go over the explanation given by the accused, and also by other witnesses for the defence of the comparatively large sums of money which the accused had in the bank. He thought that was a very important circumstance, and, at any rate, it was a very suspicious circumstance, and might go a long way towards appearing to corroborate the evidence given by witnesses for the prosecution, and he submitted that once that matter had been satisfactorily explained, their lordships would be both very loth to uphold the conviction, and it was practically based entirely upon the evidence of accomplices, of people whose living was entirely made out of prostitution. In the first instance, he would like to draw the attention of the Court to the fact that the Crown brought forward no evidence to show that Charteris was a man of extravagant habits, whereas the evidence brought for the defence showed that he was a man of a saving turn. Counsel proceeded to quote from the evidence of certain witnesses for the defence as to the accused's extreme carelessness over money matters. Proceeding, he dealt with the accused's sources of income since he came out from Glasgow in 1901. When he arrived, the accused had £40 or £50 in his pockets. Then his salary commenced from the time he left Glasgow, on the 22nd December, 1900. The defendant got £90 a year, together with a plague allowance of £3 a month, and also an allowance of 30s. a month for arresting Kafirs in possession of liquor. When the plague allowance was stopped, accused's salary was increased from £90 to £110 a year, together with a plain-clothes allowance of £12. This he drew until the 27th December, 1901. Then he got £125, with £12 plain-clothes allowance. In May, 1902, he became sergeant, and got an increase to £150, with £12 plain-clothes allowance. This he drew until May, 1903, when he got another increase of £10, and so he was drawing from the police force a sum of £172 a year. He said that on a salary of £172 a year he was able to save £100 a year. In his evidence, he contended that he was able to save during the time he was in the police force £280 out of his earnings, which amounted to £516. Then they had it on record that accused was a great frequenter of the racecourse, and that he had the reputation of being a very lucky man there. While he was in the police force, he must have made £90 a year out of betting. It was also brought out in evidence that policemen got tips that other people, perhaps, had not always the privilege of obtaining.

Then there was the question of the carting partnership, which the accused said that he had had a profit of £100 from.

[De Villiers, C.J.: Have you been able to connect these payments with the sums deposited by him in the Savings Bank and the Standard Bank?]

No my lord.

[De Villiers, C.J.: For instance, did he get a cheque?]

No, the money was paid to him in cash. Your lordship will see that the amounts put down in the book are not very big, most of them are £5, £6, or sometimes £10 a month. Proceeding, counsel said it was very difficult to trace these amounts in the bank, as it appeared from the evidence of others that the accused was in the habit of allowing money to accumulate in his box, and he also seemed to have lent a good deal of money to other people. Then it appeared that he received profits amounting to £40 or £50 upon stock, so that from the partnership he might be said to have received about £140 or £150. It was true that the appellant's name did not appear in the books, but, considering that he was a member of the police force, it was quite consistent with what they might expect that he would not figure in the books. Taking all the sources of income that he had named, counsel submitted that they had more than amply accounted for the money that Charteris had in the bank. Coming to the charges made against the accused by the various witnesses for the prosecution, counsel said he would like to draw their lordship's attention to the fact that out of the 23 witnesses who gave evidence for the Crown, there were eight who gave evidence as to protection money being paid to and received by Charteris in connection with the profits, and in connection with women soliciting upon the streets. They were all interested witnesses, they were people who were carrying on this immoral traffic in Cape Town, people who certainly could not be considered to be actuated by any desire to see the police of Cape Town do their duty unflinchingly, people who could not have any interest in seeing Cape Town become a moral place, people who would thrive upon the immorality of the city, and people who must naturally be only too glad to be given an opportunity to show the police that they could, by making a strong combination against any one policeman, swear him into gaol, and who had an interest in terrorising the police force. Those were the eight witnesses who spoke as to protection or profits from women in the streets, and especially Harris, who naturally was anxious to improve his position, and who rightly or wrongly was under the impression, if he could bring a case against the police, that he would have some chance of his sentence being in some way modified. All the other

seven witnesses were under the influence of Max Harris, and, what was more, they must all be regarded as accomplices in this case. Counsel thought our law was very clear on this point, that the accused ought not to be convicted upon the evidence of an accomplice, or of accomplices, unless there were very strong corroborative evidence. Counsel quoted the case of *Queen v. Fixeboaz and Others* (3, High Court, p. 495).

De Villiers, C.J., pointed out that the law as laid down in that case had not been upheld in this Court, because the Ordinance was quite clear, and said that it should be competent to convict on the evidence of an accomplice, the only condition being that there should be independent evidence that the crime was committed. Only this very term the point had arisen, and the Court had decided to the contrary.

Mr. Van Zyl said that it might perhaps not be worth while referring to the case of *Queen v. De Kock* (1, Roscoe, p. 441).

De Villiers, C.J., said that it would be quite competent for counsel to argue that there was no evidence that Charteris had lived on the proceeds of prostitution, apart from the evidence of accomplices.

Mr. Van Zyl said that he would take up that position. Proceeding, he referred to the relations that existed between Harris and the accused, and submitted that it was an unfortunate necessity of the Act that friendly relations should exist between the police, and such persons as Harris in order to bring home cases under the Act. He would not deny, however, that the relations between Harris and Charteris seemed to have been unduly friendly, more so than the duties of Charteris strictly required. It was an unfortunate fact that the police were to a great extent dependent upon persons like Max Harris and others in these cases. Harris naturally wanted to prove to the women that he was on intimate terms with Charteris. It was for their lordships to decide between what might have been an unfortunate or a criminal intimacy, and counsel contended there was no evidence as to the latter. With regard to the gambling incident, he did not think that his learned friend would deny that certain policemen had particular duties. The fact that Charteris did not report a gambling-house did not justify the Crown in drawing the inference that he was concerned or interested in the gambling-house. The non-trapping of houses was a suspicious circumstance, but the evidence of Inspector Osberg and Inspector Clark went to show that the orders received from a superior officer were, that if a house was quiet and orderly, it was not to be interfered with. Therefore, many of these houses were allowed to go on without being trapped, and counsel contended that the

fact that certain houses were not trapped did not amount to very much. If Charteris sent Home £600 to Scotland, there must have been some trace in the bank. All the circumstances which might be taken as corroborative did not prove that this crime was committed by the prisoner. The circumstances were merely suspicious, and some of them very suspicious indeed, but the prosecution must procure the strongest possible corroboration before the story could be believed. On the next point, the facts alleged by the witnesses for the prosecution did not constitute the crime the prisoner was charged with. Counsel submitted that the Act contemplated people who had no other possible means of sustenance, or who depended for their livelihood on the earnings of prostitutes.

[De Villiers, C.J.: A man might be very wealthy and live in part on the proceeds of prostitution.]

Mr. Van Zyl submitted that the accused did not fall under the section, as he was earning a salary more than sufficient to maintain him. Even if the money was paid to Charteris, it did not amount to the charge that was preferred against him. According to the evidence of the witnesses for the prosecution, the moneys were paid to the accused, not as the proceeds of prostitution, but in order that he should not interfere with certain brothels. The section was clearly directed to a class of men who really lived with the prostitutes, but in the present case there was no proof that any of the prostitutes paid money to Charteris.

[De Villiers, C.J.: Can the money be traced from the prostitutes to Harris, and then to Charteris?]

I submit not. The money might have been paid to enable these people to carry on prostitution. Counsel submitted that the indictment was absolutely wrong, and that Charteris should have been indicted for bribery. The prisoner might have been indicted also under Section 30 of Act 12 of 1882.

[De Villiers, C.J.: Mr. Nightingale, direct your attention to the question as to the living on the proceeds of prostitution. Supposing a person about to embark on a career of prostitution goes to a detective and offers him £100 to protect her, and she never earns anything, should not the Crown prove that the money came actually from prostitutes to the person charged?]

Mr. Nightingale: I think that is proved by the evidence of Harris. The evidence was that he was in concert with Charteris for the protection of certain brothels. Harris made the necessary arrangements with the brothels, and the money was paid to Charteris.

[De Villiers, C.J.: Supposing a person keeps a shop close to a brothel, and

the prostitutes buy what they require, and he lives wholly on prostitution, would you say that comes under the Act?]

Mr. Nightingale: I submit not, my lord. There is lawful consideration in such a case. Counsel (continuing) said that in a matter of bribery, directly the money was put down after a tender was made, the crime was complete, whether the bribee repented or not. Harris said that Charteris knew that the money was paid out of the earnings of prostitutes. Charteris well knew the source from which it came, and the consideration was a wicked and an illegal one. The money went towards Charteris's sustenance, and in that way the Crown made it out that Charteris was living on the proceeds of prostitution.

[De Villiers, C.J.: I suppose you would admit that primarily this section is directed against a different class of people? I suppose in every town there are these men who live with prostitutes and keep them as mistresses, and then others in the place pay part of what they earn. Is that not the class of people against whom the Act was primarily directed?]

On the other hand the statute by no means excludes the class of persons to which we allege Charteris belongs.

[De Villiers, C.J.: The point is, was the Act intended to meet a case of this kind. Should you not have prosecuted him for bribery or a contravention of police orders? Here's a policeman whose duty it is to see to the punishment of persons keeping brothels, and he receives money. Surely that is bribery?]

I don't know whether he is not guilty of both offences. If the money was appropriated in the manner they said it was by Charteris, then the Crown contended he came within the terms of the Statute.

[De Villiers, C.J.: I think the 3rd sub-section seems to give some explanation: "Where a male person is proved to live with or to be habitually in the company of prostitutes, and has no visible and honest means of support, he shall be deemed, unless he can satisfy the Court to the contrary, to be knowingly living on the proceeds of prostitution."]

Your lordship will see that the crime of Charteris is an infinitely worse class of crime, and I contend that the Act does not exclude such a person.

[De Villiers, C.J.: His infringement of the law is an infringement of a policeman's duty. He receives money for refraining from doing his duty, and although he gets the money from a tainted source, does that make him live on the proceeds of prostitution more than if he were a shopkeeper living on the proceeds of prostitution?]

He gives nothing at all for what he receives. The law won't recognise the

unlawful crime of foregoing his duty as a consideration.

[De Villiers, C.J.: Supposing these women had not got the money by prostitution; that they had got it honestly?]

Precisely the same argument in that event, my lord, would apply to these other people.

[De Villiers, C.J.: Just so; and that is why the Legislature found it necessary to make this sub-section 3. Harris's case was different: he was habitually in the company of the prostitute—in fact, he lived with her.]

If that was so, here was Harris, a man habitually in the company of prostitutes and a man who was habitually in the company of Charteris, and the evidence is that Charteris was habitually at this man's restaurant, a place frequented by prostitutes. If the Court is satisfied that Charteris received this money from Harris, then it must also be satisfied in accordance with Harris's direct statement, that when Charteris took this money he knew it had come from this tainted source; and in appropriating it to his own use, as the Crown alleged, he certainly has been guilty of an infringement of this Act, although he may also have been guilty of an infringement of his duty as a police official.

[De Villiers, C.J.: Have you traced any deposits made by Charteris in the Post Office or bank, so as to connect them with payments made in any way to him either by Max Harris or anyone else?]

I have attempted to do that, and I have further attempted to reconcile the deposits with the dates of various race meetings, and there is no correspondence.

[De Villiers, C.J.: My question was: Is there any correspondence with illegal payments made to Charteris?]

The evidence shows that Charteris did not always deposit money in the bank, but that he allowed it to accumulate in his box. Counsel went on to deal with the evidence relating to the moneys handled by Charteris.

[De Villiers, C.J.: What charges were preferred against Osberg?]

Osberg was to be tried for bribery, and also for an offence—a substantive offence, not an alternative—under this section.

[De Villiers, C.J.: He is not to be tried before the Magistrate, but by a jury?]

That is so, my lord.

[De Villiers, C.J.: Why wasn't the same course adopted in both cases?]

Well: it is difficult for me to make any statement in the matter, my lord.

Mr. Nightingale subsequently stated that the reason why Osberg was to be tried by a jury was because the charges against him included bribery in connection with the sale of liquor. Such charges were not brought against Char-

teris, and that was the reason why he was summarily dealt with.

[De Villiers, C.J.: Then Osberg is not charged with bribery in regard to this charge?]

De Villiers, C.J.: The appellant in this case has been charged with a contravention of the first sub-section of the 33rd section of Act 36 of 1902, in that he did knowingly live wholly or in part on the earnings of prostitution. The charge is more fully stated in the summons: that he, the said Charteris, a sergeant in the police, being a male person, did wrongfully, unlawfully, and knowingly live wholly or in part on the earnings of prostitution by wrongfully and unlawfully receiving from one Max Harris and others, and from divers prostitutes, on divers dates and occasions during the periods aforesaid, divers sums of money, which he well knew were the earnings of prostitution, and which sums of money he did wrongfully and unlawfully convert to his own use, and did treat as part of his own property.

As far as receiving money from prostitutes is concerned, there is no evidence whatever that on any single occasion the appellant received money from them. What has been proved in the case, taking the evidence as stating the facts, appears to me to amount to this: that the appellant received from Max Harris divers sums of money at different times in consideration of his refraining from taking steps against certain brothels or against certain prostitutes. He therefore received money for refraining from doing his duty as a police-constable, and for letting these prostitutes alone. But there appears to me to be no evidence that at any time he lived on the earnings of prostitution. In order to fully understand what the legislature meant by the offence of knowingly living wholly or in part on the earnings of prostitution, it is well to consider the following sub-sections. The second sub-section says: "If it is made to appear to a resident magistrate, by information on oath, that there is reason to suspect that any house or place is used by a female for purposes of prostitution, and that any male person residing at or frequenting the house is living wholly or in part on the earnings of the prostitute, such magistrate may issue a warrant authorising any constable to enter and search the house, and to arrest that male person." Then comes the third sub-section: "Where a male person is proved to live with or to be habitually in the company of a prostitute, and has no visible and honest means of subsistence, he shall, unless he can satisfy the Court to the contrary, be deemed to be knowingly living on the earnings of prostitution." This third sub-section shows the strictness of proof required by the legislature. It is not sufficient that a male person is proved to live with or to be habitually in the company of a prostitute; but it must also

be shown that he has no visible honest means of subsistence in order to lead to the presumption that he is knowingly living on the earnings of prostitution. Now, the law relating to the construction of penal provisions in statutes is thus fairly stated by Maxwell (interpretation of statutes): "The rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms, and within the spirit and scope of the enactment." In my opinion the case of a person who has received bribes from a person not being a prostitute for refraining from prosecuting prostitutes does not fall within the reasonable meaning, spirit or scope of an enactment against living on the earnings of prostitution. The appellant was a sergeant of police, and if he took bribes for foregoing his duty he is liable to punishment under the 30th section of Act 12 of 1882. If that punishment is not adequate to the gravity of the appellant's offence, he is, in my opinion, liable to prosecution under the common law for taking bribes in consideration of refraining from doing his duty as a public officer appointed for the prosecution, detection, or punishment of offenders. But it would, in my opinion, be an unreasonable extension of the provisions of the 33rd section of the Act of 1902 to hold that it applies to cases like the present. The appeal must therefore be allowed, and the conviction quashed.

Buchanan, J.: The accused was tried before the Magistrate for contravening section 33 of what is known as the Morality Act, in knowingly living wholly or in part on the earnings of prostitution. Very considerable evidence was led before the Magistrate, and after looking through the evidence carefully, I have no doubt that the Magistrate was justified in finding the prisoner guilty of the acts which were alleged against him. On appeal now, the first objection taken to the conviction was that the Magistrate's finding was against the weight of the evidence. I would clearly and distinctly state that, in my opinion the evidence fully justifies the finding of the Magistrate that the prisoner was guilty of the acts charged against him. I think also that there was ample evidence corroborating that of the accomplices to justify the conviction if that were the only ground of appeal. But the second objection taken was that the facts proved did not constitute a crime under this section, and it is here that I find a difficulty in this case. It would, I think, be straining the intention of the Legislature and the wording of the Act to make the improper misfeasance of duty on the part of the policeman a contravention of the provision, which

prohibited persons from knowingly living wholly or in part upon the proceeds of prostitution. It is upon this construction of a penal act which I think it is the duty of the Court to construe in its strict terms that I think this conviction should be quashed. I do not say that the prisoner escapes from any of the consequences of his acts in consequence of the quashing of this conviction. There are, I think, other crimes which the appellant may be tried for, and the quashing of this conviction will be no bar to his prosecution for acts which may constitute some crime other than the contravention of the Act in question. I concur in quashing the present conviction.

[Appellant's Attorneys: Silberbauer, Wahl, and Fuller.]

REX V. JONES. (49M.
(Aug. 6th.

Liquor Laws—Sale by retail— Liability of salesman.

This was an appeal against a decision of the A.R.M. of Simon's Town, by which the appellant was found guilty of selling by retail twelve small bottles of Castle stout and two bottles of sherry in a case from the wholesale store of William Gourlay and Co., and ordered to pay a fine of £30, or three months' imprisonment.

Mr. Gardiner appeared for the appellant, and Mr. Nightingale appeared for the Crown.

Mr. Gardiner said that the appeal was on the grounds that the conviction was not supported by the evidence, that the appellant was not liable for Gourlay and Co., and that there was no evidence to show that the liquor came from the store of Gourlay and Co. Counsel contended that there was no proof that Jones had anything to do with the sale, and there was no evidence to show that Jones was the only salesman. In addition, there was nothing to show that the cart which Parris was driving did not come from some of the other hotels, and it was significant that Parris was not called by the Crown as a witness.

Mr. Nightingale contended that, according to the evidence, Jones was something more than a salesman, as he was described as manager of Gourlay's wholesale store.

[De Villiers, C.J.: Supposing Jones was taking a holiday, and another salesman sold it? It may be extremely probable that Jones did sell it, but where is the evidence.]

Mr. Nightingale admitted there was no evidence on that point, but the apparent defence raised in cross-examination was that this liquor was either got from the Masonic or the Central Hotels, which did not sell Castle stout.

[Buchanan, J.: Why didn't you call Parris to show it was not?]

It would have been better but it would have been very easy for those people to show—

[Buchanan, J.: Who is the onus on?]

The evidence goes to show that this liquor could not have been got from the other hotels, as they did not sell Castle beer or stout.

[Buchanan, J.: If the charge had been against Gourlay, you might have succeeded.]

[De Villiers, C.J.: Did anyone see Jones deliver the liquor to Parris that day?]

There is evidence that the cart was drawn up outside this place, and that the case of liquor was seen in the cart. I submit that it would have been easy for the defence to come forward and show exactly that the liquor was not obtained at that place.

De Villiers, C.J.: I am bound to say that, according to the evidence, it is extremely probable that Jones did deliver the liquor to Parris for the purpose of being conveyed to Mrs. Cheese, but a conviction is not to take place upon probabilities, but upon proof. The man Harry Parris, who delivered the liquor, would have been the best evidence if he received liquor from the appellant, and then delivered it to Mrs. Cheese. His evidence, no doubt, would have been conclusive, but he was not called for the prosecution. It is said, however, that the appellant was the manager of Gourlays, and therefore he must be assumed to have delivered the liquor, but it is quite within the range of possibility that Jones was not there that day at all, in which case Jones could not be punished for this act. It is a sound rule in the administration of justice that the best available evidence should be produced in support of the prosecution. There would have been considerable evidence against Gourlay and Co., because it is their place of business, and the presumption would have been that they authorised the sale. So far as the servant Jones is concerned, there is no evidence to connect him with this particular offence. The appeal must be allowed, and the conviction quashed.

Buchanan, J., concurred.

REX V. MYBURGH.

Magistrate's finding on facts— Circumstantial evidence.

This was an appeal against a decision of the Resident Magistrate of Burghersdorp, by which the accused was convicted of stealing £35, the property of one Van Wyk, with whom he occupied the same room at the Jubilee Hotel.

Accused was sentenced to six months' imprisonment, with hard labour.

Mr. Burton (for the appellant) said that the appeal was brought on the ground that the evidence did not justify a conviction. The money was not found on the accused, and there was nothing to connect him with the affair, except his presence in the room. The accused had stated to the complainant that he himself had lost money in the place, and when the latter discovered he had lost £35, Myburgh found that he had also lost £3, and some silver. He submitted that it was merely a suspicious case, and that the Magistrate should have given the prisoner the benefit of the doubt.

Mr. Nightingale (for the Crown) having been heard in reply,

De Villiers, C.J.: I am not prepared in this case to say that the Magistrate, in judging the facts of the case, came to a wrong conclusion. It is true that there is no direct evidence connecting the accused with the theft, which appears to have been undoubtedly committed. But circumstances were proved which seem to me to justify the inference that the accused and he only could have stolen the money. It appears that the gentleman who lost the money, Van Wyk, had come to the hotel when the accused was in bed. He was shown into the same room where the accused was, and when he came into the room he says that the accused was still awake. The accused, therefore, could have watched him as he undressed, and observed where he put his clothes. The following morning, at daybreak, the accused was on the floor, and about two yards from the chair where Van Wyk's clothes were. He said: "Why did you not bolt the door?" and Van Wyk, asked, "Why?" The accused then said they had once stolen his things, and the proprietor was unable to trace them, and that on one occasion three of them in the hotel, after having their clothes and £13 stolen, had to walk out in their shirts to find clothes. Here is a definite statement which, if true, would most certainly have been brought to the notice of the proprietor, but the proprietor says he never heard of this thing before. The complainant's evidence continues: "I immediately went to my jacket, and then found the purse containing £35 was gone, and then the accused said, 'Perhaps mine is missing also'?" He examined his jacket, and said that his money was gone also. The accused then went to a shop, and bought a purse, and, subsequently, this purse is found in a place where the accused could have thrown it in order to support his statement that his purse had been taken. Well, these facts and circumstances lead to the inference that he is the thief. Could any innocent man have acted as he did? It seems un-

likely, moreover, that any person could have gone into the room without being heard, and then a stranger would have had difficulty in finding the jacket. Under the circumstances, I think the Court should not interfere with the decision of the Magistrate. The appeal must be dismissed, and the conviction affirmed.

Buchanan, J., concurred.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton.]

TUNSTALL AND GRANT V. { 1904.
PAULSE. } Aug. 8th.

Magistrate's Court — Judgment for payment in instalments.

The power conferred on Magistrates by the 11th section of Act 20 of 1856 should be exercised with discretion and with due regard to the rights of the creditor.

The plaintiff, to whom the defendant was indebted in a considerable sum for materials sold to him for the building of houses, gave him time for payment, and at the end of that time sued him for the amount. The evidence shewed that the defendant had received a sum of money and sent it to his relatives before the further time was given him, and there was no evidence to shew that at the time of the trial the defendant had not sufficient assets to pay the debt in full.

Held, that it was not a reasonable exercise of the Magistrate's discretion to order payment of the debt in instalments extending over a period of several months.

This was an appeal from a decision of the A.R.M. of Graaff-Reinet, in an action in which the plaintiffs (now appellants) sued the respondent for £112 10s. 10d., the amount of a promissory note. Judgment was given for £111 13s. 6d., but execution was stayed upon defendant paying the sum of £6 per month, beginning 1st June, and £6 every month until the judgment was satisfied. The Magistrate, in his reasons for judgment, relied on Act 20 of 1856, and stated that the defendant was a respectable coloured man with a wife and six children. He earned something like £14 a month as a tele-

graph linesman, and, in addition to keeping his family, he had to pay £15 interest per annum on a mortgage bond, £1 12s. a month to the Building Society, and water rates, etc. If his property were sold, it would hardly realise the amount of the mortgage bonds. Mr. Gardiner, for appellants, contended that the Act could never be applied to a case of this sort. There was nothing to stop the respondent mortgaging further, or even selling his house, and the money might go to someone else.

Mr. Upington, for respondent, submitted that the Magistrate was justified in taking into consideration the nature of the transactions with the Building Society. If the Magistrate gave judgment on matters that were not in evidence, but which he was aware of from his own knowledge, then counsel contended that an opportunity should be given for the statements to be put upon oath.

De Villiers, C.J.: The defendant seems to have been a man who entered on considerable transactions. He built houses and he purchased material for the building of these houses from the plaintiffs. So far as the plaintiffs are concerned, it appears to me that they treated him with every consideration. They ascertained that the defendant had received £80 from the Building Society, when he owed them the money, which he used for his own private purposes. The defendant said he sent it to a relative in the Western Province, and promised to get it back. He was given one and a half months, but at the end of that period the promissory note had not been paid. It clearly lies upon the defendant to show that reasons exist for an order that the judgment debt should be paid in instalments. The power given to magistrates by the 11th section of Act 20 of 1856 is an extremely useful one but it should be exercised with discretion and with due regard to the rights of the creditors. In the present case the plaintiff exercised his ordinary rights as creditor without any harshness whilst the defendant did not act in a straightforward manner and certainly did not prove at the time that he had not the means to pay the money in full. He is by no means a very poor man. He is in fairly good circumstances and I am not satisfied this is a case in which the power should have been exercised. It is suggested that the case should be remitted to the Magistrate for the purpose of having evidence upon the points which induced him to his judgment, but which do not appear as evidence; but I am not prepared, even if the evidence were given, to uphold the decision. It does not appear to me one of these cases in which the power should be exercised by the Magistrate.

Upon the whole, in my opinion, the appeal should be allowed, and the judgment should be altered by striking out the portion in regard to the execution of the sentence. The appeal is allowed, with costs.

Buchanan, J., concurred.

[Appellant's Attorneys: Van Zyl and Buissinné; Respondent's Attorneys: Dold and Van Breda.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ESTATE BLACK AND SIMON'S { 1904.
TOWN MUNICIPALITY v. { Aug. 9th
SIE JOHN JACKSON, LTD. { „ 10th.

Interdict—Recurring grievance—
Blasting operations.

The defendants carried on blasting operations in stone quarries on the side of a mountain immediately above the town of S. The work was done so carelessly that stones and large boulders were continually rolled down to the land below and to the neighbourhood of houses in the town. The plaintiffs being the Town Council of S., and the private owner of land immediately below the quarries continually protested, but no attention was paid to their protests until an application was made to restrain the work. On the hearing of the application, an interim interdict was granted to restrain the rolling of stones to the lower land.

Held, in an action for a perpetual interdict, that although since the previous application effectual steps had been taken for minimizing the risk, yet as the previous conduct of the defendants showed that without an interdict there was reason

for anticipating a recurrence of the grievance, the plaintiffs were entitled to a perpetual interdict, restraining the defendants from working the quarries in such a way as to cause stones to roll down.

This was an action brought by the executors of the late Alexander Nicholas Black and the Municipality of Simon's Town against Sir John Jackson, Ltd., the contractors for the new naval works at Simon's Town, for a perpetual interdict restraining the defendants from causing or allowing stones to roll down the slope of the mountain on to the plaintiffs' properties. The matter was before the Court by motion on the 19th January last (14 C.T.R., 23) when a temporary interdict was granted in the following terms: "That the respondents be interdicted from causing or allowing stones to roll down from their quarries at Simon's Town on the property of applicants; interdict to continue for one month, unless action be brought in the meantime to make interdict perpetual, with costs." The present action was instituted in order to make the interdict perpetual.

The declaration set out that the estate of Black was the registered owner of land on the slope towards the mountain above the main road, and that the Municipality was also the owner of land in the vicinity thereof. On the 24th May, 1902, the defendants entered into a contract with the Admiralty for the construction of certain dock works at Simon's Town, and for that purpose certain quarries were opened out on the slopes of Simon's Berg. The land on which these quarries were situated was Crown land in respect of which the Colonial Government had given a temporary right to the Admiralty or to its contractors to work the land, and take such material as they required for the work they had in hand. For that purpose the defendants had carried on, and did still carry on, blasting operations in the quarry, which constituted a nuisance and an infringement of the rights of the plaintiffs in that the second plaintiffs were prevented from laying out projected roads and streets on their lands lying below the said quarries, and that the land of the first plaintiffs was seriously damaged and depreciated by the existence of the quarries and the working thereof, and, further, that the lives and limbs of the inhabitants were endangered thereby. It was also alleged that the defendants had carelessly and negligently carried on the said operations, and that, as a consequence, large stones and boulders had rolled down on the land of the plaintiffs. Re-

peated remonstrances and protests had been made from time to time, and defendants had promised to take steps to secure the plaintiffs against further damage, but these precautions had proved insufficient. On motion in this court a temporary interdict was granted on the 19th January last restraining the defendants for one month from allowing or causing further stones to roll on the plaintiffs' land. The plaintiffs now sought a perpetual interdict.

The defendants, in their plea, admitted paragraph 1, and the first part of paragraph 2, but as to the remainder of paragraph 2 referring to the Municipality's trust, they alleged that the Municipality had only powers to abate nuisances in so far as provision was made under the Council's regulations, and that no such regulations had been approved relative to the working of quarries in Simon's Town. As to paragraph 3, defendants alleged that the land was vested in the Admiralty, and was in no way under the control of the second plaintiffs. The quarry was required for large and important dock-defence works urgently needed in the interests of His Majesty's Government. The defendants denied the allegations as to the operations being dangerous to life and limb, and also the allegations that the quarry was being negligently and carelessly worked. They admitted that stones accidentally rolled down the side of the mountain in the early part of the operations, but they said that thereafter they had taken precautions from time to time, and that, save one stone in August, 1903, and another in December, 1903, no stones had fallen on the plaintiffs' properties. Protection works had been constructed, and enlarged and improved from time to time, so as to be amply sufficient to prevent any stones from rolling down on to the lower properties. The defendants denied that any nuisance existed, and specially denied that the plaintiffs were entitled to an interdict, and said that the stoppage of the works would seriously hamper the completion of the contract and prejudice the interests of the public and His Majesty's Government.

The replication was in the main general.

Mr. Schreiner, K.C. (with him Mr. W. P. Buchanan), for plaintiffs. Sir H. Juta, K.C. (with him Mr. Close), for defendants.

Mr. Schreiner said that within a month of the temporary interdict being granted, a summons was issued, but it had not previously been possible to come to trial. He explained that there was no wish on the part of either of the plaintiffs to unduly interfere with the work itself, which was of great importance to the defences of Simon's Town, but they felt compelled to come to Court, because they had no guarantee against a condition of things which had most seriously

affected and depreciated the whole of the land on Black's estate, which was land that ought to be sold to wind up the estate, and the Municipality felt that it must come to Court to secure some permanent guarantee other than a temporary interdict that there should not be the perpetuation of a condition of things that had endangered the welfare of the inhabitants, and particularly those who used the main road.

For the plaintiffs

Frank Molteno, Government land surveyor, Cape Town, proved the plan put in by the plaintiffs, showing stones on their property which appeared to have recently come down the mountain.

By the Court: He would not say that any of the stones showed indications of blasting, but they all showed signs of recent cleavage. He went over the ground on Saturday last, and he counted 80 stones which had recently come down the mountain. He saw the particularly large stone which had rolled down in December last; it was four or five feet high, and about four or five feet across.

Cross-examined by Sir H. Juta: He did not see the ground before the interdict was granted, hence he was unable to speak as to any greater precautions which might since have been taken to secure protection against stones rolling down the mountain.

Ernest Wm. Attridge, Municipal Engineer, Simon's Town, repeated the allegations contained in the affidavit that he swore for the proceedings on motion (14 C.T.R., 23). He did not think the danger was now as great on the western end as it was when he made the affidavit. He would not say that the general precautions which had been taken were altogether adequate to protect the land of the plaintiffs. He thought that the noise had been less from the blasting operations since the temporary interdict came into operation.

Cross-examined by Sir H. Juta: A public meeting was held on the 18th January to consider what should be done to make things safe on the ground. Suggestions that were then thrown out with regard to protective measures had actually been carried out by the defendants. He had made no suggestion to the defendants as to what should be done since the public meeting was held. He did not know of any stones having come over the ramparts since January last. Much could be done to minimise the danger, but he did not think the danger could be done away with entirely. He agreed that the ramparts erected by the defendants were in their proper position.

By the Court: There was a large stone that came down from the quarries on Tuesday last; it was about 800 feet

below. It would weigh about a ton and a half.

De Villiers, C.J., asked counsel what was really the object of the present action? Was it suggested that something more should be done by the defendants to protect the plaintiffs' properties?

Mr. Schreiner said that the plaintiffs sought to have the interdict made permanent, and there was the question of costs to be determined.

Sir H. Juta said that the defendants had paid the costs of the application on motion, and, as a matter of fact, the last phrase of the order made in January read, according to a newspaper report, "unless action be brought in the meantime to make interdict perpetual, with costs of the application."

Mr. Molteno (recalled) said that the stone which rolled down last week was on the slope near the main road.

Alexander Shand, engineer of the Divisional Council, said he did not think the ramparts fixed by the defendants would be sufficient to prevent stones loosened by blasting from getting down the slope of the mountain. He thought stones might bound over the ramparts.

By the Court: He thought the ramparts should be raised four or five feet.

Cross-examined by Sir H. Juta: The Divisional Council had quarries at Elsie's Bay. The quarries were about 300 feet from the road. Traffic was stopped during blasting operations. Stones often came rolling down into the road; no big stones had fallen. They had erected no ramparts.

Wm. Runciman, M.L.A., Mayor of Simon's Town, and an executor of Black's estate, said he adhered to the allegations contained in his affidavits of the 8th and 18th January last. The estate had suffered heavily by the depreciation of the value of its land. Nobody would buy the land at the present time, because of the quarries above, and after what the people of Simon's Town had seen of boulders coming down the slope. It was desired to realise the land as soon as possible, so as to wind up the estate. Since the interdict he had gone over the land from time to time, and found out that stones had come down. The marks of the blasting were perceivable on the stones. Had it not been for the trees, the greater number of the stones would have rolled on to the main road. He did not know whether the statement of the defendants that the stones would enhance the value of the Municipality for building purposes was sarcasm or impertinence. Since the interdict, the blasting was less frequent than formerly.

Cross-examined by Sir H. Juta: He did not claim that the quarry works should be closed. From the very first he thought there was serious danger to life. Whether there had been compensation paid for the depreciation of

property or not, the interdict would have been sought for. It was hardly possible for a house to be empty in Simon's Town, and he would not be surprised to hear that the rent of the houses had been raised, considering the danger that existed previously. He would go so far now as to say that there was still reasonable probability of stones coming down. It was a mere impression he had that stones came down since the interdict, as he had never seen any particular stone rolling down. The Council had asked Mr. Legg for his advice, but they were not so much concerned about his recommendations as they were about the proposals which the defendants might make. Mr. Legg was secured to see if the precautions taken by Sir John Jackson, Ltd., were adequate. He could not say why Mr. Legg's report was not sent on to the defendants when it was requested through their attorneys.

[De Villiers, C.J.: You don't object to being interdicted from doing that which you don't intend to do.]

Sir H. Juta: No, my lord. The Court will see that the whole intention of the judgment was that we should proceed with precaution, and we now say we have done so.

[De Villiers, C.J.: The sole point is, have you done everything reasonable expected of you to justify the Court in discharging the interdict altogether?]

The interdict was only to continue for a month, my lord.

[De Villiers, C.J.: Does it not mean that it continues in existence until the action is brought?]

No, my lord. It is just the other way.

[De Villiers, C.J.: I see the order as it stands reads: "Interdict to continue for one month unless an action be brought in the meantime to make it perpetual."]

Sir H. Juta submitted there was plenty of time for the plaintiffs to bring their action in the February term.

[De Villiers, C.J.: It seems to me to be really a question of costs.]

Re-examined by Mr. Schreiner: If the estate of Black did not get relief it would mean a serious loss.

Henry Clark, District Surgeon at Simon's Town, stated that his house was beside the quarries, and he recollected last year a large stone coming from the works and doing considerable damage to the fencing. Before the interdict his house was cracked through the blasting.

Wm. Gillard, Town Clerk, stated that if the quarries extended as they were doing at present, the lives of the children in the school below would be in danger. There had been no permission given to the defendants to blast. In July, 1902, a shed was smashed by a big stone from the works. In December last a huge stone came through a clump of young trees, and stopped within a short distance of a house,

Cross-examined by Sir H. Juta: All his evidence was about what took place before the interdict was granted. Black's estate was not the only one concerned.

Dominick Carnegie, major in the Royal Engineers, stated that after the interdict was granted he was sitting in Dr. Clark's house when he heard stones dropping on the roof from the quarry.

By De Villiers, C.J.: He did not actually see the stones.

George Glass stated that while he was walking in the Main-street in February last he heard a heavy report, and when the dust cleared off a stone an inch and a half long fell behind him. At the same time he heard a noise on the roof of the Catholic Church. If the Court would release the order it would further depreciate the property.

Walter Douglas Barrable, builder, stated that one of his tenants left the house on account of his wife becoming hysterical owing to the stones. His property had certainly become depreciated.

Mr. Schreiner closed his case.

Donald Macfarlane, Superintendent Civil Engineer of the Admiralty Harbour Works, Simon's Town, stated that prior to January, 1904, he believed there was considerable risk from the quarries. He was then giving advice on behalf of the Admiralty. On the 18th January he brought about a meeting with a view to minimising the danger. They all proceeded to the works, and witness recommended that one of the trenches should be raised and lengthened. Mr. Legg made no reply to this suggestion. Mr. Legg said that he would report to his client. Witness's suggestions had been carried out, and in addition three ramparts were constructed. At present he was under the impression that the condition of the quarry now was a safe one. The operations at present were being conducted in the usual way.

Cross-examined by Mr. Schreiner: When he made the statement in April, 1903, he thought that the substantial benching reduced the risk to a minimum, but he was probably wrong on that occasion.

[De Villiers, C.J.: Is your statement not a little bit too strong to-day?]

I don't think so, my lord.

[De Villiers, C.J.: Are you quite certain?]

Yes. What has been done is sufficient for all practical purposes.

Robeyt Hammersley-Heenan, General Manager and Engineer-in-Chief of the Table Bay Harbour Board, stated he inspected the quarries in February and May last. In February he was asked by the firm of Sir John Jackson, Limited, to make certain recommendations, and in May he found that his suggestions had been carried out.

Cross-examined by Mr. Schreiner: He did not think there was any danger at

present. Where people lived directly below a quarry there should naturally be greater protection.

[De Villiers, C.J.: I take it that the ramparts you suggest do not dispose of the care in blasting.]

Witness: Of course with incompetent men there might be danger, but they would have to be terribly incompetent.

[De Villiers, C.J.: You say comparatively safe, provided care is taken in the blasting.]

Yes.

John Delbridge, contractor, Wynberg, stated that he had long experience of quarrying, and in his opinion the ramparts were absolutely safe.

Cross-examined by Mr. Schreiner: There were houses under his quarry at Fishhook.

Frederick Stanford, civil engineer, in the employment of the Admiralty at Simon's Town, stated he had five years' experience of quarrying at Gibraltar. Certainly there was risk at Simon's Town before the ramparts were put up, but he thought that for all practical purposes all reasonable precautions had now been taken, and the risk was diminished.

Cross-examined by Mr. Buchanan: The defendant's were not the contractors at Gibraltar. He did not know of interdict proceedings there in connection with the quarrying.

Hugh Edwards, civil engineer and managing director of Sir John Jackson, Ltd., in South Africa, stated that on the 18th January a meeting was arranged for the purpose of seeing what could be done. There were no suggestions from the plaintiffs' side, but Mr. Runciman promised to let him have whatever reports he received. Since the alterations had been made he was not aware of any stones having gone over the ramparts. The protection works cost between £1,400 and £1,500. They had not used less powder and dynamite pending the action. Since January there was no intimation from the Municipality of any stones coming down from the quarry.

Cross-examined by Mr. Schreiner: Five men had been killed at the works, but he did not consider that a high proportion.

Edward Wm. Shiel, civil engineer, gave evidence as to the sections of quarries and surrounding ground. He also stated that considerably more working had actually taken place at the quarry behind Black's place since the interdict was granted than previously.

Cross-examined by Mr. Schreiner: He considered that some protection had been made as regarded the other quarry. Some fortifications having been built on the benching. He had heard nothing about stones having been shot from that quarry until he came to the Court on Tuesday.

Frank Davis, foreman at the quarries behind Black's property, said he kept a record of the powder used for blasting. Considerably more powder had

been used since January than was used before. There had been no attempt to keep the work down.

Cross-examined by Mr. Schreiner: Heavier charges of dynamite were now used than was formerly the case. Stones did not now roll down the hill. The benching was wider now than it was before the interdict was granted. Only three stones had gone beyond the benching, and reached the first rampart. One weighed about 7 cwt. One stone of about three or four tons went through the first rampart, but only travelled about three yards beyond the rampart. There was another rampart lower still, which would have held the stone in case it had flown over the first rampart. He considered that it was impossible for a stone to pass the ramparts.

Re-examined by Sir H. Juta: The stone that passed through the first rampart was so severely checked in its course that it did not reach the second rampart.

Thomas William Drummond, an employee at the Dockyard, said he lived in a house below the quarry behind Black's property. He considered that, after the extreme precautions taken by the defendants, there was now no danger. His rent was raised last month.

Cross-examined by Mr. Buchanan: He was one of those who lodged a complaint originally. The stone that fell in December came within 100 ft. of his house. He considered that with the present width of benching, there was no danger of stones reaching his house. Since the protection had been put there, he considered that he was quite safe. He had watched the blasting operations hundreds of times.

The evidence of Admiral Durnford, taken on commission, was put in.

De Villiers, C.J., put it to counsel for the defendants whether there was not sufficient ground to continue the interdict.

Sir H. Juta submitted that there was not sufficient ground, and urged that if the state of things had been in January last such as it was to-day, the temporary interdict would not have been granted. Whatever had been suggested in the way of protection had been carried out by the defendants, and a good deal more. He contended that it was absurd to suppose that Mr. Runciman and the other gentlemen who were so much interested, for some reason or other, in obtaining this interdict, would not keep watch to see if further stones came down. Whatever the situation was before January, it was quite changed now. The whole point of the plaintiffs seemed to be that Black's land was being depreciated. That was a question of damages, and not a question of an interdict at all. It was a sound rule that an interdict should not be granted, unless the plaintiffs had no other remedy. He submitted that all reasonable precautions,

such as experience and skill and expertness could suggest, had been carried out by the defendants. What more could be done? The work that had been done was by no means insignificant. It had taken considerable time, and had cost between £1,400 and £1,500. Nobody had been injured by these blasting operations. The element of irreparable injury, which was at the bottom of all interdicts, was entirely wanting in this case. It was purely a matter of anticipated danger.

Without calling upon Mr. Schreiner, De Villiers, C.J., at the outset reviewed at some length the proceedings which led up to the application for a temporary interdict in January last. Continuing, he said: "The question is whether the Court should continue the interdict which has been granted. I confess that, if the defendants had shown by their previous conduct that without pressure, without legal proceedings, they were anxious to minimise any possible danger Sir Henry Juta's argument would have had great weight. But when I find that it is only the Admiral's report and the legal proceedings which induced the defendants to take steps for minimising the danger to plaintiffs I do not feel justified in withholding the interdict. The previous conduct of the defendants must weigh with the Court, because if this interdict is removed, there is a danger that their carelessness will recommence, and the danger to the plaintiffs will become as great as ever. A great deal has been said about the stone which came down after the interdict had been granted. Now, I don't think any stone came down which could be brought within the scope of the present action, but I do think that the fact that that stone did come down shows how necessary it is that there should be an interdict in regard to the portion now in question. There seems to have been no interdict in regard to the other portion from which the stone came, consequently the defendants were perfectly careless about it. One would have fancied that before extending the quarry in a north-westerly direction, and before attempting to blast there, they would have used the precautions which had been found necessary in another portion, in order to prevent the possibility of any danger there, but there was no interdict, there was nothing to restrain them there, and consequently there was not the same care as there was in regard to the portion to which the defendants understood that the interdict did extend. It is true that ramparts had been constructed; it is said that these ramparts were constructed after an interview had taken place between the representatives of the different parties, and great fault is found with the plaintiffs for not making

suggestions for reducing or removing the danger altogether. But it was not the duty of the plaintiffs to make any suggestion. The defendants undertook a work of great danger. They opened quarries right above the town, right above the houses of the inhabitants on the slope of a steep mountain, and the law throws upon the defendants the plain duty to use every precaution to prevent any possible damage. In proportion to the danger should be the caution exercised by the defendants in the performance of a work like blasting. On a level plain blasting is a dangerous operation, but the danger is increased when it takes place on the slope of a steep mountain above houses within the Municipality, and I therefore say that there was a duty on the defendants to use every precaution to prevent danger. They may have thought that they were contracting with the Admiralty, and that there was no great necessity for respecting private property, but, in my opinion, the fact that they were working for the Admiralty does not release them from the obligation which rests upon every individual to respect his neighbour's rights, and so to exercise his own rights as not to injure those of his neighbour. The defendants did not, in 1903, in my opinion, so exercise their rights as to justify the Court in now assuming that the grievance will not recur. As to the ramparts, it would appear that they serve their purpose, that is, on the assumption that the blasting operations are carefully carried on, and I am satisfied that if this interdict continue, great care will continue to be taken in regard to blasting operations, but I am not so certain, considering what did take place in 1903, that the same care will be taken without an interdict as with an interdict. The ramparts do not appear to me to be faultless yet; there is evidence that by raising these ramparts a few feet the danger will be still further minimised, and I am not sure that the defendants would not be well advised to adopt the suggestion. There is evidence that on some occasions after the interdict had been granted, stones did come down, which could only be caused by the blasting. It is suggested that it may have been a mere coincidence, that somebody happened to be throwing stones just the moment after blasting took place, but there was no suggestion that anyone had been seen throwing stones. The declaration in the case claims that "the respondents be restrained from working the quarries by carrying on blasting operations therein." Well, that portion of the interdict I am not prepared to grant, because, as the work is an important national work, it would require a very grave cause to justify the Court in preventing any blasting operations from being

carried on. But the Court can, at all events, require this, that the blasting operations shall be so carried on that no stones or other matter shall roll down, or be rolled down, from the quarries. The evidence shows that it is quite possible to carry on blasting operations in such a way as not to cause stones to roll down. I believe that, even if there had been no ramparts, the blasting might have been carried on in such a way as not to let stones roll down, but it is a wise precaution to have ramparts as well. But that, in my opinion, will not dispense with the necessity of other precautions being taken in regard to the blasting, so as to prevent the possibility of any injury being done either to Black's estate or to the Municipality, as representing the ratepayers. The Court will therefore grant a perpetual interdict, in terms of the plaintiffs' prayer, with the exception of the words "working the quarries by carrying on blasting operations therein," so that it will read thus: "Grant a perpetual interdict, restraining respondents from working the quarries in such a way as to cause or allow stones or other matter to roll or to be rolled down from the quarries on to the land of the first-named plaintiffs, or on to any land vested in the second-named plaintiffs." As to the costs, they must follow the result, including a sum of 5 guineas, the costs of the preparation of plan by Surveyor Molteno.

[Plaintiff's Attorneys: Estate Black. G. Trollip; Simon's Town Municipality. Van Zyl and Buissinne; Defendant's Attorneys: Tredgold, McIntyre and Bisset.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

SCOTT V. VELLINGHAUSEN. { 1904.
Aug. 9th.

Sale and purchase—Time limit—
Damages.

This was an action brought by Messrs. W. and G. Scott and Co., Ltd., Salt River, to recover from Messrs. W. S. Vellinghausen and O. Schurr, trading as W. S. Vellinghausen and Co., the sum of £85 8s. 4d., and £82 16s. 8d damages, for breach of contract.

The plaintiff's declaration stated that he was a duly registered company, which carried on business at Salt River as timber merchants. The defendants were engineers, carrying on business as such at Cape Town. On the 18th March, 1903 the parties entered into an agreement whereby the defendants agreed to supply the plaintiff with a boiler and fittings complete in accordance with a certain specification, for the sum of £400. c.i.f. Cape Town, and to ship the same from England within eight weeks from that date, i.e., on or before the 13th May, and

further agreed to supply with the boiler certain extra fittings at a reasonable price, which the parties subsequently agreed on at £92. The plaintiff had paid the defendants the sums of £400 and £92. The defendants, in breach of their agreement, did not ship the boiler within eight weeks, but shipped it in the month of July. By reason of the delay, the plaintiff was put to extra expense in erecting a building for the boiler, and the erection of plant in connection therewith, and was hindered and delayed in his business and in other ways. The plaintiff estimated the damage sustained by reason of the breach of contract at £85 8s. 4d. The defendants further, in breach of contract, failed to supply certain of the fittings, and supplied certain others in a defective condition. By reason of the breach of contract, the plaintiff was put to expense in purchasing fittings not supplied, and, in replacing or repairing fittings supplied in a defective condition, and also suffered loss through having to stop the machinery while the defects were being repaired. Plaintiff estimated the damage sustained at £82 16s. 8d.

The defendants' plea admitted that, instead of shipping the boiler and fittings within eight weeks of the time agreed upon, it was shipped in the month of July. That, notwithstanding the non-compliance with the contract, the plaintiffs accepted the boiler and fittings on its arrival without protest or objection, and paid for it. The defendants held that, by reason of the acquiescence of the plaintiffs, the latter were not now entitled to claim damages. The defendants refused to pay the sums of £85 8s. 4d. and £82 16s. 8d. The defendants admitted that, after delivery and acceptance of the boiler, the plaintiffs made the complaints, and thereupon the defendants, although not legally bound to do so, offered, in order to settle the disputes, to deduct the sum of £26 6s. 6d. from the amount due by the plaintiffs. This the plaintiffs refused to accept.

Mr. Gardiner (with him Mr. P. Jones) appeared for the plaintiffs, and Mr. M. de Villiers for the defendants.

George A. Scott stated he was managing director of the plaintiff company, and carried on business at Salt River. In March, 1903, the business was carried on at the Docks. His firm required a boiler for their new works at Salt River, and amongst other people witness interviewed was Mr. Hendry, the defendants' agent. He agreed with him to ship for his firm a boiler, the price of which was £400. They supplied him with a specification and plan of the boiler he ordered. The agreement was entered into on the 18th March. Witness pressed on Mr. Hendry the fact that time was of the utmost importance, as witness's firm were changing to new premises, and he agreed to let them have the boiler in eight weeks from the date

of order. On the 6th July witness wrote complaining that the boiler had not arrived, and stating that his firm had suffered considerable inconvenience through its non-arrival. The defendants wrote back stating they were pushing the matter forward as fast as possible. The boiler arrived on the 3rd September, and witness wrote complaining that there was no scum-cock on the boiler, and that the paint had been put on over the rust. There was no steam chest on it either, and he stated that he wished to be indemnified for the expense his firm had been put to in getting these things. Witness accepted the boiler because the business at their works would have been at a standstill without it. He never waived his claim for damages. Mr. Hendry, the defendants' agent, visited the works, and witness showed him the defects in the boiler. Half of the amount was paid on documents in London, and half out here. In October witness again communicated with Mr. Hendry, complaining of the fittings. Mr. Hendry went out and examined them. On the 29th October witness communicated with the manufacturers of the boiler complaining of the various defects. The blow-down cock and injector constantly required repairing. After further correspondence, the defendants offered to pay £26 6s. 6d. for repairs to the scum-cock. The second half of the account had at that time been paid. Witness wrote asking the defendants for the refund of £43 17s. 8d., which included the £26 6s. 6d. as the cost of repairs. He also claimed £85 8s. 4d. damages for loss of trade. In anticipation of being able to start work soon, he had large quantities of timber carted out to Salt River, and had to have it brought back again to Cape Town. Witness did not keep any record of the number of loads, but he kept two teams of horses engaged for eight weeks. The machinery was repeatedly stopping owing to the defects in the boiler. He claimed £19 10s. for that. This boiler was to work 22 machines. Witness reckoned that each machine could earn 5s. an hour.

Cross-examined by Mr. De Villiers: Witness erected a shed for a sawmill. He told Mr. Hendry he intended doing so. Witness first of all claimed £26 6s. 6d., but afterwards sent in a further claim for £19 10s. The engineer would be able to tell the Court what repairs were necessary to the boiler.

John Gallie, mechanical engineer, stated he was in the employment of plaintiffs from December, 1902, until last February. He saw the boiler in question, and it was altogether different to what was specified for. There were a few bulges on the boiler. The paint was bad. It seemed to be an old boiler, because there was soot inside. One could not tell all the defects then,

The fittings did not seem to have been fitted at all, although they should have been before the boiler left England. The sum of £85 did not pay plaintiffs for the repairs they had to do to the boiler. The boiler stopped repeatedly during the day. The cause of the first stoppage was because the junction pipe of the blow-down cock was defective. That was due to bad workmanship in England. All the stoppages were due to a defective blow-down pipe and injector. The machinery had been stopped altogether for nine hours. The scum-cock and fittings were an essential part of the boiler. Witness was sure that he put in over a month at night-time repairing the boiler. He corroborated Mr. Scott with regard to the charges made for doing the repairs.

Cross-examined by Mr. De Villiers: Witness was aware that a test certificate was sent with the boiler, but he had his doubts as to whether it was tested or not. Witness meant when saying it was an old boiler that it had been in use before. When witness found there were not enough fire bricks, he reported the matter to Mr. Scott. Witness considered it absolutely necessary to have an injector on a boiler. Sometimes a boiler, when newly put up, "weeps"; but that depends on the builder. Witness had taken charge of many boilers, but the one plaintiff had was the worst he had ever seen.

Harry William Miller, A.C.E.I., stated he had had twenty-five years' engineering experience. He had examined the boiler in question, and did not approve of its construction. The injector was a good one of its type. If the boiler was driven at its full capacity it would take the injector all its time to keep up.

Walter Parker stated he was time-keeper for the plaintiffs. He paid men for repairing the blow cock. He could, if required, give details of the expenditure in erecting the temporary shed.

Mr. Gardiner closed his case.

Robert Hendry, agent for the defendant, stated he had a conversation, as borne evidence to by plaintiff, with him in March, 1903. They discussed the advisability of putting a scum cock on the boiler. Witness received no definite instruction to supply one, and therefore did not. Witness only knew that the boiler was wanted at Salt River. He heard nothing about a shed being erected. The plaintiffs specified that it was necessary to have it landed in eight weeks. The boiler left on the 16th July, and the delivery was completed on the 13th August. The plaintiff did not ask for any other amount except the £26 6s. 6d. for a long time after the boiler was landed. Witness went down to see Mr. Scott on the 5th September. He complained of the late delivery, and then said that the paint had been put on over rusty plates. Witness scratched

the boiler with his penknife, and found bright steel underneath. There was no material advantage to be gained from painting a boiler. After corresponding with the manufacturers of the boiler, witness agreed to pay plaintiff £26 6s. 6d. There was no doubt but that the boiler was a new one. What Mr. Scott called soot in the boiler was really coal dust, which had accumulated in the coaling of the vessel. A steam chest was not necessary.

James Garvie, partner of the firm of Garvie and Co., engineers, Woodstock, stated that he found the excavations for the boiler not quite complete. Delay was caused through the non-arrival of angle plates. Scott's representative knew the blow-down was too near the furnace, in consequence of which it became hot, and the result was that it was impossible to keep the water in the boiler. He could not say whether there was a sufficient supply of fire-bricks. If any damage had been done to the injector it had been done after he had put it up.

R. H. Brydey, engineer, stated that the globular valve was quite unnecessary. The injector was a first-class one.

Cross-examined by Mr. Gardiner: He should say that the injector could work at top pressure.

Albert Bonds, civil engineer, stated that according to his calculations 2,800 bricks would be required up to the damper.

Cross-examined by Mr. Gardiner: He had considerable experience of boilers in his time. He thought that 3,000 bricks would be ample.

Mr. De Villiers closed his case, and counsel having been heard in argument on the facts.

Buchanan, J., said as regarded the first claim for damages for non-delivery within a specific time it would be sufficient to refer shortly to the evidence and to the letter that had been put in. Mr. Scott stated that he explained to Hendry, the agent of the defendant, that time was of the utmost importance, as their other boiler was defective, and might give out at any time, and that the erection of temporary building was to be proceeded with in anticipation of the arrival of the boiler. The defendants undertook that the order was to be shipped within eight weeks of its receipt in Cape Town. The plaintiffs, in reply to defendants' letter said they were pleased with this offer as time was of the utmost importance. As a matter of fact the boiler was not shipped until many weeks later, and here there was distinctly a breach of contract. The defendants contend that the damages had been waived by acceptance and payment for the boiler, but the payment was made by drafts in the ordinary course of business, and singularly enough neither defendants' agent nor Mr. Scott

himself knew that this had been done. Under the circumstances disclosed in this case I do not think that could be taken as a waiver on the part of the plaintiffs. In measuring the damages it is difficult to assess an amount with arithmetical nicety, but considering the sum that had been expended I think £50 would be a fair and reasonable award to make on the first count. As to the defects in the machinery and the short delivery of fire-bricks and fireclay there was not sufficient evidence to satisfy me that there was any breach of contract. As to the four items amounting to £26 6s. 6d., Messrs. Thomson and Co., the makers of the boiler, had agreed to refund that amount to defendants, but as it had been proved in the case that the angle-plates had been claimed for from the Railway Department, the sum of £1 18s. 10d. must be deducted. Mr. Scott admitted that he had received the price of the iron plates from the Railway Department, and he was therefore not entitled to recover twice over. On the evidence I am not prepared to say that the new injector was necessary, and the other items might be put down to ordinary defects which might fairly be expected to be found in machinery. Judgment will be given for the plaintiffs in the sums of £50 and £24 7s. 8d., with costs.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

PARKS V. PARKS.

{ 1904.
Aug. 10th.

This was an action brought by William Henry Parks, against his wife, Sarah Parks, for a decree of divorce, in consequence of her adultery with a man, whose name was unknown to the plaintiff.

The parties were married in community of property by special licence, at Cape Town, on the 28th May, 1902. In the following August, the defendant left plaintiff, and went to reside at the Paarl, where on various occasions she had committed adultery. There was one child of the marriage.

Mr. Alexander for plaintiff; defendant in default.

William Thomas Birch, Registrar of Births, Deaths, and Marriages, Cape Town, handed in the marriage certificate,

William Henry Parks, stated he was married to defendant on the 28th May, 1902. After the marriage they went to live with his mother. Three months after they were married, the defendant left him.

By the Court: They had rows prior to her leaving owing to her not having his "scoff" ready.

Continuing, witness said the defendant went to live at the Paarl. She wrote to him, and he wrote back, asking her reasons for leaving. She wrote asking witness for her maintenance.

By the Court: Witness never asked her to return to him when once she left him.

Nettie Brynton stated the plaintiff was her brother, and she lived with him and his wife in Cape Town. They were always quarrelling, but not violently. Witness saw her in August, 1902, packing her trunks, and asked her where she was going. She said she was going home to her mother. She went. Witness saw her again some months later. She had several gold rings on her fingers. Witness asked her where she got them. She replied that she had a white sweetheart in the Paarl, who gave them to her, and that she wished plaintiff would die, so that she could marry this man. Witness saw her again in the following October, when she was enceinte.

Edith English stated she was cousin to the defendant. In June, 1902, she visited them, and lived with them. They seemed happy. Towards the end of 1902 witness saw her at the Paarl, and she said she had gone home to her mother. Towards the end of 1903 witness saw her again, she then had a white baby.

Meitje Saul, a coloured midwife, stated she knew the defendant. She attended her in her confinement in 1902, when she was delivered of a coloured child. She attended her again in 1903, when she gave birth to a white child, which did not live long.

The Court granted a decree of divorce, Buchanan, J., remarked that it was peculiar the plaintiff did not ask for the custody of his own child.

DU TOIT V. DOMINGO.

{ 1904.
Aug. 10th.
" 11th.

Defamation—Malay priest—Damages.

This was an action brought by the plaintiff, Kiamdien du Toit, a Malay priest, to recover from Gabriel Domingo, also a Malay priest, damages estimated at £5,000 for defamation of character.

The plaintiffs declaration stated that both he and the defendant resided at the Paarl. Plaintiff was the Imam or priest of a Malay congregation, worshipping in a mosque there; and the defendant

also held a similar position in another mosque there. At divers times in the month of January, 1904, the defendant uttered certain false, scandalous, malicious, and defamatory words of and concerning the plaintiff, in the Dutch language, of which the following is an English translation: "Sahiedien Dollie has divorced his wife on account of Du Toit (the plaintiff) having been found cohabiting with her, and the father of Du Toit paid Dollie £30 to keep quiet about it." By reason of these words the plaintiff had been greatly injured in his good fame and reputation, and especially in his character and position as Imaun, and he had sustained damage amounting to £5,000.

The defendant, in his plea, denied all the material allegations contained in the plaintiff's declaration.

Mr. Upington for plaintiff; Mr. Gardiner (with him Mr. Pyemont) for defendant.

The plaintiff stated he held an official position in the new Moslem mosque at the Paarl. The defendant held a similar position in the old Moslem mosque. Witness's congregation was composed of 86 men, and defendant's of only 15. Witness was a "hadje," and had received a certificate from Mecca to the effect that he was entitled to the title of "Imaun." In 1897 a large proportion of the congregation became dissatisfied with the defendant as "Imaun." A vote was taken as to whether he was to remain "Imaun," or not, and the defendant won by three votes. However, those who were dissatisfied built a mosque, of which plaintiff took charge, and got together a number of defendant's congregation. Defendant showed witness considerable animosity, and made complaints to the Bishop. The Bishop held an inquiry. In his capacity as Imaun, witness had repeatedly been asked to preside at feasts. In the beginning of this year, the defendant circulated defamatory reports about witness. In consequence, witness was suspended by the congregation, who also suspended his allowance. He estimated the damage he had sustained at £5,000. His salary in the church was £8 a month. He received fees for attending feasts, etc., in addition.

Cross-examined by Mr. Gardiner: Witness had no enmity against defendant. There were no minutes of the proceedings of the special meeting of the congregation kept. Witness was at present suspended, but if his character was cleared up, he would be reinstated.

Cousain Camodien, a tailor, residing in the Paarl, stated he was a member of the defendant's congregation. On the 2nd January the defendant told witness that Sahiedien Dollie had divorced his wife, because of the defendant having been found cohabiting with her.

Cross-examined by Mr. Gardiner: Witness was a member of Du Toit's congregation, but when he heard the reports about him he left, and joined Domingo's congregation.

Coumain Camodien, jun., son to last witness, corroborated the evidence given by his father.

Hendrick Noach stated that although not a Malay, he knew plaintiff and defendant well. On the 13th January defendant told witness of plaintiff's misconduct with "Dollie's" wife.

Jacob Petersen stated he was a coachman, and resided at the Paarl. In January last he was in the employment of the defendant. He remembered a conversation between defendant and Noach. The defendant told Noach that plaintiff had been cohabiting with Dollie's wife. Witness quarrelled with defendant.

Cross-examined by Mr. Gardiner: The quarrel witness had with defendant had nothing to do with the present case. Witness quarrelled with him because he took a horse of the defendant's out, and kept it out for three days.

Lam Abdol stated he was a brickmaker, and was employed by his father. He heard defendant tell another Malay that plaintiff had cohabited with Dollie's wife, and that, in consequence, Dollie had put her away.

Cross-examined by Mr. Gardiner: Witness belonged to plaintiff's congregation.

To the Court: Witness never belonged to defendant's congregation.

Samodein Kamedien stated he resided at Stellenbosch. In January, 1904, whilst at Sooker's house, in Cape Town, he heard the report about plaintiff. Before witness heard that report, plaintiff used to conduct service for him, but when he heard it he wrote to him, stating that he could no longer be his priest.

Cross-examined by Mr. Gardiner: Du Toit did not dictate the letter to witness. Plaintiff asked witness to send a copy of the letter to him, because he had lost the original, and he did so.

Mr. Gardiner put into Court an affidavit made by witness, in which he stated he had been authorised by plaintiff to write such a letter.

Gabriel Domingo, the defendant, examined, stated he was a Mahomedan priest at the Paarl. He denied that he had seen Camodien on the Saturday as alleged. He saw him on the Monday, and Camodien then asked witness if he had heard that Dollie had divorced his wife, because she had been cohabiting with plaintiff, and that plaintiff's father had paid Dollie £30 to keep the matter quiet. Witness expressed great surprise at the report, and Camodien then told him that plaintiff already had two wives, and that he had left one with the picannies. Witness also denied that he had said anything to Noach.

Cross-examined by Mr. Upington: Witness was very much shocked when he heard the report about Dollie's wife. Witness had a conversation with the father of Dollie's wife, who told him that plaintiff had been cohabiting with his daughter. Witness denied that he tried in any way to injure plaintiff. Witness brought a charge against plaintiff before the Bishop to the effect that he was not preaching proper doctrine. All the other Bishops contended that plaintiff had squared the Bishop.

The defendant (recalled) denied in further explanation, that he offered one Socker a cart and horses if he would give evidence on his behalf. He denied that he suggested to Socker the evidence he was to put on the affidavit.

Sadien du Toit, Abdol Groenewald, Kiamdien Domingo (brother of the plaintiff), Ebrahim Anta, and others also gave evidence.

Counsel having been heard in argument on the facts.

Buchanan, J.: The plaintiff and defendant both lived at the Paarl, and are rival Imaams, or priests, of two Malay congregations at the Paarl. Up to 1897 these congregations were one, and the defendant was the priest of that congregation. A portion of the congregation in that year wished to depose him, but they could not succeed in doing so. An action was brought in this court, and the Court then directed a poll to be taken of the congregation, and the result of that poll was that there was a majority of three in favour of the defendant. After that decision, a secession took place of the dissatisfied members of the congregation, and they started a new church, of which the plaintiff became Imaam. The defendant himself admitted that since this separation the plaintiff had been drawing away members of his congregation, and the relations between the parties seemed to have become very strained at the time of the circumstances with which the Court was now called upon to deal. According to the declaration, the words alleged to have been uttered by the defendant were: "Sahiedien Dollie has divorced his wife on account of Du Toit (the plaintiff) having been found cohabiting with her, and the father of Du Toit paid Dollie £30 to keep quiet about it." It was not denied that these words used about anybody and especially a person in the position of the plaintiff, as a priest of the congregation, were defamatory in the highest degree, and the defendant did not attempt to justify the words as true, but simply denied having uttered them. Now, there were three persons to whom on three different occasions it was alleged the defendant had spoken the words complained of. It was a curious thing that the defendant admitted that the words were on each occasion used in his presence, but he says it was not he,

who used them, but that they were told to him by the persons named. His lordship, having briefly reviewed the evidence, went on to say that he thought the probabilities were strongly in favour of the story told by the plaintiff's witnesses as being the correct one, and the story of the defendant being incorrect. He commented on the way in which the witness had been approached by the defendant after pleadings had been filed, and he remarked that this, to his mind, pointed to an attempt to interfere with plaintiff's material witness. He had, therefore, to find, sitting there as a juror, that these words were spoken by the defendant to the different witnesses, who had been called. The only question that remained was what damages should be awarded? The very large sum of £5,000 was claimed, and it was alleged that this was a serious allegation. The charge, it was true, was serious, and especially as directed against a person in the plaintiff's position, and the plaintiff had suffered some material loss in consequence. The plaintiff said that he had been suspended from his position as head of the congregation, but he did not plead special damage. As far as the trial in Court was concerned, there had been no attempt to say that the allegations which had been made were true in any particular. There had been no justification pleaded. The plaintiff had come into Court mainly to clear his character. He thought there should be awarded a substantial but not a vindictive sum as damages. Considering the relationships of the parties and their occupations, and the fact that the plaintiff's character would by this action be fully cleared, he thought it would be sufficient to give judgment for the plaintiff for the sum of £50, with costs. His lordship added that before the parties left the court, he would like to say that he thought it would be better if this theological dispute were allowed to die out in a place like the Paarl, and the congregation of Moslems, who were otherwise good citizens, should work harmoniously together in their religious relationships.

[Plaintiff's Attorneys: Moore and Son; Defendant's Attorneys: Faure, Van Eyk and Moore.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSION.

{ 1904.
{ Aug. 11th.

Mr. Russell moved for the admission of Jacques Marthinus van Wyk as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Ceres.

PROVISIONAL ROLL.

FORD V. CHRIST.

Mr. Percy Jones moved for provisional sentence for £680 on certain conditions of sale, with interest at the rate of 6 per cent., being balance due of a sum of £1,020, of which £340 had been paid on account, plaintiff tendering transfer.

Mr. Burton read an affidavit by the defendant, who said that he was willing to take transfer if the plaintiff would give him title to the whole of the property bought by him (the defendant), and would settle the dispute with the Divisional Council in regard to the true boundaries. The Divisional Council claimed a strip 3 feet wide, running the whole length of the land bought by the defendant, 100 feet, and fronting to the main road at Muizenberg, which, they said, was an encroachment and belonged to the road.

Mr. Jones read affidavits by Theo. de Villiers, Government land surveyor, who said that the extent of the ground was indicated by beacons at the sale and by James Ford, who said that the Divisional Council had never made a claim upon him for the 3-ft. strip in question.

Mr. Burton contended that the liquidity of the document was destroyed, because the plaintiff was unable to deliver that which he had professed to sell. The defendant, it seemed to him, would be buying, not the property, but a law-suit. The defendant was prepared to pay the money, and had handed it over to his attorneys, but he wanted to know what he was going to get. The Divisional Council said that the land encroached to the extent of a strip of 3 feet on the main road.

Mr. Jones said he submitted that the defendant should accept transfer of the land set out in the diagram from the plaintiff. He quoted the case of *Van der Merwe v. Burgers* (4 Juta, p. 128), and contended that the plaintiff was entitled to provisional sentence. It seemed to him that the Divisional Council would have to move for the deeds re-

gistered in the Deeds Office to be set aside.

Hopley, J., said it seemed to him that the best thing would be for all the parties to come together, to see whose ground this really was. Provisional sentence would be refused, with costs. Plaintiff, if he liked, could go into the principal case.

BOARD OF EXECUTORS V. VAN SCHALKWYK.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond.

The Registrar said that there was no proof of service.

Mr. Buchanan (in answer to the Court) said that he had no affidavit of service.

Hopley, J.: You had better look into the matter, Mr. Buchanan. Counsel should be in a position to give proof of service, and it would be well, as I have said over and over again, if they were briefed with this by the attorneys.

HIGRANT, CHANTREY AND CO. V. PRATT.

Mr. Close moved for the final adjudication of the defendant's estate as insolvent. Replying to the Court, Mr. Close said he had no proof of service.

Hopley, J.: I suppose because work has increased so much in this court, the attorneys want to make it more difficult.

Order granted.

"CAPE TIMES" AND "CAPE ARGUS" V. GOLDSMID.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent and for the appointment of Mr. J. E. P. Close as provisional trustee.

Final order granted, but no order as to appointment of trustee, Hopley, J., remarking that no reason had been shown why the Court should depart from the usual practice.

DAVIES V. SOLOMON.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SAVAGE AND SONS V. VENTER BROS.

Mr. W. P. Buchanan moved for the final adjudication of the estates of the defendants, as partners, and individually.

Order granted.

SACHS V. SCHALK AND MARTHA VAN DER MERWE.

Mr. De Waal moved for provisional sentence on a promissory note for £101 18s. 9d., less £10 paid on account.
Order granted.

ATTRIDGE V. HEYNS.

Mr. M. Bisset moved for provisional sentence for £2,350 on a certain mortgage bond, together with interest.

The defendant asked for further time to be allowed her in which to sell one of the properties, and thus be able to clear off the arrears of interest.

The case was ordered to stand over until later in the day, defendant to see plaintiff's attorneys in the meantime.

SIFF V. COHEN.

Mr. Roux moved for provisional sentence on a promissory note for £100, with costs of suit.
Order granted.

SPIHLHAUS V. AJAM.

Mr. Pyemont moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WILLIAMS V. MORRIS.

Mr. Rainsford moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

REYNOLDS VEHICLE AND HARNESS FACTORY V. BLAKE.

Mr. Roux moved for provisional sentence on two cheques, respectively of £25 and £20, less £10, paid on account, and judgment, under Rule 329d, for £3 16s. 10d., for mixed account.

Order granted as prayed.

BANK OF AFRICA LTD., V. EPSTEIN, BIRCHSOHN AND JACKSON.

Mr. M. Bisset moved for provisional sentence on two promissory notes for £140 and £120 respectively, with interest and costs of suit.

Order granted.

ESTATE WALKER V. KARRIES.

Mr. W. P. Buchanan moved for provisional sentence on two mortgage

bonds, amounting together to £300, with interest; also for property specially hypothecated to be declared executable, bonds having become due by reason of the non-payment of interest.

Order granted.

SELLAR BROS. V. CLEWS.

Mr. Sutton moved for the cancellation of the provisional order for the sequestration of the defendant's estate.

Provisional order superseded.

ILLIQUID ROLL.

INGLESBY V. I. AND J. HER- { 1904.
MANN. { Aug 11th.

Mr. D. Buchanan moved, under Rule 329d, for judgment for the immediate delivery of a suite of furniture purchased for £25, and stored by the plaintiff with the defendants.

Case ordered to stand over, pending production of affidavits as to the transaction.

Mr. Buchanan (at a later stage) said he was instructed that the plaintiff was away on his honeymoon, but he now produced receipt for a payment by the plaintiff to the defendants. He was told it was believed that the suite in question had been sold. The defendants had given notice to surrender their estate.

Hopley, J., said that the receipt seemed to be for a payment of £3 only.

Judgment granted as prayed.

MOUTON V. KARG.

Dr. Greer moved for judgment, under Rule 329d, for £100, money lent, £7 interest, and costs.

Order granted.

WRIGHT V. BOSSOUW.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £23 4s., money advanced on loan, payment for and at request of the defendant, and interest, less £20 paid on account since issue of summons.

Order granted as prayed.

WENTZEL V. O'BRIEN.

Mr. Van Zyl moved for judgment, under Rule 329d, for £96 7s., less £36 paid on account for material supplied.

Order granted.

**REYNOLDS HARNESS AND VEHICLE CO.
LTD. V. MARITZ.**

Mr. Roux moved for judgment, under Rule 329d, for £31 8s., balance of account.

Order granted.

LENG V. ROODE.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £23 11s., owing by defendant for goods sold and delivered, with interest and costs.

Order granted.

GENERAL MOTIONS.

Ex parte MALCOMES AND. (1904.
CO. (Aug. 11th.

This was an application brought by Messrs. Malcomess and Co., of East London and elsewhere, in regard to the estates of Henry Boyce Cary and Halbert Glendinning Hannaford, trading at Tarkastad as H. B. Cary, which had been provisionally placed under compulsory sequestration.

Mr. Upington moved as a matter of urgency for special powers to be granted to the *curator bonis* appointed by the Master. Counsel said it appeared that the estate consisted of certain perishable merchandise, and that there was a bottle-store. Messrs. Malcomess were the principal creditors, in fact, they represented the great bulk of the insolvents' liabilities, and it was desired that power should be given to the *curator bonis* to carry on the business. Messrs. Malcomess had claims amounting to £33,314 14s. 8d., and the rest of the creditors represented under £1,000. Counsel read the affidavit of Mr. Jacobsohn, of the firm of Walker and Jacobsohn, attorneys, Cape Town, acting for the petitioners. Mr. Jacobsohn stated that on the 3rd August a provisional order was granted in this court placing the insolvent estate in the hands of the Master until a trustee should be elected. In consequence of that order, a messenger of the Court had attached the goods, and business of the said H. B. Cary, and the Master had appointed Mr. Robert Hunter Williams to be *curator bonis*. In consequence of the attachment, there was a risk that the value of the estate would be further diminished, unless arrangements were made for the disposal of the perishable merchandise and the carrying on of the bottle-store. Counsel added that it was only in exceptional cases that such an order was granted.

Hopley, J.: This does seem to be an exceptional case. The petitioners seem to own practically the whole estate, and they should have the right to carry on the business. An order

will be granted as prayed, authorising the *curator bonis*, Robert Hunter Williams, to carry on the business, including the bottle-store, with permission to telegraph the order.

NETTLETON V. NETTLETON.

Mr. Upington moved for a decree of divorce, with forfeiture of benefits of ante-nuptial contract, and costs, defendant having failed to comply with an order for restitution of conjugal rights. Plaintiff's affidavit was put in, saying that she had had no communication from the defendant, Thomas Stocks Nettleton.

Order granted as prayed.

Ex parte WEAKLEY.

Mr. Sutton moved for a rule nisi under the Derelict Lands Act, to be made absolute.

Order made absolute accordingly.

COLLISON V. CLINK.

Dr. Greer moved for an order for the restoration of a minor child (13). William Collison, alleged to have been wrongfully removed from the custody of the petitioner. The defendant, Gustava Clink, had been divorced from the plaintiff. It was stated that defendant had taken the minor from a house in Hanover-street, Cape Town, on the 26th March last, saying that she was going to her father's house in the Ladismith district. The Court had granted the plaintiff custody of the minor children of the marriage. The defendant was now resident in the Oudtshoorn district.

Order granted, requiring the defendant to restore the minor to his father, the petitioner.

Ex parte GAZO.

Mr. Roux moved for an order authorising the transfer to the Colonial Government of certain property, at Keiskema Hock, in the division of King William's Town. Petitioner was a Gaika, and eldest son of his father, and the Government desired to resume possession of the land, and offered to pay £25 compensation.

Order granted as prayed.

COOK V. COOK.

Mr. W. P. Buchanan moved for an order compelling respondent to disclose the address of his minor son, and carry out the second and fourth paragraphs of a deed of separation. The deed provided that petitioner (Florence Emily Cook)

should have custody of the girl of the marriage, and that defendant should have custody of the boy. Parties were married in England. The boy, it was believed, had been sent to England to be educated. Plaintiff claimed reasonable access to the boy as provided by the deed of separation. The payments, counsel said, were not now pressed.

The respondent said that all his communications with the boy passed through his grandmother and aunt, and he did not know the address. The plaintiff could communicate with the boy, care of his grandmother. It was far better, he thought, that the plaintiff should not know where the boy was being educated, so as to prevent unpleasantness.

Hopley, J., said that the matter ought never to have been brought before the Court on motion, and, if any further proceedings were taken, it must be by way of action. There would be no order.

Ex parte DE JONGH.

Mr. Close moved for leave to sue the defendant by edictal citation for restitution of conjugal rights, failing which, divorce. The defendant deserted the plaintiff, who lived in the Cape division, in November, 1902, and went to Canada. When last heard of he was in New York.

Leave granted, personal service to be effected, if possible, failing which, one publication in the "Cape Times" and "South African News," rule to be returnable on the 5th November.

Ex parte CORNELIUS.

Mr. Rainsford moved for an extension of time within which the petitioner, as trustee in a Carnarvon insolvency, might file account. Six months' extension was asked for.

Order granted as prayed.

MULLER V. KOONIN.

Mr. Uington moved for an order requiring respondent forthwith to deliver up or restore to plaintiff a piano, at 29, Primrose-street, hired from the plaintiff by one Joseph Goldstein, of Cape Town. Goldstein had by letter requested the plaintiff to take back the piano under condition (a) of the hire-and-purchase contract entered into between plaintiff and Goldstein. From the correspondence, it appeared that Goldstein had given the piano to respondent in satisfaction of a debt, and that the respondent claimed that the instrument was hers.

Order granted as prayed, subject to proof of notice of motion having been served on the respondent. His Lordship said there seemed to be no doubt that the instrument was the property of the applicant, Muller.

Ex parte KENT.

Mr. Schreiner, K.C., moved for the appointment of a commissioner to examine certain witnesses on oath, petitioner being trustee in the insolvent estate of a farmer in the Oudtshoorn district.

Order granted, the Resident Magistrate of Oudtshoorn to be commissioner, failing him, the Assistant Resident Magistrate.

POLLOCK V. PULVERMACHER.

Mr. W. P. Buchanan moved for leave to attach certain property *ad fundandum jurisdictionem*, and to sue the respondent by edictal citation. The respondent had passed a mortgage bond for £1,700 in favour of the applicant, but he had left the Colony and his whereabouts were unknown. The bond had become payable by reason of non-payment of interest. The last place where he was heard of was Natal.

An order was granted authorising the Registrar of Deeds not to pass transfer of the property, and leave granted to sue by edictal citation, personal service to be effected, failing which, one publication in a Durban paper, the "Cape Times," "South African News," and the "Gazette," returnable first day next term.

Ex parte WERNICH.

Mr. De Waal moved for the appointment of a *curator bonis* to take charge of the affairs of the petitioner's mother-in-law, who, according to medical testimony, was unable to manage her own affairs.

Order granted, Mr. J. H. Hofmeyr, of the Paarl, being appointed as curator.

FESTUS V. JONKER.

Mr. De Waal moved for leave to sue the respondent, who had failed to pay interest on a mortgage bond for £32, by edictal citation. The respondent was last heard of in Kimberley previous to the war.

Hopley, J., said that he would require an affidavit by some person who knew the respondent at Kimberley to show that he was at present beyond the jurisdiction of the Court.

FREEMAN V. CAPE DIVISIONAL COUNCIL.

This was an application for an order calling on the respondent to show cause why an order should not be granted calling on the respondents to furnish the applicant with a copy of the voters' roll in the field cornetries of Tigerberg and Kuil's River. The applicant was desirous of applying for a retail liquor licence at D'Urban-road, and it was necessary he should have the roll for the purpose of pursuing his application. An application to copy the roll was refused, and his attorney had been fused to do, after tendering what he for copying 150 names, and this he refused to do, after tendering what he believed to be the usual fee, namely, 10s.

The replying affidavit of the secretary of the Divisional Council set out that, while the roll was being considered, copies were only granted as a matter of grace.

Mr. Close was for the applicant, and Mr. Schreiner, K.C., was for the respondents.

Hopley, J., said he didn't think that the Council had adopted such an attitude as to require a mandamus from the Court, and the application would be refused, with costs.

Ex parte VAN DER BYL.

Mr. Van Zyl moved for the substitution of the name Nicolaas Jacobus Potgieter instead of Nicolaas "Johannes" Potgieter, in order to amend a certain order of Court.

Application granted.

Ex parte STABLEFORD AND CO., LTD.

Mr. Schreiner, K.C. (with him Mr. McGregor), for the applicants, the official liquidator, presented the report, and asked for the usual order.

Order granted, one publication to be made in the "Cape Times."

VAN RENSBURG AND DE VILLIERS V. TRYSTMAN.

Mr. Sutton moved to have an award of the arbitrators made a rule of Court.

Order granted.

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

DIVORCES.

MARTENS V. MARTENS. { 1901.
{ Aug. 12th.

Dr. Greer, on behalf of the plaintiff Hendrik August Martens, applied for an order against his wife for the restitution of conjugal rights, failing which, a decree of divorce.

Hendrik August Martens (examined) stated he was a carpenter, and resided at 26, Wandel-street, Cape Town. He was married in community of property to defendant at Braake, in Germany, on the 13th December, 1895. He landed in Cape Town in January, 1896, and had since been here. For the first year, he lived happily with his wife, but after that quarrels began. In March, 1903, he was working at Somerset West, and he received anonymous letters to the effect that she was going to a large number of dances. He immediately came to Cape Town and questioned her as to the contents of the letter. She refused to go home with him. She was then cook at the German Club. Some time after that he heard she had left the German Club. In the meantime, she called at his house for her clothes. She went to Edenberg, and as far as he knew, was still there. He believed she was a cook there.

To the Court: She went against his wish.

There were no children of the marriage. He had written to her and asked her to return, but she did not reply to him. He was willing to take her back if she returned.

[Hopley, J.: What was the quarrel you had with her after you heard she was going to dance?]

I was angry with her. I did not strike her. She laughed at me.

[Hopley, J.: Are you willing to pay her passage down if she consents to return?]

Yes.

An order as sought was granted, the return day being fixed for the 30th September.

MARSHALL V. MARSHALL.

Mr. P. Jones, on behalf of Mrs. Annie Maria Marshall, applied for an order against her husband, Edward M. Marshall, for restitution of conjugal rights, failing which, a decree of

divorce. The defendant had been barred.

William Thos. Birch produced the marriage certificate of plaintiff and defendant, which was solemnised on the 20th May, 1896.

Annie Maria Marshall (the plaintiff) stated her maiden name was Cooper. She married the defendant in May, 1896. He assumed the name of Douglas Marshall. She did not know that until after they had been married some time. There was one child of the marriage—a boy, aged 7 years. Some time after the marriage defendant got employment under the Johannesburg Town Council and remained there about eighteen months, after which he went to Bloemfontein. Shortly after arriving there he was arrested, and sentenced to a year's imprisonment, with hard labour, for forgery. Witness then returned to Cape Town. He came out of gaol in December, 1899, and was then sent to Johannesburg, as he was wanted there for a similar offence, committed previous to the Bloemfontein one. He got a year there. After that was finished, he joined the South African Light Horse. He was discharged, and came to Cape Town. He visited witness, but they did not live together. He then went to England. After he had left, witness found certain letters from a woman in England suggesting to him that he should tell witness he was invalided Home. He told witness that. He returned from England to Port Elizabeth, and joined the Remount Department there. He then joined the Western Province Mounted Rifles. Subsequently witness ascertained that he went to Australia. He was later on extradited from England, and brought back to Cape Town, and sentenced to two years' imprisonment, with hard labour. He finished his sentence on the 16th July this year. He called to see witness then, but had not offered to support her.

[Hopley, J.: Are you willing to take him back if he promises to live with you?]

I suppose I will.

Witness had since her marriage supported herself. She often gave defendant money. She did not know where her husband was now.

Counsel put in a letter written by the defendant on the 20th July, in which he stated he was determined to leave South Africa and not come back again.

[Hopley, J.: He has apparently changed his mind about leaving Africa.]

The order as sought was granted, the return day being fixed for the 30th September.

TRIAL CAUSE.

DE BIASSIO V. HARRISON. { 1904.
Aug. 12th.
" 15th.

Defamation—Damages.

This was an action brought by Louis de Bissio, an Italian stonemason, residing on the Bellwood Estate at Sea Point, to recover from William Edward Harrison, retired dyer, also of Sea Point, damages estimated at £250 for defamation of character.

Plaintiff's declaration stated he was a stonemason carrying on business on portion of the Bellwood Estate, Sea Point. The defendant was a retired dyer and cleaner, residing in Cape Town, and was the owner of the Bellwood Estate, portion of which he had let to the plaintiff. Prior to the 21st of January, 1904, the plaintiff had for some time been supplying stone in the course of his business to, amongst others, the firm of Messrs. Murray and Stewart, contractors, at Sea Point. On or about the date aforesaid the defendant falsely and maliciously wrote and published of and concerning the plaintiff to the firm of Murray and Stewart the following defamatory words, in the course of a letter written and delivered by the defendant: "Bellwood Estate, Sea Point.—Dear Sirs,—I understand you are receiving from some Italian (Bissio) on the above estate, a large quantity of stone for walling and other purposes. This stone has practically been stolen from the brickyard on the estate, and I think you cannot be aware of the fact. I am not referring to the granite which Bissio and Co. are working, but to the mountain stone, to which they have no right. Although they have more than once been told of this, they still continue to remove the stone, and I think it is well to advise you of the position. This letter is simply to inform you how matters stand, so that you may not be in any way implicated should I be compelled to take action, which I shall certainly do if any further removal of stone takes place.—Yours faithfully (Signed), W. E. Harrison"—meaning thereby that the plaintiff committed the crime of theft, and had wrongfully and unlawfully converted certain stone alleged to be the property of the defendant to his own use.

Defendant's plea admitted that he wrote the letter, but denied the other allegations. He said that the allegations in the letter were true and correct, and, by virtue of the facts, he was justified in law in publishing the allegations. On or about the 20th of July, 1903, the parties entered into an agreement whereby the defendant agreed to allow plaintiff to break up and carry away any granite rock or sandstone rock that projected as

boulders on the surface of the estate, under certain terms and conditions. Defendant had leased part of his estate to one W. F. Cook, of Colonnade Buildings, Greenmarket-square, for the purpose of working brick clay and brick making. Cook, in the course of his work, had brought up to the surface a considerable quantity of loose stone. The stones had been wrongfully and unlawfully removed for and by directions of the plaintiff. Defendant and Cook frequently warned plaintiff of the consequence of this action, but plaintiff refused to desist, and thereupon the letter was written at the suggestion of and by Cook, and signed by defendant.

Mr. Burton, (with him Mr. Van Zyl) appeared for the plaintiff, and Mr. Alexander appeared for the defendant.

The plaintiff stated he came to South Africa about three years ago. Shortly after arriving, he got a verbal lease to cut stone on the Bellwood Estate. In 1903 defendant became proprietor of the place, and the verbal lease was continued, and was afterwards changed to a written one. Witness, in the meantime, had worked up a good trade with Messrs. Murray and Stewart. Defendant let a certain portion of the estate to a Mr. Cook, and after that the defendant began to find fault with him, and told him he was not to take the stone, as it belonged to Mr. Cook. The defendant then wrote the letter complained of, and in consequence Messrs. Murray and Stewart stopped their orders, and witness's business rapidly fell off. A man with whom he had been in partnership had left him. He considered he had lost about £250 through the defendant's action.

Cross-examined by Mr. Alexander: Witness had been fined in the Magistrate's Court for assaulting defendant. It was after that he began the present action. His assistants left him, because he was unable to pay them. On Sunday, January 24, he went to see Harrison, but he did not show him the letter, and subsequently he went with a man named O'Reilly to get permission from the defendant to break some stone off the mountain.

[Hopley, J.: Apparently all this while, after you knew of this letter, you seem to remain on perfectly good friendship with Harrison?]

It was not an amicable friendship. I saw Harrison in connection with the new business.

[Hopley, J.: You were concealing your enmity?]

I was very much hurt about past events, but this was a new business, and I tried to get on as well as I could.

[Hopley, J.: Did you get permission about the Harbour Board stone?]

He said if his tender was accepted by the Harbour Board I could see him later.

[Hopley, J.: What led you to assault him in May or April?]

I didn't assault him.

[Hopley, J.: The Magistrate was quite wrong in finding you guilty?]

He might have taken a wrong view of the matter.

[Hopley, J.: After that you paid £20 damages in a civil case?]

Yes.

[Hopley, J. You knew everything in January. Why didn't you start the action in May?]

I was not aware of all the damages this matter had caused me.

[Hopley, J.: If it had caused you no damages you would not have started the action?]

No, my lord.

[Hopley, J.: It was not so much the imputation on your character as the effect on your pocket?]

It was first on account of my character, and, secondly, on account of my pocket.

Hopley, J.: You have been prepared to let the character go if your pocket was all right?]

Not knowing the language, I did not care to trouble, but when I found I was suffering damage I was compelled to proceed.

Giovanni Sabatino, stonemason and contractor, formerly in partnership with the plaintiff, stated they never took any stone from the area beyond what they had permission to take. After the defendant wrote the letter business began to fall off, in consequence of which witness sold his share of the business.

John George Murray, of Messrs. Murray and Stewart, builders and contractors, Sea Point, said his firm had bought stone from the plaintiff's quarry to the extent of £500 or £600. He had always found the plaintiff straightforward in business dealings. After the letter he looked upon the plaintiff as a thief, and he withheld certain payments pending an inquiry. He believed the plaintiff was an honest man.

Cross-examined by Mr. Gardiner: The plaintiff was paid after a reasonable time. There had been a falling off in the building trade since February of this year.

Fredk. Bellamy, of Sea Point, said that he had a contract for the excavation of clay on the Bellwood Estate, with one Barouti. They had rights on the east side of the Bellwood Estate right up to the north of the Municipal boundary. He had ceded his contract to Cook. The plaintiff had the right to all surface stone. Witness's contract did not include stone other than concrete that he might come upon. The plaintiff was requested to cut away projecting boulders, which he did in a satisfactory manner. When Cook came in in October plaintiff continued to cut the stone as usual. The defendant must have been aware that the plaintiff was removing

the stone. Up to the time he left in January the plaintiff appeared to be doing good business. The subject of Harrison's letter has been talked about in trading circles at Sea Point.

Cross-examined by Mr. Gardiner: His share on leaving the partnership amounted to one shilling. Whatever stone was removed from the brickyard was projecting boulders.

Ebenezer Farquhar, cartage and building contractor, Sea Point, stated that Harrison's letter was much talked about in business circles.

Further corroborative evidence having been given as to the effect of the letter,

Mr. Burton submitted that on the evidence the defendant was entitled to absolution from the instance, and closed his case.

[Hopley, J., said he thought not, as there was a distinct accusation in the letter.]

Wm. Edward Harrison stated that plaintiff was already on the estate when he came there. After witness wrote the letter in January he was seldom on the estate during the day. He had occasion to charge the plaintiff with assault, and he also summoned him for damages. If the plaintiff had continued to take only projecting boulders defendant would never have interfered with him. On the Sunday following the letter the plaintiff seemed pleased when defendant suggested that if he (plaintiff) ceased taking stone witness would say nothing more about the letter.

By Hopley, J.: It was the plaintiff's constant visits to witness's house that led up to the assault.

Cross-examined by Mr. Burton: The voluntary separation between himself and his wife was concluded in April. He did not think that the plaintiff was living too cheap on the estate. He was not aware that the plaintiff was taking stone away from the brick-making area. Cook asked him if he could have the stone, and then the letter was written to the plaintiff, Cook dictated the letter, and at that time he had no right to the stone. Instead of taking action against the plaintiff, he wrote the letter to some of his customers, but it was not with a view to damage plaintiff's character. He would hardly like to say that the plaintiff "stole" the stone, but he certainly took it away.

[Hopley, J.: How was Murray and Stewart to know which was surface and which was underground stone?]

They might depend on the plaintiff telling the truth.

[Hopley, J.: How do you expect him to tell the truth after you accused him of being a thief?]

I didn't draft the letter. It hardly accused him of being a thief.

[Hopley, J.: Well, virtually. Were you sober when you signed the letter?]

Yes, perfectly, my lord.

Frank Herbert Cook stated he went

into partnership in the estate with Balamy and Barouti on the 6th November, 1903. In the course of constructing the foundation for the machinery they came upon boulders, which the plaintiff got permission to take away. Partnership was dissolved on the 7th January, 1904. In November and December he had occasion to speak to the plaintiff about working on other stones that had been excavated in the clay pits. In December the plaintiff said he thought he got a right to the stone, but promised not to touch it again.

Cross-examined by Mr. Burton: His partners would not have given permission to the plaintiff to take stone without his knowledge. He denied that the letter was written with a view of injuring plaintiff in his business.

Wm. Easton, manager of the Kimberley Hotel, stated that on the second Wednesday in January he went out with Cook and Harrison to see the plaintiff. Harrison remonstrated with the plaintiff for taking away stone and for taking down part of a wall. The plaintiff said that he was sorry, and promised that he would take no further stone.

Cross-examined by Mr. Burton: Plaintiff did not require an interpreter. In reply to Mr. Harrison, plaintiff said he understood that he had been taking stone which he had no right to.

Mr. Alexander closed his case.

Hopley, J.: In this action the plaintiff, who is a stonecutter, claims from the defendant the sum of £250 damages for defamation of character. The words complained of were contained in a letter written by the defendant to a firm of contractors. After perusing the evidence, I cannot arrive at any other decision than that there has been defamation. But from the evidence brought forward no damages seem to have been caused by reason of that defamation. In such a case as the defendant urged as his reasons for writing in the manner he did, the proper course would have been for him (the defendant) to apply for an interdict against the plaintiff instead of writing a letter as he had done. It does not appear that any special damages have been proved, but the accusation in the letter itself is a serious one, and the Court will give judgment for £25 and costs against the defendant.

[Plaintiff's Attorney: G. Scanlon;
Defendant's Attorney: D. Tennant,
jun.]

AUSTIN V. PALMER AND OTHERS.

Commission—Procedure.

A. having sued P. in an action which arose out of a certain prize fight, applied for a commission to take the evidence of

P., who was about to quit the Colony.

Held, that no commission should be granted until the declaration (at least) has been filed.

Mr. W. P. Buchanan moved as a matter of urgency for the appointment of a commission to take the evidence to-day of Pedlar Palmer, who was about to leave for England on Monday. Counsel said that the action brought by W. J. Austin arose out of a recent prize fight. A certain amount of money was put up by certain gentlemen to be fought for, but the defendants now refused to pay out to his client his proper share.

Mr. Gardiner said he had just been instructed to oppose the application on behalf of the second defendants, the Argus Co., and Mr. W. W. Seabrook, the Sporting Editor.

Mr. Alexander said he had also been instructed to oppose on behalf of Messrs. Haيمان and Morrall, the first defendants.

[Hopley, J.: Who is going away?]

Mr. Buchanan: One of the fighters, my lord.

[Hopley, J.: Who is the plaintiff?]

W. Austin. He was one of the contestants, and Pedlar Palmer, the other contestant, is going to England. Palmer has been settled with. Palmer is leaving, and Austin wants his evidence. This is a matter of extreme urgency, my lord.

Mr. Gardiner: It is a most extraordinary application.

[Hopley, J.: But the circumstances are extraordinary.]

Mr. Gardiner pointed out that it was only on the previous day that the summons had been served, and it was difficult to know what the plaintiff's case exactly was. The declaration might disclose no grounds of action. Counsel contended that there was not sufficient time to prepare a cross-examination. There had been no pleadings filed, and to grant such an application would be contrary to the practice of the Court.

[Hopley, J.: I must say it is a bit premature. What is your position? Have you got the money?]

Mr. Gardiner: I am not instructed that we have. I submit the plaintiff can have a commission in England.

[Hopley, J.: Who are the other people in the action?]

Mr. Buchanan: The first defendants are the proprietors of the Pavilion, Camp's Bay, where the fight took place.

It was agreed that the amount should be placed in the hands of the Sporting Editor of the "Argus."

[Hopley, J.: Where does the Argus Company come in?]

Their Sporting Editor was acting for them.

[Hopley, J.: How many times has a commission been granted at this stage?]

Not often, my lord. The rule of Court, however, is very wide where a witness is going abroad. The steamer might sink on the voyage, or Pedlar Palmer might die from injuries received in the fight.

[Hopley, J.: Where is the money at present?]

Mr. Alexander: I don't know, my lord. The summons was issued by Thos. Palmer and W. Austin in the first instance, but now a fresh summons has been issued by W. Austin.

[Hopley, J.: There is no allegation of dishonesty. Is the money safe enough?]

Mr. Alexander: The original summons referred to £500. There is no allegation that these people will not be able to pay.

Mr. Buchanan said that when the money was refused after the fight, a summons was issued by Palmer and Austin. There had been a compromise in Palmer's case, and he had withdrawn from the action. The defendants had admitted liability to Palmer, but not to Austin.

[Hopley, J.: I understand the position now. Give me your authorities?]

Mr. Buchanan said, in a case such as the present time was the essence of the whole thing. Counsel then quoted Rule 35 of Court, and contended that it was wide enough to embrace such an application.

[Hopley, J.: There used to be an old rule that it was only when the pleadings were closed such an application would be granted. We have gone so far as to grant it after the declaration has been filed, but now you come with the summons almost red-hot from the Registrar's hands.]

Mr. Buchanan: We say the defendants were the organisers, and they know as much about the case as the plaintiff. I don't think my learned friend will deny that.

[Hopley, J.: He keeps on denying that the "Argus" organised the fight.]

Mr. Gardiner: They did not, my lord.

Mr. Buchanan: Perhaps, then, Mr. Alexander's clients know all about it. I am instructed that defendants have entered an appearance because they know everything about it.

[Hopley, J.: Perhaps it is because they know nothing about it.]

Mr. Buchanan: They can cross-examine the witness to show they know nothing about it. They know that the declaration will merely set out the contract.

[Hopley, J.: Has any Court of Justice ever assisted a party to recover money in a prize fight?]

I think so.

[Hopley, J.: I don't see how many exceptions there may be. Only the other day, I think, there was a prosecution where everybody concerned in a prize fight was charged with manslaughter. At all events, these people are committing assaults on each other. Of course I am only throwing these things out as possibilities.]

The commission will help the defendants considerably in framing their plea.

[Hopley, J.: Is one of the contestants so material a witness as to whether or not the contract was carried out?]

Supposing it is not a fair fight?

[Hopley, J.: Then Palmer and Austin would have to be conspirators in the matter. What likelihood in that case is there of Palmer saying it was a fair and square fight?]

Palmer's evidence would be most material in any case.

He might be going to England or America, any other part of the world. To take his evidence on commission would be more expeditious, and more convenient.

Counsel then proceeded to argue on the application, and contended that it would save expense and a deal of inconvenience to take the evidence at once. It was only within a short time that Austin knew that the promoters had settled with Palmer.

Hopley, J., in refusing the application, with costs, said it would be very unwise to create such a precedent unless there could be shown absolute necessity for doing so. The Rule of Court was wide enough, but it had been controlled by a practice which originally was more strict than it even was now. He did not think in this particular case that the parties were in danger by waiting in the proper course for the pleadings to advance a stage or so. Counsel for the plaintiff seemed to think that his client was the only party to be considered; but here the defendants had been brought into court without any notice whatever, and asked to consent to a commission to be held to-day, and in the meantime to instruct their counsel to defend them in an action in which they had not seen the declaration. While the Court would, in the ordinary course, listen patiently to the case, he did not think he was justified in going out of his way to help people engaged in a prize fight.

[Applicant's Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

LIPSCHITZ AND TOOCH V. } 1904.
SAPIERO. { Aug. 15th.

Trespass—Damages—Cultivated land.

Where a person has the right to enter upon the land of another for the purpose of repairing a watercourse, the right should be exercised in such a manner as to do no unnecessary damage to the land entered upon.

The appellant having such a right, repaired the watercourse by digging up portion of a lucerne field, although there was material available outside the lucerne field, a few yards from the watercourse.

Held, that this constituted a trespass for which the appellant was liable in damages.

This was an appeal from a judgment of the Assistant Resident Magistrate of Oudtshoorn, the appellants, Lipschitz and Tooch, having been sued in the court below by the respondent, Mondel Sapeiro, for damages, for having wrongfully, unlawfully, and in violation of a certain agreement entered upon the plaintiff's property, made excavations therein, and altered the bed and banks of a certain furrow. The plaintiff sought to recover £20 damages, and was awarded £5 and costs.

From the record in the Court below, it appeared that the parties were owners of property at Disseldorf, in the district of Oudtshoorn. An agreement was entered into in November, 1896, for the maintenance and management of a certain watercourse, Donkey Sluit, flowing past both properties, and for the administration of the agreement a bailiff was appointed. It was alleged that the defendants had employed the bailiff, Daniel van der Berg, to alter the bed and flow of the furrow opposite the property of the plaintiff, who contended that the work was such as to constitute a breach of the agreement. The plaintiff said that the bailiff had gone on to his lucerne

camp and dug up considerable portions, and that this had been done solely to oblige the defendants, who had diverted the course of the furrow opposite their property below.

Mr. Schreiner, K.C., was for the appellants; Mr. McGregor was for the respondent.

Mr. Schreiner said that the judgment was of considerable importance to the appellants, because it was not merely a matter of damages, but the decision went right down to the root of the appellants' rights. Was the bailiff to be prevented from going on to the land of one of the higher proprietors to put the furrow in order? He was anxious to have from the Appeal court a judgment limiting the ground of the liability, so that it should not be said by these people that the Supreme Court had held the doctrine that the waterman could not go quite properly on these properties, and from a proper place take proper material. This was one of the matters which, if there were Water Courts, should not take up the time of the Supreme Court, but, unfortunately, there were no Water Courts yet. The Magistrate, in his reasons for judgment, stated that he found that the defendants had authorised the execution of the work complained of. The rights of the parties to the suit were not in dispute.

Without calling upon Mr. McGregor,

De Villiers, C. J.: For the purpose of the decision of this case the Court will assume that the defendants have the right to go upon the plaintiff's property in order to repair the furrow, but that right should be exercised in a reasonable manner, and it is perfectly clear that if the right exist, it exists by virtue of the contract to which Mr. Schreiner has referred, and that contract expressly says that the right shall be exercised with the least injury to the plaintiff. If the defendants have the right to repair this furrow, they certainly have no right to go upon cultivated lucerne land if there is land in the immediate vicinity which is available for the purpose. As to the damages the moderate estimate made by the Magistrate should certainly not be interfered with by the Court. The Court holds that it was a wrongful act to go upon the lucerne lands for the purpose of repairing the furrow, which could have been repaired by means of material taken from a spot twelve yards from this embankment. For these reasons, I am of opinion that the appeal should be dismissed with costs.

Buchanan, J., concurred.

[Appellants' Attorneys: Michan and de Villiers; Respondent's Attorneys: Syfret, Godlonton and Low.]

CRIMINAL APPEAL.

REX V. HOPI AND NOPATYELANA

This was an appeal from a conviction and sentence of the Assistant Resident Magistrate of Umtata, the appellants having each been found guilty of sheep-stealing, and sentenced to nine months' imprisonment and to pay 15s., the value of the alleged stolen ram. Mr. W. P. Buchanan was for the appellants; Mr. Howel Jones appeared for the Crown.

From the record in the Court below it appeared that the Magistrate had taken the evidence of two witnesses who were related to the prisoners. There was an old-standing land dispute, and bad blood existed between the relatives. The vast majority of the evidence went to show that at the inquiry held soon after the alleged discovery of the remains of the sheep, the complainant, Lwabe, did not even suspect the two prisoners, or, for that matter, the Makweta boys. Mr. W. P. Buchanan for the appellants argued that bearing in mind the whole of the circumstances, he submitted that the Magistrate should have given the accused the benefit of the doubt.

Without calling upon Mr. Jones for the Crown.

De Villiers, C.J.: The ground of appeal in the present case is that the accused ought to have the benefit of the doubt, but if the Magistrate had no doubt whatever, then there was nothing for the appellant to have the benefit of, and the only question now is whether the Magistrate was right in having no doubt on the matter at all. Well, there were two witnesses for the prosecution who positively stated that they saw the two accused going to a certain spot and throwing something into the marsh, and that upon going to the spot these two witnesses saw the skin of the sheep which had been stolen. It is simply a question of credibility. A host of witnesses were called for the defence to show that Montanana's subsequent conduct was inconsistent with his evidence, but, as the Magistrate said, these witnesses were in some way related to the Makweta boys, and wanted to protect all the boys in the hut. Upon this evidence I think the Court would not be justified in interfering with the decision of the Magistrate. I may add that the proceedings had been confirmed in the Eastern Districts Court by one of the judges in that Court. The appeal will be dismissed.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

Es parte LEWIN AND { 1904.
OTHERS. { Aug. 16th.

**Lien—*Jus retentionis*—Artificer—
Removal of goods.**

Where an artificer who has manufactured an article from materials belonging to another has voluntarily delivered the article to the owner, he loses his right of retention or lien, and is not entitled to claim an attachment of the article pending an action for his wages, nor is he entitled to an order restraining the removal of the article to another place within the jurisdiction of the Court in the absence of proof that he would be prejudiced in his rights by such removal.

Mr. Alexander moved, as a matter of urgency, for a rule *nisi* temporarily interdicting the removal of certain goods now lying at the Cape Town Railway Station, pending an action to be brought by the five petitioners for money alleged to be due for work done. The matter, it was stated by counsel, had already been before His Lordship the Chief Justice in Chambers. The goods were still in the hands of a third party, the Railway Department of the Colonial Government, and they might send them away from the jurisdiction of this Court, although, counsel admitted, they were intended to be sent to Kimberley. The petitioners said that the respondent Yates had not only refused to pay them the money owing to them, but he had threatened them with assault for applying to him. His refusal to pay showed *mala fides*.

[De Villiers, C.J.: No, only that he denies the debt.]

I ask only for a rule *nisi*, and I am quite willing that the costs of this application should abide the result of the trial.

De Villiers, C.J.: The applicants allege that they have a lien or right of retention in respect of the chains made by them for the respondent, but they admit

that the chains have been delivered to the respondent, and they do not allege that the respondent obtained the chains by fraudulent or other illegal means or that he is in insolvent circumstances, or that there is any danger of his removing the chains out of the jurisdiction. The applicants intend to bring an action for the amount due to them for their skill and labour in the manufacture of the claims, and, if their statements are correct, they would have had a right of retention until payment of the amount due to them. But this right ceased upon their voluntarily delivering the chains to the respondent, and I therefore refused an application for the attachment of the goods based upon the applicants' alleged lien. They now apply for an order restraining the respondent from removing the chains to Kimberley pending the action, but, in the absence of any proof that the applicants would be prejudiced by such removal, I am not prepared to make the order.

[Applicant's Attorney: J. Buirsiki.]

CONRADIE V. GRAY. { 1904.
{ Aug. 16th.

Pounds Act—Damages for trespass—Pound-master—Notice to owner.

Oxen belonging to one V. trespassed on the plaintiff's lucerne field and did considerable damage. At the time of the trespass the oxen were in charge of the driver of V.'s wagon, and due notice that the plaintiff intended to have the damages assessed by arbitration was given to the driver in terms of the 36th section (sub-section 1) of Act 15 of 1892. Notice was also given to the defendant, as pound-master of the pound, in which the plaintiff impounded the oxen, that proceedings for the assessment of damages were being taken and that the oxen were not to be released, but, notwithstanding such notice, the defendant delivered the cattle to V. on payment of pound fees only.

Held, that notice to the driver, as caretaker, was sufficient notice to the owner, and that on assessment of the damages by arbitrators, the plaintiff was entitled under the 35th

*section to recover the amount
from the defendant.*

This was an appeal from a judgment of the Resident Magistrate of Tulbagh. The appellant Conradie, who is pound-master of the field cornetcy of Breede River, had been sued by the respondent, James Gray, farmer, Waverley, for damages to lucerne land by oxen, and had been ordered to pay £5 15s. damages, less 15s. paid on account, with costs of suit.

From the record in the Court below it appeared that certain ten head of cattle belonging to one Vergotynner, of Ceres, trespassed on the lucerne lands of the plaintiff, Gray. Gray waited for the owner, but none turned up, and he then handed the stock over to the charge of the pound-master, who impounded the cattle, but subsequently—next day—the stock were released and given over to the owner. The plaintiff sued the pound-master as and for damages sustained to lucerne lands under section 35 of the Pounds Act (15 of 1892). He said that the pound-master owed him £15 15s., and neglected and refused to pay the said sum, made up thus: Damages to lucerne land, £15; arbitrators' fees, 15s.

The Magistrate, in his reasons for judgment, said it appeared clear that there was cause of action against the defendant, the pound-master, for release of the cattle after so short a period from the date of the cattle being impounded, but, inasmuch as the award was only made with one landowner, with a Justice of the Peace as umpire, and the award was beyond what it was probable the damages committed by Vergotynner's cattle were, and that damage had been caused by other cattle, the Court would award £5 as a reasonable amount for damage to lucerne by ten oxen in a field for five or six hours at the most.

Mr. Burton (for appellant): The plaintiff in the Court below relies upon the provision in the Pounds' Act as to claiming damages from the pound-master. Since he claims under that Act he must be held bound by its provisions. With these provisions he has not complied, and therefore cannot claim damages under the Act. Sections 32 and 35 are particularly clear. As to assessment of damages see section 38. The plaintiff, having elected to have his damages assessed under section 36, was bound to comply strictly with the provisions of that section. No notice was given as presented by sub-section (1). The plaintiffs treated the man in charge of the animals as the owner. He knew Vergotynner to be the owner and he could easily have sent a note to him as he was only 7 miles away. Instead of doing that he sends a message by Jonker who gave the message to a wagon-driver.

[Buchanan, J.: Was not that Pietrus Vergotynner?]

It does not appear that it was. The owner of the animals heard nothing about arbitration until it had been concluded and hence he had no opportunity of appointing an arbitrator in terms of sub-section (2). Thus the very object of the Act was defeated. If the pound-master had released the cattle, as the plaintiff wished him to do, he might have got into trouble with the owner of the animals. The plaintiff elected to avail himself of a special privilege granted by the Pounds' Act, and that being so he should have complied strictly with the provisions of that Act. Under section 35 the pound-master was not bound to detain the cattle after the arbitration. The plaintiff gave no notice to the Field Cornet, he called in a J.P., but that is not the same.

[De Villiers, C.J.: The sub-section says the Field Cornet or a J.P.]

Yes, but preferably the Field Cornet. The sub-section as to notice speaks specially of the Field Cornet.

[De Villiers, C.J.: Do you say that notice must have reached the owner of the cattle trespassing within 24 hours?]

Yes.

[Buchanan, J.: Notice was given to his servant.]

That is not sufficient. The object of the provisions of the Act as to notice is to give the opposite party an opportunity of appointing an arbitrator. Here the defendant had no opportunity of doing so; and has he had not, the arbitration was invalid and plaintiff was not entitled to damages.

[De Villiers, C.J.: Within what time may they assess damages?]

The Act does not fix a time but the defendant must have an opportunity of appointing an arbitrator.

Mr. Schreiner, K.C. (for the respondent): Notice to the man in charge of the cattle was notice to the owner. The pound-master could not adjudicate as to whether a proper mode of procedure had been adopted or not. If the owner merely sends a notice to the pound-master and takes no steps with a view to arbitration, the pound-master has no power to release. In this case there has been a substantial compliance with the terms of the Act. A J.P. can assess damages equally with the Field Cornet. See sub-section (2) and (3) by which we must interpret sub-section (1) of section 36. As to notice to the owner, this notice need not necessarily be sent either by post, or wire, or in writing. The person in charge of cattle is the owner's agent.

[De Villiers, C.J.: Would that apply to a shepherd?]

Certainly: the owner might be living anywhere.

[De Villiers, C.J.: He might be; but in this case he was close at hand.]

That makes no difference as to the legal position of the parties.

[De Villiers, C.J.: If the owner is known, notice must be given to him. If he is not known, no notice to him personally is required. The only damages you can recover are those assessed by an arbitrator.]

How is it possible to give notice to the owner if he is many miles away? Even a legal summons can be served at a man's last known place of residence, and if the owner is travelling from place to place, the person in possession stands in the place of the owner.

[De Villiers, C.J.: Here the true owner was known.]

Not to the respondent: he thought that P. Vergotynner was the owner.

[De Villiers, C.J.: But you were bound to give him a chance of appointing an arbitrator. If you did not know the owner you should have proceeded as the Act directs.]

It was known who the owner was: at least we thought we knew who he was. Section 3 says that the caretaker is to be considered the owner.

Mr. Burton (in reply): I admit that that section escaped my notice. Of course it makes a great difference. But there is no evidence that notice was given to Pietrus Vergotynner.

De Villiers, C.J.: Considerable time would have been saved in this case if the Court had been referred to section 3 of the Act, which defines the owner as being the proprietor of any animal or the agent or caretaker of the proprietor. This interpretation removes all the objections which have been pointed out to the construction contended for on behalf of the plaintiff. Under section 35 the pound-master is clearly liable in case of the release of any animal which had trespassed, without payment of the damage or trespass money. It was proved in the present case that the pound-master had written notice that it was the intention of the plaintiff to claim, not the ordinary trespass money, but special damages for entering the lucerne land. The pound-master, knowing that, chose to allow the owner to obtain these animals. Now, I quite agree with Mr. Burton that the plaintiff could not recover damages from the pound-master unless he had taken the proper steps to entitle him to recover from the owner of the animals. He contends that as no notice had been given to the owner in terms of the 1st sub-section of the 36th section the subsequent assessment of damages was wholly illegal. The definition of the word "owner" given in the 3rd section removes this objection because due notice was given to the driver of the wagon who was found alone at the wagon and may fairly be regarded as the caretaker of the animals. A further question has been

raised whether the fact that the Magistrate ignored the assessment and awarded the amount of damages himself prevents the plaintiff from succeeding under the 35th section. The damages as awarded were less than the amount of the assessment.

If there had been a cross-appeal by the respondent, the Court would probably have supported that cross-appeal. The award had been made in a proper way, and the damages had been duly assessed, and the Court would probably have awarded damages for £15, and the fact that the Magistrate went wrong on that point did not justify the Court in reversing his decision in regard to the £5. The appeal must be dismissed, with costs.

Buchanan, J., concurred.

[Appellant's Attorney: V. A. Van der Byl; Respondent's Attorneys: Faure, Van Eyk and Moore.]

UYS V. MOLL AND CO.

Partnership—Liability for partnership debts.

This was an appeal from a judgment of the Acting Resident Magistrate of the Paarl, the appellant and one Epstein having been sued in the Court below by the respondents for £48 2s. 9d., goods sold and delivered, and ordered to pay that amount.

It appeared from the record in the Court below that the defendant had denied liability, as well as a partnership alleged in the summons between Uys and Epstein. The defendant Epstein was in default at the trial. The goods were sold and delivered to the Paarl Model Mineral Baths and Sanatorium of Fairview, Lady Grey Bridge Station, of which concern Uys was alleged to be a partner with Epstein, and it was also stated that Uys had given orders on several occasions for goods for the baths.

Mr. Upington (for appellant): In this case the Magistrate found that there was a partnership and that the conduct of the parties supported the assumption. I contend that in default of an agreement as to profit and loss there can be no partnership. As to holding out, there is a difference between the case of a man who does not notify his retirement from a partnership and that of a man who merely allows his name to be used.

[Buchanan, J.: This is one of the strongest cases of holding out that you can have. Here the partners order goods and have them booked in their joint names.]

Two men went into a shop and ordered goods to be booked to Uys and Epstein. Neither of the two said that he was either the Uys or the Epstein in question. The creditor ought to have made

enquiries as to whom he was dealing with.

Mr. Close (for respondents) was not called upon.

De Villiers, C.J.: This was an action for goods supplied to the defendants, Uys and Epstein, by the plaintiffs, from the 19th March to the 10th September, 1903. It is quite clear from the evidence, and especially from the document marked "A," that the defendants, Uys and Epstein, believed themselves to be partners. They called themselves partners in the document. Not only that, they issued cards upon which the words "Uys and Epstein" appear, and it is quite clear that the Uys and Epstein referred to were the defendant and Epstein. That is perfectly clear. It is not suggested that there was any other firm of Uys and Epstein, and seeing that this document treats them as partners they must have intended by the names on the cards Uys and Epstein to have referred to themselves. These two defendants went together to the plaintiffs' shop, and they there ordered goods, but now it is said that Epstein had already begun purchasing before the two came together. That might affect the item before they came together, but there was a clear ratification by Uys on the 26th March of the purchase made between the 19th and that date. He had given cards in which the partnership appeared, and he said these goods were to be supplied for the partnership. In my opinion, there was ample evidence to justify the Magistrate in coming to the conclusion that credit was given to both defendants. Clearly, both the defendant and Epstein were the persons meant by Uys and Epstein appearing on the card. Under the circumstances, I am of opinion that the appeal must be dismissed, with costs.

Buchanan, J., concurred.

[Appellant's Attorneys: Faure, Van Eyk and Moore; Respondent's Attorneys: Moore and Son.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSE.

GARAGE CONTINENTAL CO., { 1904
LTD. V. VAN DER RIET. { Aug. 16th.

This was an action in which the plaintiffs, the Garage Continental Co., Ltd., of Cape Town, sued the defendant, Joseph van der Riet, to recover the sum of £536—£500 the purchase price of a certain

motor-car, alleged by the plaintiff company to have been sold to the defendant. The rest of the claim was made up of £36, amount due for work done, and material supplied in connection with a couple of other cars, which were stored for him, and attended from time to time by the plaintiff company. The defendant, in reconvention, claimed £150 for damages sustained in consequence of the plaintiffs refusing to hand over to him two motor-cars, stored by him on their premises.

The plaintiffs' declaration stated that they were a limited liability company, carrying on business at Cape Town as the Garage Continental, Ltd. The defendant was Joseph van der Riet, of Cape Town. On or about the 28th March last plaintiffs received from Messrs. I. and J. Hermann a certain motor-car, called the "Comfortable" car. A few days after the defendant came with a representative of the firm of I. and J. Hermann, and informed Mr. Hoeschen, the plaintiffs' manager, that he (the defendant) had purchased the car from I. and J. Hermann, and the defendant requested the plaintiffs to store the car at the Garage for the sum of £2 10s. a month. At the time plaintiffs received the car, it was not in perfect order, and the plaintiffs, on the defendant's behalf, put it in perfect order. On or about the 20th April, Mr. Hoeschen drove the defendant to Hout Bay in a car called the Benz Parsifal, belonging to plaintiffs, for the purchase of which the defendant was then in treaty. The next day the defendant purchased the car for £500, promising to pay on the 15th May, until which time defendant requested plaintiffs to keep the car. Defendant did not pay the amount, but had put plaintiffs off with promises and various excuses. About the last week in April the defendant took the Benz Parsifal from the Garage to Kraaifontein for a drive, and took upon himself the risk and responsibility for plaintiffs, being compelled to send a man unacquainted with the management of the car to drive it. On or about 27th April plaintiffs, at defendant's request, caused the Benz Parsifal to be fetched from D'Urban-road, at which place defendant had left it, broken down. The plaintiffs had in their possession three cars belonging to defendant stored at defendant's request, which they would deliver up on payment of the sum of £536 12s.

The defendant in his plea and claim in reconvention stated that he admitted the first and second paragraphs of the declaration with regard to paragraphs 3, 4, and 5, and he stated that in or about the beginning of April he took over from Messrs. I. and J. Hermann for a debt a certain motor-car called the "Comfortable" car, then stored with plaintiffs. It was agreed that the car should be delivered to defendant after certain repairs were effected by plain-

tiff on behalf of Messrs. I. and J. Hermann. These repairs were effected by plaintiffs, and delivery of the car was on the 15th April taken from them by defendant, who then arranged for the storage of the car by plaintiff at the rate of £2 10s. per month. Defendant admitted that after April 15 he on various occasions took out the car, and that at divers times after that date he arranged to have certain repairs done to the car. Defendant admitted that towards the end of April Hoeschen invited him for a drive to Hout's Bay in the Benz Parsifal car, and then attempted to sell the car to him, but he denied that he ever purchased the car. He further stated that in or about the month of May Hoeschen agreed with Hermann to take Hermann and defendant to Kraaifontein. Hoeschen did not keep his appointment, and on Hermann and defendant reaching the Garage, one Bloch, an employee of the plaintiffs' firm, offered and did drive them out to Kraaifontein in the Parsifal car, which broke down at D'Urban-road on the return journey. Defendant was not liable in any way for the injury to or the fetching of that car, nor for any expenses in connection with the journey. Defendant denied the correctness of the account and disputed his indebtedness, with the exception of certain of the items, amounting to £15 11s. Defendant admitted that plaintiffs had two motor-cars, viz., the Comfortable car and a Kudell (De Dion) car, belonging to him, in their possession. He had frequently before the action was brought demanded delivery of the same, and offered to pay the sum of £15 11s., but plaintiffs had refused to accept that sum or deliver the cars. They had wrongfully set up the claim, and had wrongfully and unlawfully detained the cars, whereby the defendant had been deprived of the use and possession of and profit derivable from the cars, and had thereby suffered damage in the sum of £150. Defendant said that he was now justified in refusing to pay over to plaintiff the sum of £15 11s., and was entitled to bring it up in account in this action against the sum claimed by him.

Plaintiffs' replication and plea to claim in reconvention stated:

1. For a replication to the defendant's plea, the plaintiffs say that, save as to admissions therein contained and of the plaintiffs' cause of action, the plaintiffs deny all and singular the allegations of fact and conclusions of law in the defendant's plea contained, and deny specially that the defendant has suffered the alleged or any damage for which the plaintiffs are liable, join issue thereon, and again pray for judgment in terms of their declaration.

2. And for a plea to the claim in reconvention, the plaintiffs (now defendants in reconvention) say that they

crave leave to refer to the matters pleaded above and in the declaration in this suit, and by reason thereof they join issue upon the said claim, except in so far as liability to plaintiffs is therein admitted, and save as above, pray that it may be dismissed, with costs.

Mr. McGregor (with him Mr. Struben), for plaintiff. Mr. W. P. Buchanan, for defendant.

Karl Hoeschen, manager to the plaintiff company, stated the defendant purchased the "Comfortable" car, which had been stored at plaintiffs' store by Messrs. I. and J. Hermann. Plaintiffs' firm did certain repairs to the machine before it was handed over. He put a new tube on one of the wheels. When defendant had the car a short time, witness put a new tube on another wheel. Defendant hired some of witness's men to teach him to drive the car. Plaintiffs agreed to store and lubricate the car at the rate of £2 10s. per month; all the repairs were to be paid for. The witness (continuing) gave evidence as to the alleged sale of the car to the defendant, which he stated occurred after a drive in the Benz Parsifal car to Hout Bay. The defendant promised to pay on the 15th May, but he did not. Witness then asked him for payment, and he replied that he was expecting a cheque from the military, and that when he got it, he would pay for the car. He, however, never paid for it. The sum of £36 was made up of "extras" for the use of the car.

Cross-examined by Mr. Buchanan: Witness's firm, first of all, had the car repaired for Messrs. I. and J. Hermann. Defendant took the car over. Before he took the car, he said there were certain repairs he wished to have completed. They were done. Witness was very anxious to sell the Benz Parsifal. The defendant asked him to drive him round to Hout Bay in it. Witness did not offer to do so until asked. The sale occurred on the 22nd April. In the account witness sent to defendant in June, he did not charge for the motor-car, but he mentioned it in the letter sent to defendant which accompanied the account. Witness agreed to take the "Comfortable" car from him in part payment. He agreed to allow him £75 for it. The defendant was represented to witness as a man of means, and he spoke glibly of cheques for thousands of pounds. Every time witness saw defendant, he asked him for the cheque.

James Marcus Smith, bookkeeper, in the plaintiff company, stated he saw the defendant in the store towards the end of March. He told witness he had purchased the "Comfortable" car from I. and J. Hermann. After some time defendant told witness that he had purchased the "Benz Parsifal" car from the plaintiff firm. Defendant, after purchasing it, used to use the "Comfort-

able" car. He also used the Parsifal car. About the 29th May, witness saw defendant in company with Hoeschen, at Somerset. They were driving the Parsifal. Defendant took the Parsifal car out, with Bloch driving it. Plaintiffs would not allow Bloch to drive it unless defendant took responsibility. He did so, and took the car out. Defendant seemed very proud of the car, and showed it to all his friends. He used to take his friends down to the Garage to see it.

Cross-examined by Mr. Buchanan: Defendant asked plaintiffs to send the Benz Parsifal car out with him, as he intended buying it. He was debited with the cost of the car on the 22nd April.

Mr. Buchanan said that in view of what had been suggested by the Court, his client would go into the box and give his version of what happened.

James Smith (recalled) stated that it was on the 22nd April that the defendant bought the car. Hoeschen took the defendant round to Hout Bay.

Jacob Bloch, motor engineer, employed by the plaintiff company, stated that the car was bought by the defendant. Witness asked defendant to give him the job of driving the car. The defendant said he paid £500 for the car. He added that Hoeschen promised him two covers and tubes.

Cross-examined by Mr. Buchanan: It was after the defendant bought the car they went to Kraaifontein. There was no mention of giving the other car in exchange. The defendant did not know that witness could drive the Parsifal car.

Another witness stated that the defendant asked for the Parsifal car, but he explained that Mr. Hoeschen was to drive the car himself. The defendant said that he had bought the car, and that he was entirely responsible. The last time he saw defendant was on the 6th July, when he was creating a noise at the place.

Cross-examined by Mr. Buchanan: He saw Hoeschen making the entry on the day of the sale. He was certain Herman said that the defendant had paid for the car, and he allowed the car to leave the place on the strength of that arrangement.

Albert Wm. Applegate, motorist, formerly in the employ of the plaintiff company, stated that when he was out with the defendant, he said that he would like to buy the Parsifal car. He had seen the defendant out driving in the car at Hout Bay. The defendant told him that he was going to buy the car for £500.

Cross-examined by Mr. Buchanan: When the defendant was at Hout Bay witness understood that he had bought the car after a satisfactory trial.

Mr. McGregor closed his case.

The defendant said that he agreed to build six houses for Hermann at £150

each. It was arranged that he should take the "Comfortable" car for £150 in part payment. He denied purchasing the Parsifal car for £500.

By Hopley, J.: Hoeschen really took him out in the car to get further evidence that witness had bought the car.

Mr. Buchanan closed his case and having been heard in argument on the facts,

Hopley, J., said that there was no law in the case. It was purely a question of fact, and it would be sufficient to say that he believed the evidence for the plaintiffs, and disbelieved the evidence for the defendant. There would be judgment for the plaintiff, with costs.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

NATIONAL BANK V.
GRAAF.

{ 1904.
Aug. 17th.
" 18th.

Principal and surety—Construction of contract—Interest.

The defendants, as sureties and co-principal debtors, undertook to pay to the plaintiff Bank on demand all sums of money which the principal debtor should from time to time owe to the Bank, "provided, nevertheless, that the total amount to be recoverable from them shall not exceed in the whole the sum of £3,900, together with such further sum for interest, charges and costs as shall from time to time have accrued or become due and payable thereon."

Held, that the defendants were liable for interest on the debtor's overdraft of £3,900 for the whole period covered

by the guarantee and not merely from the date of demand for payment made on them.

This was an action in which the plaintiffs sought to recover from Mr. Graaff the sum of £4,581 5s. 2d., with interest at the rate of 7 per cent. thereon from the 31st March, 1904, upon a certain guarantee signed by the defendant and Sir James Sivewright, for advances to the Cape Canning Company. Sir James, it was stated, had not been summoned, and was not before the Court.

The declaration set out that on or about the 15th August, 1898, the defendants, in consideration of the plaintiffs allowing a certain company, styled the Cape Canning Company, Limited carrying on business in Cape Town, certain banking facilities, jointly and severally bound themselves in writing as sureties, and co-principal debtors for repayment on demand by plaintiffs of any sum or sums of money which the said company may from time to time owe or become chargeable to the plaintiffs for, including commission, discount, and all other usual charges, provided that such amount so guaranteed should not exceed in the whole £3,900, together with such further sum for interest, charges and costs, as should from time to time have accrued or become due and payable thereon. Thereafter the plaintiffs, in terms of the said guarantee, allowed the Canning Company certain banking facilities, and from time to time advanced sums of money to the company, and permitted it to overdraw its account at the plaintiff bank, the amount so advanced, with interest and charges thereon being £4,581 5s. 2d., which amount was still due and owing. Plaintiffs, in terms of the guarantee, claimed payment of the said amount, with interest and charges thereon, from the defendants, one paying the other to be absolved.

The defendant, in his plea, admitted the guarantee, and that banking facilities were granted by the plaintiffs to the Canning Company. He said that on the 20th November, 1903, the plaintiffs demanded that the defendant should liquidate the overdraft. He tendered on the 13th May, 1904, to pay £3,900, together with interest from the 20th November, 1903, taxed costs to the 13th May, 1904, which tender he now repeated, but he refused to pay the amount claimed in the declaration.

Mr. Upington (with him Mr. Sutton) was for the plaintiffs; Mr. Schreiner, K.C. (with him Mr. Van Zyl), was for the defendant, D. P. de Villiers Graaff.

Mr. Upington said he took it that the real point was as to the construction of the guarantee, whether the clause upon which, apparently, the defendant relied—

i.e., that his liability was not to exceed in the whole £3,900, together with such further sum for interest, charges, and costs—was to be read as if the interest, charges, and costs were only to accrue from the date upon which liquidation of the overdraft was demanded.

[De Villiers, C.J.: There is no question raised as to compound interest?]

Well, they don't admit the guarantee of the amount claimed, but they don't specifically raise the point.

Mr. Schreiner said that his client's position was that he did not admit the correctness of the amount. They rested on the plea that plaintiffs only demanded from the defendant on the 20th November, 1903, and the defendant tendered to the bank on the 13th May, 1904, with taxed costs to date, the amount of £3,900, with interest. Their position was that, between the bank and the Canning Company, it was current custom to charge compound interest from month to month, and add the compound interest to the amount of the overdraft, and that when the stop came in November, 1903, and the plaintiffs demanded from the sureties that they should pay, the plaintiffs could not go on charging compound interest from that date. The defendant was prepared to pay ordinary interest from the date when the plaintiffs made the demand. He (counsel) could not get away from this, that it was customary for the bank to state the monthly overdraft, and to state interest on it. His position really was this, that the defendant admitted that in respect of the overdraft, in accordance with banking custom, the plaintiffs would be justified in adding interest monthly upon the amount of the overdraft, but did not admit that compound interest might be charged against him in respect of the period after the demand was made upon him for payment by the bank under his guarantee.

Wm. Clarke Cruikshank, manager of the plaintiff bank, said that in August, 1898, the Canning Co. were granted banking facilities, and in consideration thereof, a guarantee was given by the defendants. Witness produced an extract from the bank's books showing the state of the Canning Company's account, and said the memorandum of account annexed to the declaration was prepared under his supervision. On the 30th November, 1901, the company's overdraft, including interest, was shown to be £3,900. After that date until the 31st March, 1904, no amounts were included for further advances, but compound interest was added monthly, in accordance with banking custom. About August or September last year they made a demand on the Canning Company to liquidate the account. On the 20th November, 1903, they wrote to the defendant, Graaff, demanding liquidation of the sum of £4,580, plus interest, Mr.

Graaff and Sir J. Sivewright were directors of the Canning Company. In May last the defendant Graaff, through his attorneys, tendered £3,900, plus interest.

Cross-examined by Mr. Schreiner: The account showed that in October, 1898, the overdraft had already exceeded £3,900. The overdraft had never really been below £3,900 since October, 1898. For a few days in November, 1901, it sank below that figure, but a short time after that it rose again. There was no advance made to the Canning Company after November, 1901. The company's account was daily operated upon, until December, 1902, when the business was given up.

[De Villiers, C.J.: Why, if the overdraft was £3,900 in October, 1898, did you not commence the compound interest from that date?]

Because the interest had been debited in the interval, and the interest was merged in the principal. The £3,900 included both principal and interest.

[De Villiers, C.J.: Was the amount of £3,900 in November, 1901, both capital and interest?]

Yes, that is so.

[De Villiers, C.J.: Just so. Then why didn't you start the compound interest from the date of the guarantee?]

We did, my lord.

[De Villiers, C.J.: Not against Graaff?]

Yes, because it had been debited to the account monthly.

Witness afterwards said that if they had charged compound interest from October, 1898, it would have meant that they would be charging interest twice over.

Further cross-examined: They made no demand upon Mr. Graaff until November, 1903. The bank contended that the guarantors were liable for principal and interest from the date of the guarantee.

Mr. Schreiner remarked that his client's position was that he was only liable for interest from the 20th November, 1903, when the first demand was made upon him, whereas the plaintiffs charged him with interest from the 1st November, 1901.

[De Villiers, C.J.: Isn't that a question of construction of the documents?]

Mr. Schreiner: That is so, largely.

In further cross-examination witness admitted that the plaintiffs looked to a guarantee of £1,000 given by Mr. Strasburger, the managing director, to make up any deficit, after they had been paid by the other guarantors. They regarded Strasburger's guarantee as a fair one. He believed the guarantors were all covered by the Canning Company's assets. He admitted that the more the bank got from Graaff and Sivewright the more was Strasburger's liability diminished.

Counsel then addressed the Court in argument on the facts.

Cur. Adv. Vult.

Postea (Aug. 18th).

De Villiers, C.J.: The question for decision in this case is what is the true construction of a proviso to an undertaking given by the defendants to the plaintiff bank by sureties for the Cape Canning Co. The proviso reads as follows: "Provided, nevertheless, that the total amount to be recoverable from us hereunder shall not exceed, in the whole, the sum of £3,900, together with such further sum for interest, charges, and costs, as shall from time to time have accrued or become due and payable thereon." It would appear that it is the custom of banks in the case of overdrafts, such as that which was made to the Cape Canning Co., to charge compound interest on the amount of the overdraft, the interest being reckoned on the monthly balance, and to the monthly balances being added interest of the previous month. The defendant Graaff has candidly made the following admission: "That defendant admits that in respect of the current account of the Canning Co. the bank would, by custom and course of dealing, of which he was aware, be justified in adding interest monthly upon the amount of the overdraft, but does not admit that compound interest may be charged against him in respect of the period after demand was made upon him by the bank for payment under his guarantee." The plaintiffs' contention is that so long as the guarantee subsisted, the defendants were liable for whatever the Cape Canning Co. was liable, and that, inasmuch as the Canning Co. would, under the ordinary custom, be liable for the compound interest for the whole of the period, the defendants incurred a similar liability. The defendants contend that the meaning of the proviso is that interest shall only run from the date when notice was given to the defendants by the bank that the amount of the guarantee was to be paid. Mr. Schreiner greatly relies upon the fact that under the guarantee the moneys to be paid were to be paid on demand, and that in the first portion of the undertaking there is a statement that the amount to be paid is to include interest, discount, commission, law costs, stamps, and all other necessary and usual charges and expenses, and he contends that these charges cannot be supposed to be included in the subsequent proviso. In my opinion the Court should give effect to the grammatical meaning of the words used, and should, if possible, give effect to every portion of this contract. The reading contended for on behalf of the defendant would seem to ignore altogether the words, "together with such further sum for interest charges, and costs as shall from time to time have accrued, and shall become due and payable thereon." In other words he would read this

proviso as if these words which I have just read had been omitted altogether, because interest would be payable from the date of demand, and there would be no necessity whatever for adding "together with such further sum," etc. To my mind it is clear that the grammatical and ordinary meaning of these words is that there shall be added to the £3,900 such further sum for interest, charges, and costs as shall have accrued during the currency of the guarantee upon this amount of £3,900. An account has been put in which shows that in February, 1901, that is, some years after the guarantee had been given, the amount had reached £3,900. From that date all the charges for interest had been added, and ultimately the amount of £3,900 reached £4,581 5s. 2d. In my opinion, in these amounts are included all the interest, charges, and costs which under the proviso may be added to the sum of £3,900. Then a further question has been raised as to whether from the date when notice was given to the defendants compound interest should be charged or simple interest. It appears to me, however, that the admission made by the defendants, which I have already read, would be sufficient to render the defendants liable also for the compound interest after the date when they received notice. The concluding portion of the guarantee reads as follows: "And we renounce the *beneficium ordinis seu excussionis et divisionis*, and agree and declare that this guarantee is to be in addition and without prejudice to any other sureties now or hereafter to be held from the said debtor, and that it shall remain in force as a continuing security, notwithstanding any intermediate settlement of account, and notwithstanding the death or legal disability of any of us, until the Cape Town branch of the said bank shall have received notice from us, or from our respective executors, trustees, or other legal representatives as the case may be, terminating the same, and until the sum or sums due or to become due or accruing at the date of the receipt of such notice shall have been paid." The guarantee, therefore, is to be a continuing security until the money has been paid, and if the Canning Co. would have been liable, as it is admitted they were, for the compound interest after notice had been given to the defendants, I am afraid that that liability would continue to attach to the sureties. The question has been raised whether the contract of suretyship should receive a strict interpretation or otherwise, but questions of this nature can only arise where there is any doubt as to the meaning of the words used. If in their ordinary reasonable grammatical sense the sureties undertake a liability commensurate with that of the principal, the Court should not, out of a tender-

ness for the sureties, apply a construction which the parties themselves could not have intended. In my opinion, it is reasonably clear that the construction contended for by the plaintiffs is the correct one, and that judgment should be given for the plaintiffs as prayed.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

STABLEFORD V. RIMMEL. { 1904.
Aug. 17th.

This was an action in which the plaintiff sued for £26 9s. 6d., being an amount due by certain boarders, whom the defendant guaranteed to pay for. The two boarders disappeared without paying, and now the action was instituted against the guarantor.

Mr. M. de Villiers was for the plaintiff, and there was no appearance put in by the defendant. Counsel said when he applied on a previous occasion, under Rule 32nd, for judgment for £26 9s. 6d., which was owing by the defendant on a guarantee that he would be responsible for two boarders, whom he introduced to the plaintiff, the Chief Justice ordered the case to stand over to enable the defendant to file a plea, and he suggested that the parties might try and arrive at a settlement in the meanwhile. The defendant had filed a plea in which he set out that he was released by the plaintiff from liability. Counsel now reverted to the original position, and applied for judgment.

Evidence having been given by the plaintiff,

Hopley, J., granted judgment, with costs.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION. { 1904.
Aug. 18th.

Mr. De Waal moved for the admission of Jacobus Faure Rousseau as an attorney and notary.

Application granted and oaths administered.

PROVISIONAL ROLL.

BOTH A V. BUCKLEY.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £4,500, and for the property hypothecated to be declared executable, with interest and costs.

Order granted.

ARONSTAIN V. MAISEL.

Mr. Gardiner moved for a decree of civil imprisonment upon a judgment of this Court for £100 and the costs, amounting to about £70. Goods to the value of about £25 had been attached, and no other property had been found by or pointed out to the Court Messenger.

Mr. M. de Villiers (for the respondent) applied for a postponement. The respondent, he said, had been arrested on a warrant at Port Elizabeth upon a statement that he was going to leave the jurisdiction of this Court, and was going to Johannesburg. He asked for leave for the defendant to be conveyed to Cape Town.

Case postponed until the 31st August, but no order as to defendant's removal to Cape Town from Port Elizabeth.

ESTATE FARMER V. SELDON.

Mr. D. Buchanan moved for provisional sentence for £140 upon certain conditions of sale, with interest and costs, plaintiff tendering transfer.

Defendant admitted that he owed the money.

Order granted.

BOARD OF EXECUTORS V. VAN SCHALKWYK.

Mr. D. Buchanan said it seemed that in this matter the summons was served on the day after the defendant was required to enter appearance. He read an affidavit from which it appeared that the defendant had instructed an agent to sell his farm in September, and that the Board of Executors had agreed to stay proceedings on being vested with defendant's general power of attorney. The agent had replied that they could not get the necessary documents down in time, and suggested that the Board should dispense with the general power. Further correspondence took place, and the negotiations eventually collapsed. Counsel submitted that the defendant, through his agent, had waived any right to a fresh service of summons. He now moved for provisional sentence on the mortgage bond.

De Villiers, C.J.: The defendant was summoned to appear on the 1st

August, and was only served with the summons on the 2nd August. The negotiations which took place could not amount to waiver by the defendant of his right to proper service. Provisional sentence will, therefore, be refused.

WIBER V. VAN WEENEN.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £2,000, and for the property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest.

Order granted.

FEDERAL SUPPLY AND COLD STORAGE CO. V. LOGAN BROS.

Mr. Percy Jones moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

ESTATE BAM V. TALANDA.

Mr. De Waal moved for provisional sentence for £112 on a certain lease, bearing rent for four months, at £28 per month.

Order granted.

MEYER V. CORNELIS AND BRAAF.

Mr. M. Bisset moved for provisional sentence for £110 on certain conditions of sale, with interest. There was a defect of service in the case of Cornelis Braaf. Counsel asked for judgment at present against Willem Braaf.

Order granted against W. Braaf, the case against the other partner to stand over pending further inquiries as to service of summons.

BOTES AND STEYTLER V. VENTER AND NAUDE.

Mr. W. P. Buchanan moved for a provisional order of sequestration to be superseded.

Provisional order superseded accordingly.

LANDSBERG V. WILSNACH.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,200, together with interest and costs, and for property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest.

Order granted.

ZEEDEBERG AND DUNCAN V. COHEN.

Mr. D. Buchanan moved for a decree of civil imprisonment against the defendant.

Order granted.

ABDERNE V. PULVERMACHER.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £300, together with interest and costs, bond having become due by reason of the non-payment of interest. Counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

**HUDSON, VREEDE AND CO. AND OTHERS
V. FINKESTEIN BROS.**

Mr. D. Buchanan moved for the final adjudication of the defendants' private and partnership estates as insolvent.

Order granted.

**SOUTH AFRICAN TRADE PROTECTION
AND TRUST CO, V. SIERADZKI.**

Mr. W. P. Buchanan moved for provisional sentence on two promissory notes for £35, the plaintiffs being legal holders thereof by endorsement.

Order granted.

ILLIQUID ROLL.

**LANDSBERG AND CO. V. { 1904.
WEEBER. { Aug. 18th.**

Mr. D. Buchanan applied, under Rule 329d, for judgment for the sum of £14 9s. 5d., amount due for goods sold and delivered.

The order was granted.

SHAPIRO V. FREEDMAN.

Mr. Van Zyl applied, under Rule 329d, for judgment for amount due as costs in a law action.

The order was granted.

ABEL V. STOREY.

Mr. M. de Villiers applied, under Rule 329d, for judgment for the sum of £300 13s. 6d., together with interest from 1st January at 6 per cent., for goods sold and delivered, and an order authorising the Registrar to hand over a sum of £36 paid into court.

The order was granted.

**OHLESON'S CAPE BREWERY V.
MCNEILAGE.**

Mr. D. Buchanan applied, under Rule 329d, for judgment due for £178 8s. 6d., amount due for goods sold and delivered.

The order was granted.

**MULLER V. SIBBERT, MAISTER AND
STRAGAN.**

Dr. Greer moved on behalf of the defendants, under Rule 25, for leave to sign judgment against the plaintiff for not proceeding with the action within the next term after that in which the action was entered. Plaintiff had been barred under Rule 330a.

The order was granted.

CAPE GOVERNMENT V. VAN DER VENTER.

Mr. Howel Jones applied, under Rule 329, for judgment for the sum of £26 3s. 9d., in default of plea.

The order was granted.

REHABILITATIONS.

Sir Henry Juta applied for the rehabilitation of William August Lippert, who was adjudged a bankrupt fourteen years ago. His assets amounted to £38,975, and he had a deficiency of £385 19s. 7d.

The order was granted.

Mr. Bisset applied for the rehabilitation of Johannes Diederik Latagan and Susanna Johanna Petronella Latagan.

The order was granted.

GENERAL MOTIONS.

**GLASS V. GLASS. { 1904.
{ Aug. 18th.**

Mr. W. P. Buchanan moved for decree of divorce, in default of the husband's compliance with an order for the restitution of conjugal rights. He said the defendant was a member of a travelling circus, and they did not know where he was at present, as he left the circus in Natal. The requisite notices were inserted in the "Government Gazette" and Natal papers.

The case was allowed to stand over, to ascertain, if possible, the whereabouts of the defendant.

NELSON V. NELSON.

Mr. Van Zyl moved for a decree of divorce, in default of the wife's compliance with an order for the restitution of conjugal rights.

The order was granted.

ANNEAR V. ANNEAR.

Dr. Greer moved for a decree of divorce in default of the husband's compliance with an order for the restitution of conjugal rights.

The order was granted, plaintiff to have custody of the children, and defendant to forfeit the benefits of the marriage in community.

Ex parte GREEFF.

Mr. Van Zyl applied to have a rule nisi under the Derelict Lands Act made absolute.

Granted.

Ex parte STREYDOM.

Mr. Van Zyl applied to have a rule nisi under the Derelict Lands Act made absolute.

Granted.

Ex parte DE VRIES.

Mr. De Waal applied to have a rule nisi under the Derelict Lands Act made absolute.

Granted.

Ex parte JOUBERT AND OTHERS.

Mr. M. de Villiers applied on behalf of applicants, who form the consistory of the Dutch Reformed Church at the Paarl, for an order authorizing the amendment of certain deeds of transfer. The applicants wished to have the deeds changed from the Board of Directors of the Paarl Christian Association to the consistory of the Paarl Dutch Reformed Church.

De Villiers, C.J., having perused the various documents, said he would make a rule calling on all concerned to show cause why the consistory of the congregation should not be substituted as trustees in lieu of the directors of the Christian Association of all landed property in the Paarl vested in the directors.

KRIEL V. UNION-CASTLE STEAMSHIP CO.

Mr. Gardiner, on behalf of the applicant, applied for an order calling on the defendants to show cause why the plaintiff should not be allowed to sue *in forma pauperis*.

Granted.

ESTATE LILIENFELD V. WALKER.

Mr. Upington applied on behalf of the plaintiffs for leave to sue the defendant, who was resident in Johannesburg, by edictal citation.

Granted.

BRACHT V. HANSEN AND SCHRADER AND WAITE V. HANSEN AND SCHRADER.

Mr. D. Buchanan applied for the appointment of a commission *de bene esse* to take the evidence of a witness in Johannesburg.

Mr. Gardiner, who appeared for the defendants, raised no objection.

The order was granted, Mr. Saul Solomon being appointed commissioner.

STEYTLER V. KHAN.

Mr. Struben applied for an order authorizing the High Sheriff to pass transfer of certain property. He said petitioner obtained judgment against the defendant for a sum of £400 on a certain mortgage bond. He had arranged for the sale of the property for £600, which was a very good price, but the High Sheriff would not pass transfer without the sanction of the Court.

The order was granted, subject to the High Sheriff being satisfied that the price was the best obtainable.

DAVIDS V. ESTAIE DAVIDS.

Mr. Roux, on behalf of the plaintiff, applied for leave to sue *in forma pauperis*.

Granted.

JAMES V. FREDERIKSON.

Mr. Upington, on behalf of the applicant, applied for an order to restrain the defendant from selling certain landed property. Plaintiff was one of three heirs, to whom this land, situate at Um-tata, was left. They undertook to pay off all the debts in connection with the estate. The object of the defendant, the applicant alleged, was to purchase the property himself at a cheap rate.

Mr. W. P. Buchanan said he had just been briefed for the defence, and he asked for the adjournment of the case to enable defendants to reply to the affidavit.

The application was granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

VERMAAK V. VERMAAK. { 1904.
Aug. 19th.
" 22nd.

Will—Construction—Children—Grandchildren.

Husband and wife, by their joint will, bequeathed certain farms after the death of the survivor to the collective children (gezamenlijke kinderen) of the marriage, on condition that the farms should remain "perpetual family property so long as the law would allow it" to be possessed in succession by the male descendants of the testators' children aforesaid. At the time of the survivor's death there were several sons and daughters living, but one daughter C. had died during the lifetime of both testators, and her sons now claimed the life interest in the share which their mother would have enjoyed for her life if she had survived the testators.

Held, that it sufficiently appeared from the context of the will that in appointing their children as fiduciary legatees, the testators had regard to descendants of a remoter degree than the first, and intended to include children of their deceased daughter C.

This was an action brought by the plaintiffs, Frederick H. Luyt, in his capacity as the executor dative of the late Sina Philippina Jacomina Vermaak (born Kachelhoffer), and Ignatius Wilhelmus Ferreira, in his capacity as father and natural guardian of his minor sons, Gert Matthew Ferreira and Johannes Vermaak Ferreira, against Michael Anthony Muller, in his capacity as the executor testamentary of the estate of the late Johannes Cornelius Vermaak, to obtain construction of the codicil of a certain will made by the late Johannes Cornelius Vermaak.

The plaintiffs' declaration was as follows:

1. Before and on the 30th May, 1855,

and thereafter until the 29th October, 1898, Sina Philippina Jacomina Kachelhoffer (hereinafter called the testatrix) and Johannes Cornelius Vermaak (hereinafter called the testator) were lawfully married with community of goods, and the testatrix died on the said 29th October, 1898.

2. On the 30th May, 1855, the testator and testatrix executed a certain document, purporting to be their joint last will and testament, but owing to the absence of the requisite attestation, the said document is of no legal validity.

3. Thereafter the testator and testatrix duly executed in the presence of the requisite witnesses a joint and mutual testamentary writing, the original whereof is in Dutch.

4. The said testamentary writing constitutes the last will of the testator and testatrix, and thereby by mutual consent effected a massing of the joint estate with a disposition thereof subject to a life interest in favour of the survivor of them after the death of such survivor, and massing by such disposition all property of the joint estate movable and immovable, including certain farms and landed property, consisting of the farms Haarhof's Kraal and Diep Kloof, in the district of Uitenhage, and the farm Kwaga, situate in the district of Humansdorp, upon the conditions and stipulations set forth in such last will.

5. After the death of the testatrix, the testator, as survivor, adiated and accepted and enjoyed benefits of usufruct of the entire joint estate, under the said testamentary writing or will, until his death on the 11th March, 1903.

6. Before his death the testator made a last will and testament, dated the 14th January, 1903, whereunder the defendant is appointed executor testamentary.

7. The first plaintiff is the executor dative of the estate of the testatrix.

8. The second plaintiff is the father and natural guardian of two minor sons, Gert Matthew Ferreira and Johannes Vermaak Ferreira, born of the lawful marriage of the said plaintiff and the late Catherina Vermaak, who was in her lifetime a daughter born of the marriage of the testator and testatrix.

9. The plaintiffs contend that the testator could not by his last will aforesaid lawfully make any disposition of the joint estate of his late wife, the testatrix, and himself, inconsistent with the provisions of the said testamentary writing or last will, and that the property of the said joint estate must be distributed in accordance with the said provisions, and more especially contend that the said minor sons of the second plaintiff are entitled as the male descendants of their mother, a child of the testator and testatrix, to a life interest in portion of the aforesaid farms in

succession to their mother, in terms of the conditions and stipulations in the said testamentary writing set forth.

10. The defendant disputes the contention of the plaintiffs, and claims to dispose of all the property, movable as well as immovable, of the joint estate aforesaid, in accordance only with the last will of the testator.

Wherefore the plaintiffs in their capacities pray for: (a) An order declaring that all the property of the joint estate of the testator and testatrix shall be administered in accordance with the terms, conditions, and stipulations contained in the testamentary writing or last will aforesaid of the testator and testatrix, and that the first plaintiff is entitled to join with the defendant in such administration. (b) A declaration that the minor sons aforesaid of the second plaintiff are entitled, as male descendants of their mother, to a life interest in portion of the farms mentioned in paragraph 4, in accordance with the terms, conditions, and stipulations of the said testamentary writing or last will. Or that they may have such further or other declaration of rights or relief as to this Hon. Court may seem meet, together with costs of suit.

The following is the will referred to by plaintiff in his declaration: Appendix and Supplement to Testament, dated May 30, 1855.—Further, it is our express wish and mutual agreement, after the death of the surviving testator, to bequeath and bespeak jointly to our children born or still to be born of this marriage, all movable and immovable property, farms and estates, consisting of the farms called Haarhof's Kraal and Diepkloof, situate in the district of Uitenhage, Groot Winterhoek, besides the farm Kwaga, situate in the district of Humansdorp, Gamtas River, upon the following conditions and stipulations: Firstly, the abovementioned farms and estates shall remain perpetual family property, so long as the laws of this land in any wise allow thereof, to be possessed in succession by the male descendants of the testators' children aforesaid. Secondly, should there be, through circumstances (in case of decease of one of the heirs) no male descendants, or none living, all rights to and shares in the abovementioned farms and estates shall fall to and devolve upon the male heirs at the time existing. Thirdly, should one of the heirs wish to depart and live elsewhere, he or the same shall not have the right to sell or let the abovementioned farms or estates, or rights to the same, or to put others in his place, but the usufruct accruing through his or their absence shall fall to the rest of the remaining heirs.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1 to 8 of the plaintiffs' declaration.

2. He says, however, as to paragraph 6 thereof, that the first plaintiff, as executor dative in the estate of the testatrix never had any property whatsoever to administer, the testator having remained in full possession of the whole estate from the death of the testatrix up to the time of his own death, as set forth in paragraph 5 of the declaration, and the first plaintiff has never filed any administration or distribution account in the estate of the testatrix.

3. As to paragraph 8 of the declaration, the defendant says that the said Catherina Vermaak died on the 29th October, 1888, predeceasing both the testator and the testatrix.

4. As to paragraphs 9 and 10, the defendant says that the testator's said last will, dated the 14th of January, 1903, the original whereof is in Dutch, confirmed all the provisions of the said joint will, except as to the disposition of the movable property still left in the said joint estate at the death of the testator.

5. Prior to the execution of the said last will, the testator obtained the consent in writing, of all the heirs in the said joint estate, to the disposition of the said movable property, as provided for in the said last will. The document embodying such consent was duly filed with the testator's said last will in the Master's Office.

6. The defendant contends that the testator was entitled under the circumstances hereinabove set forth, to dispose of the said movable property in the manner in which he did by his said last will, and that the property in the said joint estate should be distributed in accordance with the terms of the said last will of the testator, and not of the said joint will, in so far as the terms of the two wills are inconsistent with one another.

7. The defendant admits that he disputes the claim of the first plaintiff to join with him in the administration of the property in the joint estate.

8. The defendant contends further that in any case, and whether the property in the said joint estate be distributed according to the terms of the joint will or under the testator's last will, the said minor sons of the second plaintiff are not entitled to a life interest in the said farms as claimed by the plaintiffs.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed, with costs.

The following are the documents referred to by defendant in his plea: Last will and testament: Be it hereby known that I, Johannes Cornelis Vermaak, residing at Haarhofskraal, division of Uitenhage, have hereby resolved to make my last will and testament, and to that end I declare all testaments and codicils or other testamentary acts made by me previous to the date of these presents, to be null, except the codicil at the foot of an incomplete will dated May 30,

1855, now filed in the office of the Master of the Supreme Court, being the joint will of my deceased wife, Sina Philippina Jacomina Kachelhoffer and myself, which I ratify and confirm, and the land in my estate (I) bequeath in equal shares to my sons or to their lawful heirs and descendants. All my movable property I bequeath hereby to my daughters, Maria Louisa Ferreira, born Vermaak, and Louisa Muller, born Vermaak, or their lawful descendants, to be divided by them by two impartial persons, or otherwise sold, in case she (they?) so elect. As executor and administrator of this, my estate, and effects, I hereby appoint my son-in-law, Michael Anthony Muller, of Haarhofskraal, district of Uitenhage, to carry out everything according to law and equity. I declare this to be my last and final will and my full and only intention, according to the codicil aforementioned. Thus done at Haarhofskraal, in the division aforesaid, on the 16th day of the month of January, in the year of our Lord one thousand nine hundred and three, in the presence of the undersigned witnesses.

We, the undersigned, Johannes Christoffel Kachelhoffer Vermaak, Hendrik Matheus Vermaak, Alexander Vermaak, and Pieter Vermaak, sons and lawful heirs of Johannes Cornelis Vermaak, and his deceased wife, Sina Philippina Jacomina Vermaak, born Kachelhoffer, hereby acknowledge that we give our consent to a will to be made by our father, the said Johannes Cornelis Vermaak, bequeathing all his movable property to our sisters, Maria Louisa Ferreira, born Vermaak, and Louisa Muller, born Vermaak, and hereby declare to retract all our right, which, according to law, we have to the said movable property found in the said estate, and to allow the same to fall to our above-mentioned sisters. Thus done at Humansdorp on this 14th day of the month of January, 1903, in the presence of the undersigned witnesses.

The plaintiffs' replication to the defendant's plea was as follows:

1. The plaintiffs admit the allegations in paragraph 1 of the plea.

2. They admit the execution by the sons of the testator of the document, but they say that the document does not affect in fact or law the rights of the children of the second plaintiff in respect of the farms referred to in the declaration.

Mr. Schreiner, K.C. (with him Mr. Close) for the plaintiffs. Mr. Burton (with him Dr. Greer), for the defendants.

Mr. Schreiner contended that the children of the late Catherine Vermaak were entitled to the benefits she would have, had she lived, derived.

Mr. Burton contended that, as the codicil to the will was not made for a period of ten years after the death of Catherine, it did not affect her children.

Cur. Adv. Vult.

Postea (August 22.)

De Villiers, C.J.: By their joint will the testators bequeathed, after "the death of the survivor of them, certain farms to their collective children (ezamentlyke kinderen), born or still to be born of this marriage, upon the following conditions: Firstly, the farms shall remain perpetual family property, so long as the law of the land allows thereof, to be possessed in succession by the male descendants (oir) of the testators' children aforesaid; secondly, should there, on the death of one of the heirs, be no male issue or none living, all rights to the farms shall revert to the male heirs at the time in existence." The translation annexed to the declaration is obviously incorrect in rendering the words "vermaken aan hunne gezamentlyke kinderen" into "bequeath jointly to our children."

The testators had several sons and daughters living at the death of the surviving testator, and it is common cause that these daughters, as well as the sons, were entitled to share as fiduciary heirs in the first line of *fidei-commissary* succession created by the will. It is common cause also that the male descendants of these daughters, as well as of the testators' sons, formed part of the male issue intended to share as *fidei-commissary* heirs in the second and subsequent lines of succession. But one of the daughters, Catharina, died during the lifetime of both testators, leaving issue, the two minor plaintiffs, of her marriage with Ignatius Ferreira. The question now to be determined is whether these minors, being grandchildren of the testators, were intended by the testators to share with the testators' children in the first line of succession. If they are not to be regarded as included among the children, there appears to me to be no other provision in the will entitling them to share in any subsequent line of succession. In the case of *Galliera v. Rycroft* (17 S.C.R., 569), the Judicial Committee of the Privy Council adopted the view of Voet that the word "kinderen," which was the word used by the testators in the present case, must *prima facie* be taken to refer to descendants of the first degree, but that, if it can be gathered from the context of the will that the testator had regard to descendants of a remoter degree, the word should be construed as having such a wider signification. In the present case the ruling desire of the testators seems to have been to keep the farms in the family so long as the law would allow them to be so kept. But, although the daughters were to be admitted in the first line of succession, male descendants only of sons and daughters were to be admitted in the second and subsequent lines of succession. But if the plaintiffs were now excluded from the first line of succe-

sion, their sons would also be subsequently excluded, and the clear intention of the testators to create a *fidei-commissum* in favour of their grandsons and subsequent male descendants would be wholly frustrated. Mr. Burton, in his able argument, contended that the use of the words "to be possessed in succession by the male descendants of the testators' children aforesaid" disposes of the view that the word "children" includes grandchildren, but it should be borne in mind that the *fidei-commissum* was intended to extend beyond the second degree of male descendants. If, therefore, the testators meant to include children of deceased children in the first line of succession, it would be the most natural thing for them to add that the farms are "to be possessed in succession by the male descendants of the testators' children aforesaid." The intention of the testators to make their farms a "perpetual family property" would not be effectually carried out if male descendants like the plaintiffs and their male descendants were to be completely excluded from the succession. I am of opinion, therefore, that it may fairly be gathered from the context of the will that, in appointing their children as fiduciary legatees, the testators had regard to descendants of a remoter degree than the first, and intended to include children of their deceased daughter Catharina. The adjective "gezamentlyke," as applied to the children, would also seem to indicate an intention to employ the term "kinderen" in a collective and somewhat comprehensive sense. The Court will therefore declare that the children of Catharina are entitled to a fiduciary life interest in the proportionate share of the farms, in which she would have had a life interest in case she had survived the testators. The costs of this action will be borne by the estate, represented by the defendant, the defendant to have his expenses as a witness.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorneys: Dempers and Van Ryneveld.]

Ex parte NEL AND OTHERS.

Mr. W. P. Buchanan applied in this case for the appointment of a *curator ad litem*.

The application was granted, the Rev. A. B. Ross being appointed.

COULTON V. BULL.

Professional competition—Interdict—Damages.

This was an action in which Dr. J. J. Coulton, of Humansdorp, sought

an interdict to restrain the defendant, Dr. J. E. Bull, also of Humansdorp, from practising in that district. He also claimed damages from the defendant by reason of his breaking a contract.

The plaintiff's declaration stated that on the 5th December, 1902, he engaged the defendant in England as his assistant for twelve months at a salary of £20 a month and free apartments. He also paid his passage from England. In the agreement between them it was specified that at the end of the engagement the defendant should not practise in the district for a period of five years under a penalty of £1,000. In breach of the agreement, the defendant, after the period of twelve months, carried on a practice in Humansdorp, and was still doing so. Wherefore the plaintiff claimed £1,000 damages, and sought an interdict to restrain the defendant from further practising.

The defendant in his plea alleged that he had been wrongfully and unlawfully dismissed by the plaintiff prior to the termination of the agreement. He admitted he carried on as medical practitioner at Humansdorp.

Mr. W. P. Schreiner, K.C. (with him Mr. Percy Jones), appeared for the plaintiff. The defendant filed a plea, but failed to appear.

Dr. Coulton, the plaintiff, stated he was district surgeon at Humansdorp, where he had been practising eight years. Witness entered into an agreement with defendant, who came from England and acted as his assistant. He paid him £20 a month, and gave him free quarters. On the 5th December, 1903, witness called defendant into his surgery and paid him up to date. They said nothing about the contract. He left, but returned in the afternoon, and informed witness that he intended introducing his brother, who was also a doctor, to the farmers in the district, and then leaving for some other district himself. Witness then saw his legal adviser. Defendant stopped at the hotel until the 7th December at witness's expense. The defendant advertised in the local paper that he intended practising in the district. Witness wrote to him, complaining of his conduct, but received no reply. Witness saw the defendant on the day he left for Cape Town. The defendant said witness need not bother to go to Cape Town, as he was withdrawing from the case. Witness told him that if he paid £1,000 down he would settle the case, but not without that. The defendant did not do so. The defendant had taken several of witness's patients, and had cut into his districts in other ways. Witness's practice had fallen off to the extent of £500 a year.

De Villiers, C.J., granted the interdict, and awarded plaintiff £200 damages and costs.

SECOND DIVISION.

[Before the Hon. Mr Justice HOPLEY.]

TRIAL CAUSE.

SABER V. KANSLEY. { 1904.
Aug. 19th.

This was an action instituted by the plaintiff, a broker and commission agent, to recover the sum of £456, being the balance of an account between the parties. The defendant's plea was to the effect that the plaintiff was his general agent, and received and disbursed moneys on his behalf from August, 1901, until February or March, 1904, and that it was the duty of the plaintiff to render an account, duly supported by vouchers. The defendant was willing upon the debate of such account to pay such moneys as might be due to the plaintiff, and in reconvention he claimed for such an account. The replication was that accounts were rendered in 1901 and 1902, and that the parties met and went through the accounts. The plaintiff was always perfectly willing to supply vouchers, and he said that he had supplied such vouchers.

Sir H. Juta, K.C. (with him Mr. Van Zyl), was for the plaintiff, and Mr. Gardiner (with him Mr. P. Jones) was for the defendant.

Sir H. Juta said that the parties met, and the defendant refused to pass a large number of items, and it was upon those items the issue would turn. The defendant was a dealer in fish in a large way, and he was a man who could not write. The plaintiff had acted for him in buying property and in receiving and disbursing his moneys. The defendant was an illiterate man, and there were no receipts for the moneys, except the vouchers. The question was whether it was not a case in which there should be a reference, and perhaps an additional reason for that course was that the principal witness in the case, a man named Miller, who had received a large amount of money from the defendant, was ill.

Mr. Gardiner said he had no objection to fall in with his learned friend's suggestion.

Hopley, J., approved of the suggestion, and appointed Mr. G. W. Steytler, failing him Mr. J. E. P. Close or Mr. Maynard Nash to take the reference.

GENERAL MOTION.

Ex parte TRUTER.

Mr. D. Buchanan moved for the appointment of a *curator bonis* and a

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curator ad litem in the estate of the petitioner's daughter, who was at present confined in Valkenberg Asylum, and suggested that Mr. Abraham Truter, solicitor, of Beaufort West, and Mr. Rainsford, of Cape Town, should act in the respective capacities.

Order granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

SKIPPON V. DE WIT. { 1904.
Aug. 22nd.

Mr. Schreiner moved, as a matter of urgency, for leave to plead, the defendant having been barred. The matter arose out of certain building quantities, the plaintiff suing the defendant as architect for £400 odd, as damages for inaccuracies in the quantities he had prepared. Some time would be required in which to take measurements.

Mr. Close (for the plaintiff) raised no objection, but said that his client desired the case to come to trial this term.

Order granted, giving leave for removal of bar, and setting the case down for trial on the 30th inst.

HEYDENRYCH V. JEFFREY. { 1904.
Aug. 22nd
" 29th.

Promissory note—Note payable at a particular place—Maker—Holder—Presentment for payment—Agency.

On the due date of a promissory note for £105, made by the defendant in favour of the plaintiff, and payable at the office of one S., the plaintiff presented the note for payment at the office of S., where a letter, written by the defendant, asking for a fortnight's extension, was handed to the plaintiff. The plaintiff accordingly allowed the extension of time, after the expiration of which he repeatedly requested S. to

pay, but was put off with the excuse that he had not yet succeeded in raising a permanent loan for the defendant. In fact, S. had raised the loan, and out of the proceeds had, at the end of the fortnight's interval, received payment of the note, which, however, he had not in his possession and could not hand over to the defendant. S. having absconded, the plaintiff sued the defendant, who set up the defence that S. was the agent of the plaintiff to receive payment of the note.

Held, on failure of proof of such agency, that the defendant, as maker, remained liable on the note of which the plaintiff was still the legal holder.

This was an appeal from a judgment given by Mr. Justice Buchanan, in the Supreme Court, in which the appellant was the plaintiff, and the respondent the defendant in the Court below (see 14 C.T.R., 472). The plaintiff sued the defendant for the sum of £105, upon a promissory note, dated the 15th October, and payable on the 15th November, 1902, made and signed by Thomas Jeffrey to and in favour of Benjamin Heydenrych. The case, first of all, came before the Court as a claim for provisional sentence, and certain affidavits were then put in. Provisional sentence was refused. Subsequently the plaintiff proceeded with the principal case.

Mr. Burton (with him Mr. J. E. R. de Villiers) was for the appellant; Mr. W. P. Buchanan (with him Mr. M. Bisset) was for the respondent.

Mr. Burton said that the case was decided by his lordship upon a point that the form of the note gave a clear intimation to the debtor that he was to pay James Scott. His lordship referred to another aspect of the case, which was raised upon the pleadings, viz., that if there had not been such an intimation, the conduct of the plaintiff throughout had justified the defendant in assuming that Scott was his agent to receive payment of this note, and that there was a great deal in equity to justify such a plea, but, he said, it was not necessary to decide that. The case was, decided by his lordship, if he (counsel) were correct in his reading of the judgment, on the point that by the form of the promissory note the plaintiff had given the defendant a distinct intimation that he was to pay James Scott. The question was one of

legal inference from the facts, with the exception of one or two criticisms, which it might be necessary to make of the evidence given by the defendant. The learned Judge, in his reasons for judgment, made a distinction between the case and the one which had been brought by the plaintiff against a man named Hector, or Hoctor, in which the note was made payable at the plaintiff's own house or office. He said that Heydenrych, in this case of Jeffrey's, knew nothing of the debtor, whom he had never seen, and he dealt through Scott. Instead of making the note payable at his own office, or house, he made it payable at the office of Scott. That, however, said counsel, was not quite correct, because the note provided for the payment to be made to Heydenrych himself, though it was payable at Scott's office. That, it was held, was an intimation to the defendant that he was to pay Scott. Counsel submitted that it was clear on the facts that Scott was not the plaintiff's agent in connection with the loan; Scott was not approached by the plaintiff, nor was he employed in any way in the negotiation of the loan. What was most important of all was that plaintiff never handed the note to Scott for the purpose of collecting it. Could Scott's agency, he asked, be inferred from the circumstances? It was clear that Scott was the agent, not of the plaintiff, but of the defendant. Defendant was a builder, he wanted a loan for his building operations, and he had had previous dealings with Scott. The intermediary of the parties, counsel contended, would be regarded as the agent of the party, who approached him. Jeffrey really wanted a big loan of £1,500, and he had applied to Scott for his assistance. Then the defendant urgently needed £100 on account, and he himself said that he applied to Scott. Perhaps the strongest feature in the whole case was that he paid the money to Scott without getting the note back. That in itself was overpowering against the defendant. If Scott had been the agent of the plaintiff, the plaintiff would have given him the note to collect, and if the defendant was held entitled to make a payment like this the agency, or the authority of the person to receive the payment must be very clearly proved by the defendant, and the onus lay upon him to show there was authority on the part of the person to receive payment. Counsel submitted that Scott was the agent of the defendant, and not the agent of the plaintiff.

Mr. Buchanan submitted that it would not be necessary for him to altogether establish the agency of Scott, but sufficient to rely on the place of payment being agreed upon. It could not be expected that the parties were to meet at Scott's office; they must have contemplated payment to Scott. Counsel

cited American cases to show that payment to a bank, or collecting agencies was sufficient, and submitted that the Court might decide the case on the intentions of the parties. Neither of the principals knew each other's address, or whereabouts, and there could be no doubt that the money was to be paid through Scott. Scott was an intermediary between both parties, and was as much the agent of the defendant as he was of the plaintiff.

[De Villiers, C.J.: When did Scott abscond?]

Some time in May.

[De Villiers, C.J.: When was the note paid?]

November 29.

[De Villiers, C.J.: Six months after the note was due.]

Yes, my lord, and nine months after the note was paid we got the letter. Proceeding, counsel said the delay showed that the plaintiff looked to Scott for payment. If the maxim that the person who occasioned the loss in the case of two innocent parties must suffer held good, then the responsibility would fall on the plaintiff for failing to approach the defendant.

Mr. Burton, in reply, said a bank was a well-known place of exchange, and was vastly different from the specification of some other private place. The defendant knew that he had not the note, and he made no application for the document, and any blame that could be placed on the plaintiff could equally be placed on the defendant. He submitted that the particular form of the note did not constitute an agency.

[De Villiers, C.J.: The loan was for a month at the rate of 60 per cent. per annum. There is no mention of interest after the due date of payment, and, therefore, he would only be entitled to 6 per cent. Now, is that in accordance with the usual course of dealing to take 6 per cent. ?]

Everything depends upon the security.

[De Villiers, C.J.: But, then, the security was not good enough to charge less than 60 per cent. ? What additional security had he afterwards to satisfy him that he could let six months pass without suing him.]

But he had not allowed that time to pass without making application to Scott, who was defendant's agent.

Cur. Adv. Full.

Postea (August 29th.)

Hopley, J.: In this case the following facts seem to me to be clearly established by the evidence taken at the trial: In October, 1902, the respondent was in want of money, and approached one Scott, a land and estate agent—who also apparently made it part of his business to raise loans for clients from money-lenders—with a view to obtaining a loan upon the security of some landed property owned by him,

and for that purpose he handed to Scott his title-deeds, no doubt with the necessary power of attorney to pass the mortgage, which was to be for the sum of £1,500. On the 14th of October, the loan had not been raised, and the respondent was then in urgent need of £100 to meet pressing liabilities. This fact he made known to Scott, who then approached the appellant, a money-lender, with an application for a loan of £100 for one month, on the understanding that part of the £1,500 to be raised would be applied in payment thereof, and that a promissory note for £105 would be given by respondent. As security for this temporary accommodation Scott placed in the appellant's hands the title-deeds or transfer papers relating to the property in question, together with a power of attorney, which must have been a power signed by the respondent, authorising the appellant to raise a mortgage of £1,500 on the property to secure the payment of the promissory note. On these conditions, appellant consented to advance his money, and Scott then brought him from the respondent the Note in Suit, which is in the following terms:

"Due 15th November, 1902.

"No. 223.

"Cape Town, 15th October, 1902.

£105 0s. 0d.

"On the fifteenth day of November next, I promise to pay to B. G. Heydenrych, or Order, at James Scott's office, 10, St. George's Hotel Chambers, St. George's-street, Cape Town, the sum of One Hundred and Five Pounds sterling, value received.

"T. Jeffery."

Thereupon appellant handed Scott the following cheque:

"No. 192. 154,639.

"Cape Town, 15th October, 1902.

"African Banking Corporation, Ltd., Cape Town.

"Pay T. Jeffery, or Order. One Hundred Pounds sterling.

"B. G. Heydenrych."

This cheque Scott handed to the respondent, who endorsed it, and paid it into his bank on the same date.

On the same day Scott applied to appellant for the papers relating to the property, which he required for the purpose of arranging the loan of £1,500, and these were given up to him upon his giving a personal written guarantee that the promissory note for £105 would be paid out of the sum he was raising as loan for the respondent. On the 14th of November this loan had not yet been arranged, in consequence of which the respondent went to Scott, and told him he would not be able to pay the note next day, and asked whether he could not have a short extension of time. Scott said he would see "his client."

but that something should be paid on account, whereupon respondent gave him £4, and signed a request for extension on the following terms: "I wish Mr. Heydenrych to hold over the loan for 14 days upon my property, re my promissory note to him.—Yours, T. Jeffery, November 14, 1902." On the due date, appellant presented the note for payment at Scott's office, and was handed the above request by Scott, who told him that the loan was not yet through, and might take a couple of weeks longer to arrange. Appellant thereupon agreed to the extension. During the next fortnight, Scott succeeded in borrowing the £1,500 for respondent from Mr. Hofmeyr, and on the 29th of November the respondent gave Scott a cheque for £101, the balance due on the note. The cheque was as follows, the body thereof being drawn out by Scott, "November 29, 1902.—The Standard Bank of South Africa, Limited, Woodstock. Re. Heydenrych. Pay James Scott one hundred and one pounds sterling.—T. Jeffery." This cheque was endorsed by Scott, and the moneys arising therefrom were converted by him to his own use, as the £4 previously given to him on account had likewise been treated. When respondent gave Scott this cheque he asked him for the note and Scott told him that he had not got it, but promised that he would get it the next day. The respondent called twice after that for the note, but Scott put him off, and finally promised that he would send it by post, which he never did. Meanwhile, appellant, who never parted with the note, had applied after the 29th of November to Scott, or at Scott's office, but Scott told him that the loan had not yet been arranged, and put him off from time to time. He seems, moreover, to have asked for respondent's address, but was put off on that point also by Scott, saying that he was his agent, and was raising the loan for him. There is no doubt that all this while both parties thought Scott to be an honest man, and he seems to have been plausible enough to put them both off from time to time. Scott absconded in May, 1903, and his estate was sequestrated as insolvent. And in August, 1903, appellant wrote to the respondent demanding payment of the note with interest from its due date. The letter stated: "This note was payable at the office of Mr. Scott, Cape Town, and upon application there I was always put off with the reply that Mr. Scott was raising a bond for you, and the money would then be paid. Mr. Scott has since gone insolvent, and after some difficulty, I have at last ascertained your present address." The respondent refused to pay, and the appellant instituted legal proceedings on the note, and claimed provisional sentence, which was, however, refused, whereupon he proceeded to the principal case, and the judgment now appealed from was given

against him. The learned Judge found that the appellant knew nothing of his debtor, the respondent, whom he had never seen, and with whom he had never had personal communication, but that he dealt with him entirely through Scott, and that he accepted the note payable at the office of Scott, and not at his own place of business. This is entirely in accordance with the evidence, and thereupon his lordship's ruling is that the appellant thus intimated to his debtor that Scott had authority to receive payment on his behalf. With all due deference to the ruling of so experienced a Judge I cannot hold that any such inference can be drawn. The terms of the note are clear enough, and they state not only that payment was to be made at Scott's office, but also that it was to be made to B. G. Heydenrych, or to his order. That is the true and complete tenour of the note, and it lies upon the respondent to show that he carried out his contract and fulfilled all that he had promised to do. It is true that he has proved that he paid to Scott the full amount of the note by the date to which payment had been deferred, but to be absolved against the holder of the note, he must go further, and show that Scott had authority to receive the payment. The learned judge seems to have held that Scott was the appellants' agent in the whole of the matter. I cannot find that the evidence in any way supports this proposition. On the contrary, there seems to me to be abundant and conclusive evidence that Scott was the agent throughout of the respondent. The respondent engaged him to raise on mortgage a loan of £1,500 for him, and this he did, receiving, no doubt, the usual commission from the respondent for such services. Whether he also received a further amount from the respondent for raising the temporary loan from the appellant, or whether he considered that those services were included in the larger business he had undertaken, is not quite clear; but it seems certain that he was not paid anything at all by the appellant. When respondent found that he could not on its due date meet the note, he went to Scott, asking him to get a short extension, and signed the request to appellant to that effect. This request Scott placed before the appellant when he presented the note on its due date, and the extension was granted. On this his lordship finds that, at Scott's request, the time for payment was extended, and this is looked upon as additional proof of his agency for appellant. But, surely, it is exactly the reverse. Scott told respondent that he would have to see the creditor on the matter, and actually got him to sign a request to the creditor (to be presented, it is true, by Scott) for such extension. This was a clear intimation to respondent that the creditor was the

person directing affairs, and that a direct application for leniency would have to be made to him. It must be held on such evidence that the extension of time was given by the appellant on the request, not of Scott, but of the respondent, and it seems to me quite clear that Scott, in placing this request before the creditor, was acting as he had acted throughout, as the agent of the respondent and for his benefit alone. A further proof of Scott's agency for appellant is deduced in the judgment from the fact that he obtained the title-deeds from the appellant as above set forth. The learned judge says "Heydenrych afterwards returned the power and the title-deeds to Scott, treating him as his representative in this matter." But, surely all that Heydenrych did was to hand over to the agent for his debtor the necessary papers to enable him to fulfil his duty to his principal, the respondent; and so far from treating Scott as his own representative, he made him give his personal written guarantee that he would apply part of the funds to be raised, with the assistance of these documents, for his client to the payment of the note for which appellant was holding them as security. It is, therefore, clear that there is in the general conduct of the parties no evidence of agency for the appellant on the part of Scott, and the only question to be determined is whether he was, by the terms of the note itself, appointed agent to receive payment on behalf of appellant. Now, the only way in which Scott's name appears in the note is that his office is designated as the place of payment, and the place of payment, as Storey says, of a promissory note is always a matter of arrangement between the parties for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience. It is worthy of notice in the present case that the note was tendered to the appellant with the place of payment already inserted, and that place was the office of the respondent's agent, who was arranging the loan. This was the place selected by the respondent, and the appellant simply accepted it as being not inconvenient to himself. He fulfilled his duty according to the law regulating dealings in promissory notes, when he presented it on the due date at the appointed place, on which date he was met by the request for the extension of time, to which he acceded. When he so acceded, all he agreed to was a *partum de non petendo* for a fortnight, and after the expiration of that period, the note became payable on demand, and there was no necessity for a fresh presentation. Now, it was argued, and so held in the judgment now under appeal, that as the respondent had placed the amount of the note in the hands of Scott at the extended due date,

he had discharged all his obligations according to the tenour of the note. Apart from notes made payable at a bank, to which I shall refer presently, the only authority for so sweeping a proposition that was cited was an American case, before the Supreme Court of South Carolina in 1880. That case, however, seems to me distinguishable from the present. There the maker of the note had certain factors in Charleston called Wroton and Dowling, from whom he used to get statements of account periodically, and in 1876 he had given that firm a promissory note due on the 1st of October of that year, payable at their place of business, and of which it is clear that they themselves were the payees, for they subsequently negotiated the note, and passed it on for value to a holder in due course. On the due date the maker deposited at the office of Wroton and Dowling the amount of the note to meet it, and received credit for such amount from them in their books as against the note at its due date; but he did not demand back his note. The holder (a bank) did not present the note for payment on due date, and Wroton and Dowling subsequently failed, the note being still with the holders. In action brought by them against the maker, the Court held that he was discharged in the circumstances. *Bank of Charleston v. Zorn* (37. American Repp., p. 753). The judgment, as reported, contains some sweeping general *dicta*, which, as they stand, I think do not properly state our law on the subject; though in reference to the particular case with which they were dealing, they may be unobjectionable. In that case it will be observed that the payment was to be made at the office of the payees, who accepted the payment and gave credit for it. The maker had therefore discharged all his obligations under the note, and his only mistake was not to demand its restitution, which, as the payees were his trusted agents, was not one involving a large amount of negligence. The holders, however, had, by the terms of the note, full knowledge and notice that the debtor might, and probably would, pay to Wroton and Dowling; and in spite thereof, they did not attempt to get the money from that firm at the due date. It may well be that the Court was led to its conclusion by the consideration that the holders had adopted Wroton and Dowling as their agents to receive payment, and looked to them alone for a settlement. Even with that possible explanation, however, the case is not, to my mind, a very satisfactory one. Another case is that of *Oshorn v. Baird* (30. American Repp., 710), and that case is entirely satisfactory, as the note in question was payable at a bank which the Court held to be the holder's agent, and clearly designated by him as such

to receive payment at or before due date. In the case of *Lazier v. Horan*, reported in 37, American Repp., 736, a case from the Supreme Court of Iowa, the maker of a note was discharged, and the Court employed the following language in their judgment: "The note was made payable at a bank. Those institutions are depositories of money. They are also collection agencies through which by much the larger part of that branch of the business of the country is transacted. When a note is made payable at a bank, the parties expect the collection to be made through the bank. It is true when the defendant deposited the money the bank, while holding it, was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorise the bank to pay the note. 'If the customer of a banker accept a bill and make it payable at his bankers, that is of itself sufficient authority to the banker to apply the customer's funds in payment of the bill.' *Byles on Bills*, 151. And if the money be deposited for the payment of such a bill or note, the holder may maintain his action against the bank therefore. By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that payment may be made at a bank, it means that payment is to be made to the bank." For myself I should say that the concluding dictum of the above judgment is going somewhat too far, if it can be taken to be meant to have universal application, and not to be dealing with the commercial law of the State of Iowa alone. "That the doctrine as stated in *Lazier v. Horan* is not universally adopted by the American Courts is clearly shown by the case of *Indig v. National City Bank* case in the New York Court, reported in 37, Am., Repp., p. 736, in which the Court said: "It is by no means clear that the maker of the note is discharged. When a note is payable at a bank an entire failure to present it for payment does not discharge the maker. If the maker has not sufficient funds in the bank, the omission to present is of no consequence. If he has funds, then he can plead it by way of tender, and is relieved of liability only for interest and costs. And even if the bank fails with funds in its hands, this is no defence to the note. The bank is in such cases regarded simply as the agent or depository of the maker of the note, and he alone suffers by its failure, and his promise to pay is not discharged. In this respect only, a note, or bill, payable at a bank, differs from a cheque. Therefore, if there has been no presentment whatever, and the bank had failed with sufficient funds of the maker in its

hands to pay the note, the maker is still liable." For myself I think that in all cases even when a bank is the place where a note or bill is payable, it is a matter of evidence whether the bank is the agent of either or both of the parties, though the presumption would be in favour of holding that in such cases the intention of the parties was to establish a mutual agency. This would be in accordance with ordinary commercial usage and custom; but it would still be open to either party to show that the agency of the bank was purely for the convenience of the other. To go further, however, and to hold that when a bill or note is made payable at the house of a private individual, or at the office of an ordinary business man, an agency is thereby established by which such private individual or business man is made the agent for the holder to receive payment, would lead to unsettling well-known rules of commercial law relating to such matters, and to impairing the well-established rights of holders of negotiable instruments of that nature. I may add that all the cases that can be quoted in which the makers of notes have been discharged from liability proceed, as far as I am aware, on the ground that no presentation was made in good time, though funds had been provided by the due date. In the present case there was a presentation on the due date, and the holder at the maker's request gave him time. Thereafter the respondent paid the amount directly by cheque in favour of his own agent, and did not even take the precaution to make out his cheque in favour of his creditor. His agent was a dishonest man, as it appears from the evidence, and by his plausibility was able to deceive both parties for a long period, and put them off—the one in his demand for the return of the note which he had signed, and the other in his demand for his money. They both were too confiding in Scott, and consequently neither displayed the proper amount of diligence which might have been otherwise expected of them; but the person who really enabled Scott to carry out his fraud and appropriate the £105 to his own use, seems to me to have been undoubtedly the respondent, and I am by no means convinced on the evidence that even if the appellant had presented the note again on the 29th of November, and again and again, shortly thereafter, he would have received payment thereof from Scott, who would probably have made some plausible excuse to evade parting with the money which he had improperly obtained, and that Scott would have paid over the money if demand had been made is a matter of defence which it lay on the respondent to establish. Therefore, even on the equity of the case, I think the respondent should be the one to suffer the loss, which was occasioned primarily by his

own rash and blind trust in his own agent. For these reasons, I am respectfully of opinion that the appeal should be allowed.

De Villiers, C.J.: This is an appeal from a judgment of the Divisional Court in an action brought by the holder against the maker of a promissory note for £105. The action originated with a summons for provisional sentence, and at the hearing the defendant's affidavit was produced, which satisfied the Court that there were good grounds for holding that he had paid the amount of the note to one Scott, at whose office the note was payable, and that he had been led to believe that Scott had authority from the plaintiff to receive such payment on his behalf. Provisional sentence was accordingly refused, with costs, and the plaintiff proceeded with the principal case before a Divisional Court. At the trial a letter written by the defendant to the plaintiff on the day before the note fell due was produced, which showed that the defendant then knew that the plaintiff was the holder of the note, and that the defendant could not then have believed that Scott had full powers to act on behalf of the plaintiff. The only evidence of such agency left was the fact that the note had been made payable at the office of Scott. Upon this point the learned Judge, in his reasons, says: "The plaintiff knew nothing of the debtor, whom he had never seen, and with whom he had had no communication, but dealt with him through Scott. Instead of making the note payable to himself at his own office, he accepted the note made payable at the office of Scott. He thus intimated to the debtor that Scott had authority to receive payment on the plaintiff's behalf." The learned judge accordingly gave judgment for the defendant, with costs.

There can be no doubt that the fact of the note having been made payable at Scott's office would have been a link in the chain of evidence to establish Scott's agency, but standing by itself, it is not, in my opinion, sufficient to establish such agency. The note was made payable at Scott's office for the convenience of the defendant, who had employed Scott to raise a permanent loan of £1,500 for him on the security of some property. While Scott was negotiating with intending lenders, the defendant was in urgent need of £100, and Scott undertook to obtain the amount as a temporary loan. He accordingly applied to the plaintiff, who gave his own cheque for the amount in favour of the defendant or order, and received the promissory note in question, payable one month after date. On the due date he presented the note for payment at Scott's office, and was met with the defendant's letter, to which I have already referred. The letter, which bore the previous day's date, reads as follows: "I wish Mr. Heyden-

rych to hold over the loan for fourteen days upon my property re my promissory note to him." It is quite incomprehensible to me why this letter, which has such an important bearing on the case, was not produced at the provisional hearing. In his affidavit, the defendant said: "On the 15th day of November, 1902, the due date of the note, not being in a position to meet the same, I saw Mr. Scott at his office, and applied to him for an extension of time for payment for a further fortnight. He replied that he would see his client, and let me know afterwards. I again called in the afternoon of the same day, and Mr. Scott then told me that it would be all right; I could have the extension for a fortnight if I paid him a few pounds on account, as he was short of money. Having some £4 in cash with me, I handed same over to Scott." Not a word in this statement about the defendant's own letter of the previous day requesting the plaintiff, by name to give a fortnight's extension. Knowing that the plaintiff, as the holder of the note, had been asked by himself for an extension of time, the defendant on the due date of the note, made a payment on account to Scott for his personal use, and within the fortnight following he paid the balance to Scott by his cheque made in favour of Scott. This money was paid out of the amount raised by Scott on permanent loan. The promissory note, however, was not delivered to the defendant, for the plaintiff had never parted with the possession of it. Clearly, therefore, without proof of Scott's authority to receive payment of the note on behalf of the holder, the defendant, as maker, remains liable. The note could only be discharged by payment to the holder, and, as Scott had not the note in his possession, the burthen of proving his authority to receive payment lay on the defendant. The evidence given at the trial satisfies me that some of the statements in the defendant's affidavit were wholly misleading, and that Scott had no authority from the plaintiff to receive payment of the note.

At the hearing of the appeal, a passage in *Story on Bills of Exchange* (p. 356), was relied upon as supporting the defendant's discharge from liability. The passage reads as follows: "In respect to the acceptor, no presentment or demand of payment of a bill payable at a bankers or other particular place, need be made at that place on the day when the bill becomes due or afterwards in order to maintain an action against him; but it is a matter of defence on the part of the acceptor that he had funds at that place to pay the bill, which, if true, will exonerate him from the payment of all damages and interest; and if he has been injured, or has sustained any loss, by the neglect of the holder to demand payment at that place (as if the bill be payable at a bank, and the

acceptor had funds there, and that bank has since failed), then the acceptor will be discharged from liability on the bill to that extent." The first part of Story's statement of the law would not apply to the maker of a promissory note, for although, in general, his rights and liabilities correspond to those of an acceptor of a bill of exchange, the 1st subsection of section 80 of Act 19, of 1893, specially provides that "where a note is in the body of it made payable at a particular place, it must be presented at that place in order to render the maker liable, unless the particular place mentioned is the place of business of the payee, and the note remains in his hands." In the present case, the place of payment, which is mentioned in the body of the note, is not the plaintiff's place of business, but he did duly present the note for payment on the due date. As to the latter part of Story's statement, it is not necessary to inquire whether our law agrees with the American law, for the simple reason that the facts stated by him as matter of defence do not exist in the present case. On the due date of the note, the defendant had no funds at Scott's office to pay the note. During the fortnight's interval after the due date, the defendant made no deposit with Scott for payment to the plaintiff, but he made a direct payment to Scott, knowing that Scott had not the note in his possession. If he chose to take the risk of paying Scott, he might have protected the plaintiff and himself by giving Scott a crossed cheque in favour of the plaintiff, instead of giving a cheque made in favour of Scott. If there was negligence on the part of the plaintiff, there was still greater negligence on the part of the defendant, when once it is established that Scott was not the plaintiff's agent to receive the payment of the note. As to the nature of the neglect on the plaintiff's part, which would, according to the American authorities, release the defendant, the case of *Charleston National Banking Association v. Zorn* (37, A.R., 733) shows that the defendant would have to prove that the plaintiff was guilty of neglect in not demanding payment of the note at the office of Scott before he absconded, that the plaintiff would have received the money if the note had been presented, and that, owing to such non-presentment, the defendant lost the money. In point of fact, the plaintiff did present the note at Scott's office at the due date, and again after the expiration of the fortnight's delay. On the first occasion he was met with the defendant's letter asking for a fortnight's delay, and on the subsequent occasions he was put off with the false excuse that the permanent loan of £1,500 had not yet been raised for the defendant. The case of *Lazier v. Horan* (37, A.R., p. 735) has also been relied

upon, but there it was clear that if the holder of the note had presented it at the bank on the due date, the note would have been met. The deposit at the bank was regarded by the Court as a setting apart of the money for and on behalf of the holder of the note, and the failure of the holder to call for the money on the due date was regarded as an act of neglect, which discharged the maker on the subsequent failure of the bank. In the present case, no money was paid to Scott on or before the due date of the note; when the money was so paid, it was handed over, not as a deposit for the plaintiff, but as a direct payment to Scott, and the plaintiff did, after the expiration of the fortnight, apply without success to Scott for payment. It is not clear that the application was made on the very day on which the fortnight expired, but it is manifest that if the plaintiff had presented the note on that day, it would not have been paid. It is quite impossible, therefore, to hold that the non-presentment of the note was the cause of the defendants losing the money. Even, therefore, if the American decisions were binding, there would be no ground for holding that the defendant is discharged from liability on the note.

It was suggested by the learned judge in his reasons, although it was not made a ground of his decision, that the receipt by the plaintiff of a guarantee from Scott, and the plaintiff's delay in demanding payment from the defendant, are circumstances which in equity should be held to relieve the defendant from liability. The guarantee, which was given on the day when the note was made, was as follows: "B. G. Heydenrych, Esq.—Dear Sir,—On account of you advancing Mr. T. Jeffrey £100 upon his promissory note, I guarantee that the said promissory note £105 will be paid to you out of loan of £1,500 I am arranging for said Mr. Jeffrey.—Yours, James Scott." I confess I fail to see how this guarantee assists the defendant either in establishing Scott's agency for the plaintiff or in affording an equitable defence to the action. The letter shows that Scott was acting as agent for the defendant, and that, in order to secure the temporary loan of £100 from the plaintiff, Scott gave his own guarantee that the money would be paid out of the proceeds of the permanent loan. This guarantee was an additional security for the plaintiff, and could not have been intended in any way to limit the liability of the defendant as the maker of the note. In regard to the plaintiff's delay in demanding payment from the defendant, his explanation that he could not discover the defendant's address is by no means satisfactory, but, unless the Court is prepared to hold that there was collu-

sion between the plaintiff and Scott, the delay cannot deprive the plaintiff of his right as holder to recover payment from the maker of the note. The plaintiff could only lose his remedy on the note if he failed in doing anything that was obligatory on him to do. If, for instance, he had failed to present the note at Scott's office on the due date, the defendant would not have been further liable on the note, whatever other remedy the plaintiff might have had. But there was no obligation on the plaintiff to proceed against the defendant on the note or against Scott in the guarantee, and consequently his delay does not afford any legal or equitable ground for relieving the defendant from liability. I am bound to say that, considering the high rate of interest which the plaintiff demanded for the month's loan, his delay in suing on a note on which he could only recover 6 per cent. from the due date, does give rise to suspicion; but it would be highly dangerous on mere suspicion to break upon the rules which regulate the relative rights and duties of parties to negotiable instruments. It is with great regret, therefore, that I am unable to concur with the judgment of the Divisional Court. In my opinion, the appeal should be allowed, with costs in this court, and judgment entered for the plaintiff for £105, with interest at 6 per cent. from 15th November, 1902, and costs in the court below.

Mr. Justice Buchanan said that, as this was an appeal from a judgment that he had given, he should have preferred not to have taken part in the decision of the case now. The judgment he gave in the court below indicated clearly and sufficiently the grounds upon which he proceeded. No authorities were quoted then to the Court in support of the contentions of counsel, but now the American cases had been cited before them. These American cases had been fully discussed in the judgments which had just been delivered by his brethren, and they seemed to him to support the view he took of the law at the trial. As His Lordship the Chief Justice had pointed out, even supposing these authorities were binding, there were circumstances in this particular case which took it out of the rule of law, one of the most important being that, when presentment of this note was made on the due date, there were no funds, the money had not been paid by the person who gave the note. He was not now wishing to concur in the view that the deposit of money at the place of payment on the due date would not have been sufficient, but under the circumstances, he thought he was not entitled to maintain his individual opinion, seeing that there were so many flaws in the defence which had been set up in this case. Under the special circumstances of this case, he was not prepared to maintain

the judgment he gave in the court below. He could not, however, omit expressing the opinion that the equities of this case were so strong against the plaintiff that he did not think the Court ought to go out of its way to assist him in securing payment, considering the laches of which he had been guilty.

Mr. Burton (for the appellant) applied for an order that the costs cover costs of application for provisional sentence.

De Villiers, C.J., said that the application for provisional sentence was refused with costs, and he considered the plaintiff was himself to blame for not giving all the information that was available. The present application must be refused.

[Appellant's Attorneys: V. A. van der Byl and De Villiers; Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

ROSSOUW V. VLOK. { 1904.
Aug. 22nd.
" 29th.

Trading with enemy—Sale to non-combatant.

This was an appeal from the decision of the Resident Magistrate of Hay, awarding the plaintiff in the Court below, and now respondent, the sum of £20, value of 21 sheep, his property, unlawfully taken possession of by the then defendant.

From the evidence in the Court below it appeared that the respondent, who lived in Rhodesia, had a farm at Hay. In June 1900, he visited it, and purchased some sheep, which he had branded with his brother's mark, and left them in his care. He took this course because his brother was a rebel, and there would not be so much fear of the sheep being commandeered by the enemy. Some time after, the defendant, who was a policeman, purchased the sheep, as he alleged, for the Republican Army, but used them himself, and gave a receipt for them. The action was brought to recover the value of them from him.

Mr. Burton appeared for the appellant, and Sir H. Juta for the respondent.

In the course of argument, the question arose as to whether Volk's brother was a rebel at the time the sheep were entrusted to his care, or not, so the case was adjourned to enable the Court to make inquiries.

Postea (August 29th).

De Villiers, C.J.: In this case the information applied for by the Court has been obtained, and it now appears that the witness, Christian Vlok, brother of the plaintiff, surrendered as a rebel before the plaintiff handed over the sheep to him. The contention of the plaintiff

before the Court was that the alleged sale by the witness Christian Vlok, was illegal, because it was a sale to the enemy, and therefore an illegal dealing with the enemy. If, therefore, it had appeared at the time when the sheep were handed over by the plaintiff, that his brother Christian was still a rebel, the plaintiff could not have relied on the illegality of the sale to the defendant, seeing that he would have been equally guilty of an illegality in handing over the sheep to his own brother, who was still a rebel. The information now given removes this difficulty. The only point is whether the Magistrate was right in his finding upon the facts. Upon the facts, he found that the defendant Rossouw had acquired the sheep, not for the use of the enemy, but for his own proper use. He occupied a neighbouring farm, on which he and his father and his father's family lived, and the sheep he obtained from Christian Vlok were used for the feeding of himself and his father and the family. The Magistrate found that the sheep had not been used for the enemy, that it was not, therefore, one of those cases in which the defence that the act was done in the course of ordinary warfare for the benefit of the enemy could apply, and I am bound to say that upon the facts, I am not prepared to dissent from the judgment of the Magistrate. The sheep were entirely for the defendant's own personal use, for persons who were non-combatants. The defendant himself had sheep which could have been slaughtered on his farm, his father had sheep which could have been slaughtered, and the sheep were taken for their own private purposes. For these reasons, I am of opinion that the judgment of the Court below should not be disturbed, and the appeal will, therefore, be dismissed. Mr. Justice Hopley concurred.

[Appellant's Attorneys: Herold and Gie; Respondent's Attorneys: Michau and De Villiers.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D).]

BOLDT AND CARL V. HEI- f 1904.
NAMANN. Aug. 23rd.

Mr. J. E. R. de Villiers appeared for the plaintiff, and Mr. Close for the defendant.

In this action the plaintiffs, Fritz Boldt and Louis Worms, trading together at Cape Town as Boldt and Carl, sought to recover from Daniel Robert Joseph Heinemann, of Robertson, the sum of £21 7s. 1d., amount due for goods sold and delivered.

Mr. Close said that his client, after reconsidering his position, had decided to accept judgment on the terms of the declaration.

Judgment as prayed was granted.

GLASGOW V. GLASGOW AND DAVIES.

Adultery—Proof.

In this action, the plaintiff, Tom Glasgow, residing at Simon's Town, sought a decree of divorce against his wife, Dinah Glasgow, because of her adultery with one Jack Davies, from whom he claimed damages fixed at £500.

Plaintiff's declaration stated that he was a gardener, residing at Simon's Town, and was married to the defendant on the 15th April, 1892. There was issue of the marriage two children. On divers occasions the first-named defendant was seen to commit adultery with the second named defendant. He claimed a decree of divorce against the first-named defendant, and damages estimated at £500 against the second-named defendant.

The first-named defendant in her plea denied the allegations contained in the declaration as to the charges of adultery, and as a claim in reconvention stated plaintiff lived for some time past in adultery with a woman named Sarah Dixon.

The co-defendant denied all the allegations as to misconduct.

Mr. J. E. R. de Villiers appeared for the plaintiff, and Mr. Burton (with him Dr. Greer) for the defendant.

Thomas Glasgow stated he was married to the first-named defendant in 1892, in the English church. There were two boys issue of the marriage. Witness was a gardener, working at the Admiralty. On the evening of the 16th April last witness left the house, and a neighbour, named Mrs. McLawley called his wife. Witness, in company with a man named Tom Peters, went over to see what his wife was wanted for. He saw his wife with the defendant Davies, and they retired to a bedroom. Witness followed them into the room, and as he did so his wife came out, followed by Davies. Witness tried to catch hold of Davies, but his wife would not let him. Witness and his wife lived together until May, when they separated. He had supported her since. His wife was of very intemperate habits, and was repeatedly arrested. He wanted the custody of the two children. He claimed damages at £500 from Davies.

Cross-examined by Mr. Burton: His wife did not tell him she was going to visit a neighbour. He always believed Mrs. McLawley was a respectable woman. Jack Davies, the co-defendant, was an old man. Witness did not assault his wife nor Mrs. McLawley. Witness had lived unhappily with his wife because she drank. Witness denied that he had committed adultery with Sarah Dixon or any other women. Mr. Budge, witness's landlord, did not give witness notice to leave because he carried on with other women. Witness denied that a man named Dixon had caught him committing adultery with his wife.

Thomas Peters stated he visited Mrs. McLawley's house on the 16th April with the last witness, and saw the two defendants committing adultery. Glasgow tried to strike Davies, but the two women prevented him. Witness had often seen Mrs. Glasgow drunk. On the night in question she was drunk, but Davies was sober.

Cross-examined by Mr. Burton: Witness knew Mrs. McLawley. She was a respectable woman.

Sophia Dixon denied that she had committed adultery with Glasgow.

For the defence, Dinah Glasgow, the first defendant, stated that her husband had constantly ill-treated her. She once left him for a period of five months, and on another occasion he drove her and her children from the house. He supported her and the children. She denied that she had committed adultery with Davies. She had seen her husband committing adultery with Sophia Dixon.

The second defendant, Jack Dixon, an elderly Krooman, denied that he had committed adultery with Glasgow's wife.

De Villiers, C.J., said he would like to hear evidence as to Glasgow's misconduct after his wife had left him.

Tom Dixon called, stated he caught Glasgow committing adultery with his wife a short time ago.

John William Budge stated the plaintiff was a tenant of his. In April last, on account of the repeated complaints with regard to plaintiff's conduct with women, witness cleared him out of his house. The plaintiff admitted to witness that he had turned his wife out and kept another woman.

Cross-examined: Witness never heard of Mrs. Glasgow's drunkenness. He heard of her being arrested once for creating a disturbance.

Christina Davies, wife of the second defendant, stated she had often sheltered Mrs. Glasgow when her husband ill-treated her. Sophia Dixon told witness that plaintiff was supporting her.

Counsel were then heard in argument on the facts.

De Villiers, C.J., said, in regard to the claim in convention, he was not satisfied that there was any adultery on the part of the defendant with Davies. The only witnesses were the plaintiff and

Peters, and their evidence was most unsatisfactory. Even if their evidence was accepted, it was quite plain from it that there was no criminal intercourse in the room between the time when the defendant Davies was seen to go into the room and the time when the plaintiff went to the door. The evidence of these witnesses was most unsatisfactory, and it would be impossible to find any person guilty of the offence of adultery on evidence of that kind. Their statements were denied by the witnesses for the defence. The old man Davies had given his evidence, and it appeared to him (his lordship) that his version as to what took place was a likely one. Glasgow seemed anxious to find some evidence against his wife. Finding that she was sent for by her neighbour, and seeing Davies there, he jumped to the conclusion that the two met for improper purposes. The claim in convention should in the opinion of the Court, fail. The only other point was as to whether the defendant should succeed in her claim in reconvention. He was quite satisfied that adultery was committed before April, 1904. If the evidence stood by itself on that point, the defendant would not be entitled to succeed, because she, knowing of the adultery of her husband, had continued to live with him. Taking the fact that adultery had taken place between the plaintiff and Sophia Dixon before April, the admissions made by plaintiff to Mr. Budge, and the fact that Mr. Budge found Sophia Dixon at the plaintiff's house washing, the Court was justified in concluding that the plaintiff was guilty of adultery after he ceased to live with his wife. There seemed to have been no condonation, because, according to his own evidence, the plaintiff had ceased to live with the defendant. The Court gave judgment for the defendant on the claim in convention, and on the claim in reconvention. The claim for the division of property would have no effect, because the defendant brought nothing into the estate.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Maxton and Centlivres.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

BAM AND OLIFF V. BLOOM. { 1904.
Aug. 28rd.

Agent — Commission — Payment by cheque.

The defendant had instructed plaintiffs (a firm of auctioneers)

to find a purchaser for his farm. Plaintiffs introduced one L., who agreed to purchase for a certain sum, and tendered a cheque, which defendant accepted in payment. This cheque having been dishonoured, defendant refused to pay plaintiffs their commission.

Held, that plaintiffs were entitled to recover the customary commission.

This was an action brought by Bam and Oliff, auctioneers, Cape Town, against Lewis Bloom, speculator, to recover £500, commission upon the sale of certain property.

The declaration set out that the defendant placed in the hands of Mr. Oliff, of the plaintiff firm, as his agent, the sale of his rights under a certain agreement that had been entered into by the defendant with Mr. De Wet for the purchase of a certain farm at Brandvlei, in the district of Worcester. It was agreed between the defendant and Mr. Oliff that in the event of the latter arranging for a purchase in terms of the rights of the defendant, Mr. Oliff was to receive a commission of £500. This had occurred before Mr. Oliff entered into partnership with Mr. Bam, and the contract was taken over by the plaintiff firm. Thereafter, on the 31st July, 1903, an agreement was entered into with one Captain Livingstone, by which Livingstone became the purchaser of the rights of the defendant under his agreement with the proprietor of the farms for £1,750, a supplementary agreement of August 8 providing for the payment of an additional sum of £210 to cover transfer duties and expenses in consequence of double duty being payable. On the 8th August, Captain Livingstone, with the knowledge and consent of the defendant, passed his cheque for £1,960 in favour of the plaintiffs, and drawn on the Standard Bank at Aliwal North. The cheque was duly presented, but was dishonoured. Thereafter, the cheque was handed to the defendant, and he sued the said Livingstone in the Transvaal on the cheque for the sum of £1,960, and obtained judgment thereon, and in execution received £1,153. The plaintiffs claimed payment from the defendant of £500 as commission aforesaid.

The defendant, in his plea, said that he entered into an agreement with the plaintiff Oliff with regard to giving him commission, but it was a condition of the agreement that the said Oliff guaranteed payment of the purchase price by the purchaser of the option along with the transfer duties and ex-

penses. He denied that the cheque was made in favour of the plaintiffs with his knowledge or consent. He admitted that he obtained judgment against Captain Livingstone in the Transvaal, but said that the amount received by him was £997 10s., and not £1,153. There was still due to the defendant a sum of £962 10s. from the said Livingstone in respect of the cheque. Defendant admitted that he had not paid to the plaintiffs the said sum of £500, or any part thereof, but he denied that he was liable for such sum, inasmuch as Livingstone had failed to carry out his obligation in the contract of sale, and plaintiffs had not fulfilled their part of the agreement as to commission. He prayed that the claim be dismissed, with costs.

The defendant now stated that he wished to make a few verbal alterations of his plea. He did not receive £997 from the Transvaal judgment, but only £875.

Mr. Schreiner, K.C. (with him Mr. De Waal) for plaintiffs; Defendant in person.

Mr. Schreiner said that his client's case was simply that payment of the purchase price had nothing whatever to do with the matter of the commission, nor had the difficulties which Mr. Bloom had experienced in connection with realising against the purchase of his option. They absolutely denied that they entered into an undertaking that the purchase money would be paid. The plaintiffs introduced the purchaser to the seller, and it was unfortunate for Mr. Bloom if he had not recovered his money from Captain Livingstone.

John Frederick Oliff, of the plaintiff firm, said the defendant first approached him in regard to the transaction in dispute in March of last year. That was prior to the partnership. There was a farm at Brandvlei, of which defendant had right of purchase from Mr. De Wet. The defendant completed the purchase of the property for the sum of £9,000. Defendant asked witness if he could dispose of the property for him, and named £13,000 as the price. Witness said he had known a party, who had been willing to pay up to £12,000. That party was Captain Livingstone, who was commandant at Worcester during martial law. It was arranged between defendant and witness that he should be paid £500 upon the sale, if effected. There was no mention of a guarantee. Witness subsequently saw Captain Livingstone on the Parade, and introduced him to Bloom at the office of his (witness's) firm in June, or early in July, 1903. Further negotiations took place. Witness's firm made no guarantee that Livingstone would carry out his contract. The first agreement of the 31st July contemplated an immediate transfer from De Wet to Livingstone, but it was found that double transfer duty would

have to be paid, and in the end, in August, 1903, a supplementary agreement was arranged for the payment of an additional £210 to cover transfer duties and expenses. The cheque given by Livingstone was drawn on the Standard Bank at Aliwal North. At the interview when the agreement had been finally arranged at Worcester, Bloom became very excited, and demanded his money. Witness told him that he could not have any money on a cheque that was payable at Aliwal North, and offered to advance Bloom £300 on his own promissory note. Bloom accepted the advance, and witness's firm subsequently had to take proceedings in the Supreme Court, and to obtain judgment on the promissory note against the defendant. The defendant subsequently got judgment in the Transvaal on Livingstone's cheque, and witness's firm advised him as to the property to levy upon at Standerton, Transvaal, belonging to Livingstone.

The defendant cross-examined the witness at considerable length. With regard to the defendant's right in the farm, he admitted that his view all along was that the defendant had not an option on the property, but that it was a sale to him from De Wet. Both Livingstone and the defendant argued against that, and witness eventually sank his own better judgment under the circumstances, but, later on, when they saw an attorney, witness's view was upheld, and it was pointed out that double transfer duty would have to be paid.

Hopley, J. (after examining the agreement between De Wet and defendant) said he did not see how the witness could have had any question as to Bloom having an option.

Gerhardus Jacobus Bam, stated he was always present at any negotiations that took place. The cheque was made payable at Aliwal North. With the exception of one suggestion, which was refused there was never any guarantee given.

Cross-examined by Defendant: Witness did not promise to give defendant any money. No money was offered at the Cape Town Station.

Mr. Schreiner closed his case.

The defendant then called

Henry Gibson, chief constable, at Worcester, who said that on the 11th August, the defendant came to his house and made a complaint that he had signed a paper that he did not know anything about. Witness could not understand on several occasions what the defendant was complaining about.

[Hopley, J.: You had no personal interest in what he was talking about?]

No, my lord. He seemed to think all attorneys were against him, and that he would be swindled.

Hanan Blacher, dealer on the Parade, stated that he saw the plaintiffs on a certain evening in August, and he remembered Bam saying that the money

was all right, and that the defendant would have to go to Worcester and sign the papers.

The defendant went into the box, and stated that he sold the farm through Mr. Oliff for £1,750. Mr. Bam said that Captain Livingstone had deposited the money all right, but there was no mention about a cheque before he started for Worcester.

Cross-examined by Mr. Schreiner: He had quarrelled with every attorney that he had come across, because he suspected everyone.

By Hopley J.: If the cheque had turned out all right he would have paid the plaintiff £500.

Hopley, J., suggested that Mr. Schreiner might consult his clients, with a view to some abatement of the claim, although strictly in law they were entitled to the full amount.

Mr. Schreiner said his clients were quite willing, on the hint thrown out by the Court, to forego £150 in the claim.

[Hopley, J.: If the Court finds against you, you will have to pay £500. The plaintiffs now say in answer to the Court that they will not claim the whole amount. Have you anything to say on the case.]

The defendant having addressed the Court,

Hopley, J., said he believed before the plaintiffs went down to Worcester they informed the defendant they had received a cheque, instead of cash, and he did not believe they would be so foolish as to guarantee such a large amount of money. It seemed to him, in strict law, the plaintiffs had earned their commission when the defendant accepted the mode of payment by Livingstone. The plaintiffs had generously abated portion of their claim, and that seemed to him to be the right thing to do in a hard case. There would be judgment for the plaintiffs for £350, with costs.

TROTT BROS. V. MAISEL BROS. AND CO., LIMITED.

Mr. Struben applied for judgment, under Rule 319, against the defendants, who were in default of plea. The plaintiffs obtained leave to sue the defendants by edictal citation on a claim for damages for £189 for breach of contract. The defendants had been served personally.

Evidence was then called for the plaintiff.

Charles Trott, partner in the plaintiff firm, stated that on the 22nd April, 1904, he agreed with Benno Maisel, who he believed to be the principal of a firm with business all over the world, to tender jointly for certain clothing in partnership. Both parties tendered for 20,000 cord jackets at the Ordnance,

Port Elizabeth, at the rate of 4d. each, and the defendants' tender was accepted. The defendant Benno Maisel afterwards stated that his tender had been cancelled, because the conditions had not been fulfilled. Maisel stated that he had sold the jackets at a good profit in Johannesburg. Witness could have sold the jackets at a good profit.

Robert Trott, partner with the last witness, stated that Maisel informed him that their tender had been accepted for the jackets, and that he had sold them for 9d. each. The defendant Benno Maisel said that he quite understood that he had to pay for the goods. Witness said if there was any trouble about cash, that he would finance the deal himself. The tender fell through because Maisel did not pay within three days.

Judgment as prayed, with costs.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

COLONIAL GOVERNMENT. v. $\left\{ \begin{array}{l} 1904. \\ \text{Aug. 24th.} \\ \text{" 26th.} \\ \text{" 29th.} \end{array} \right.$
BONNER AND OTHERS.

Estoppel — Misrepresentation —
Fraud — Customs duty —
Bonded warehouse—Costs—
Pro rata liability—Consortes
litis.

The first defendant B., being a bonded warehouseman at Port Elizabeth, received into bond 40 cases of cigars from W., who afterwards wishing to send them in bond by rail to Johannesburg, obtained from B. the cases and the rail-notes which B. had prepared for the carriage of the goods by rail. W. appropriated the cases with cigars to his own use, and brought 39 other cases to the Railway station, marked with different marks, except one case, to which he directed the attention of the Railway offici-

als, saying that it contained another case inside. The officials neglected to check all the marks and signed the Railway receipts which had been previously prepared by B. as being correct. The 39 cases were sent to Johannesburg, where there was no one to receive them, and on their being subsequently opened, they were found to contain only rubbish. The defendant B. being sued with two sureties on the bond which he had given to the Government for the due warehousing of all goods delivered into his warehouse, claimed as damages the amount of the loss sustained by him through the misrepresentation made by the Railway officials in the receipts signed by them.

Held, that as the initial act which enabled W. to perpetrate the fraud was the delivery to him by B., of the cigars and rail-notes, the Government was not estopped from denying the correctness of the receipts which the Railway officials, induced thereto by the production of the rail notes, had given to W.

Held further, that on a simple prayer for costs, the plaintiff was not entitled to claim, that the costs be paid by the defendants jointly and severally.

This was an action in which the Colonial Government sought to recover from Walter Muir Bonner, William Gibb McNair, and Harry Phillips, of Port Elizabeth, the sum of £1,368 3s. 10d., amount due for Customs charges.

The two latter defendants filed pleas, but were not represented by counsel.

Mr. Schreiner, K.C. (with him Mr. H. Jones) for plaintiffs; Mr. Gardiner (with him Mr. Upington) for defendant Bonner.

Mr. Schreiner, in opening the case for the plaintiffs, said it was one brought by the Colonial Government, through William Aldred Collard, in his capacity as Assistant-Treasurer of the Colony. It appeared that Mr. Bonner, the defendant, had a bonded warehouse at Port Elizabeth. In September last, one Wolf placed in the bonded warehouse certain

cigars and cigarettes. There were 30 cases of the former and 10 of the latter, which he had purchased.

[De Villiers, C.J.: Who is this Woolfe?]

Mr. Schreiner: Woolfe is a fraudulent party, and what your lordship has to decide is on whom the results of his fraudulent actions will fall. Continuing, Woolfe was a man who had businesses in Johannesburg and Port Elizabeth. He was a man of many aliases, such as Green, Watson, etc. He appeared to have practised various frauds, and at the present time a warrant was out for his arrest. The circumstances of the case were exceptional. Woolfe put the cigars in Bonner's bonded warehouse some time in September. About the 17th, he requested Bonner to have the goods removed from bond at Port Elizabeth, in bond, to Johannesburg. To do this Bonner had to make out forwarding notes. Woolfe somehow or other obtained possession of these forwarding notes from Bonner. Bonner accounted for their disappearance by suggesting that they must have been taken by Woolfe. Woolfe got possession of the documents in which Bonner purported to have forwarded these cigars and cigarettes to J. Wilson, Johannesburg. Woolfe brought wagons, which he hired in Port Elizabeth, to the warehouse. He produced the forwarding notes to the clerks, and loaded the 40 cases referred to in the documents. He then sent 19 of the cases to Jaekes and Co., Port Elizabeth, and 21 of the cases by rail to Kimberley. He appeared at the railway with 39 cases on the wagons, which he delivered to the Railway Department. The contents of these cases were simply rubbish. The railway authorities took the cases as cigars and cigarettes. The evidence of the checkers on that point would be important. He (Mr. Schreiner) contended that the action of the defendant in allowing Woolfe to take these cigars away without sending anybody to look after them, was a very unwise proceeding. The cases going into bond in Johannesburg naturally remained there some time before there was any question of delivery, and then only the deception was discovered.

[De Villiers, C.J.: I suppose when the fraud was discovered it was impossible to get the goods back?]

Oh, yes. The goods were placed on the market in Cape Town and elsewhere, and sold, and Woolfe had gone. The defendant said he had receipts from the Railway Department, but they were receipts for things they had never received.

Mr. Gardiner said the checkers acknowledged having received cases to be delivered to Johannesburg, bearing the same numbers as those that were in the warehouse when the cases arrived at Johannesburg. They were not the same

as those received by the railway authorities at Port Elizabeth.

De Villiers, C.J., said he thought that as the onus of proving that he was not responsible fell on the defendant, he would like to hear him examined first.

The plaintiff's declaration was as follows:

1. The plaintiff is William Aldred Collard, in his capacity as Assistant Treasurer of the Colony and Receiver-General of Revenue, and as such representing the Colonial Government. The defendants reside at Port Elizabeth, in this colony. The first-named defendant is the owner or occupier of a bonded warehouse, situated in Britannia-street, in that city.

2. On or about the 20th August, 1903, the first-named defendant as principal, and the other defendants as sureties, *in solidum* entered into and executed at Port Elizabeth aforesaid, in proper form of law a general inland removal bond.

3. On or about the 16th September, 1903, and on subsequent days until the 26th September, there were warehoused in the said bonded warehouse without payment of the proper Customs duty thereon certain 30 cases of cigars and 10 cases of cigarettes.

4. On or about the said 26th September, the said 30 cases of cigars and 10 cases of cigarettes were entered, suffered, and delivered to be removed from the said bonded warehouse into the custody of the proper office of Customs at the free warehousing port of Johannesburg, in the Transvaal.

5. Neither the said cases of cigars and cigarettes nor any part of them were within the space of 21 days next following the date of such sufferance duly re-warehoused, according to law, at the said free warehousing port of Johannesburg.

6. The Customs duty payable and unpaid upon the said cases of cigars and cigarettes amounts to the sum of £1,358 8s. 10d.

7. By reason of the premises, the defendants are liable to the plaintiff jointly and severally in the said sum of £1,358 8s. 10d.

Defendants' plea and claim in reconvention was as follows:

1. For a plea to the plaintiff's declaration, the defendants say: They admit paragraphs 1, 2, and 3 thereof, save that they say that the Hon. the Treasurer-General is the proper person to sue on behalf of the Colonial Government.

2. As to paragraph 4 thereof, the said goods were, on or about September 26, 1903, delivered over from the said warehouse to the Railway Department of the Colonial Government, for the purpose of conveyance by the said Government to Johannesburg, and the said Government issued receipts acknowledging that it had received the said goods.

3. The said Government has not delivered the goods to the defendant Bon-

ner or to anyone on his behalf, although application has been made therefor by defendant Bonner, who has paid the said Government the sum of £58 1s., in and about railway and Customs warehousing charges in respect of the said goods; nor have any of the said goods been delivered or come into the possession of defendant Bonner, or of anyone on his behalf.

4. The said Government has tendered to defendant Bonner in discharge of its obligations, certain worthless cases, 39 in number, containing rubbish, to wit, straw and stones, but the said cases are differently numbered, and are of different size and description from those warehoused and forwarded by the said defendant as aforesaid, and whereof the said Government acknowledged the receipt.

5. The defendants submit that, under the above circumstances, the defendant Bonner is not liable to pay to the plaintiff the sum of £1,358 8s. 10d., claimed in this suit, nor are the defendants Phillips and McNair, as sureties for the said Bonner, liable to pay the said sum.

6. Save as above, the defendants deny all the allegations contained in paragraphs 4, 6, 7, and 8 of the declaration.

7. They admit paragraph 5 thereof, and that the amount of duty which would be payable on the said goods, when duly delivered, is the sum of £1,358 8s. 10d.

Wherefore they pray that the plaintiff's claim may be dismissed, with costs.

Should the above plea be over-ruled, but not otherwise, the defendants say: Should this Honourable Court hold that the defendants are liable to pay the amount of the Customs duty to the said Government under the terms of the said bond, although the said Government has failed to deliver the said goods, the defendants say that they have a claim against the Government for the aforesaid sum of £1,358 8s. 10d. as damages sustained by them through the negligence of the Government. Wherefore they pray that the plaintiff's claim may be dismissed, with costs.

And for a claim in reconvention, should this Honourable Court hold that the plaintiff is entitled to judgment for the sum of £1,358 8s. 10d. on the said bond under the terms thereof, the defendants (now plaintiffs in reconvention) say: They crave leave to refer to the matters pleaded in the first seven paragraphs of the plea. Owing to the failure to deliver the aforesaid goods at Johannesburg, and in consequence of the negligence of the said Government through its Railway Department in connection with the aforesaid goods and the receipt and carriage thereof, the defendants have wholly lost all control over and possession of the said goods, and have sustained damages in the sum of

£1,358 8s. 10d., and the defendant Bonner has further sustained damages in the sum of £58 1s., for which sums the plaintiff (now defendant in reconvention) is liable. Owing to the non-delivery of the said goods and in consequence of the negligence of the said Government in connection with the receipt and carriage thereof, the defendant Bonner has sustained serious loss in his business as a forwarding and commission agent, and has been compelled to relinquish the same; the said damage amounts to the sum of £1,000.

The plaintiffs in reconvention claim: (a) The sum of £1,358 8s. 10d. as damages; (b) alternative relief; (c) costs of suit.

And the plaintiff in reconvention (Bonner) further claims: (e) the sum of £1,000 as damages; (f) the sum of £58 1s.; (g) interest *a tempore morae*; (h) costs of suit.

W. M. Bonner (the defendant) stated he knew Woolfe, who resided in Port Elizabeth for a time, and then went to reside in Johannesburg. Witness acted as his agent then. In 1905, Woolfe came to Port Elizabeth, and placed in witness's bonded stores 30 cases of cigars and 10 cases of cigarettes. Witness received instructions shortly after from Woolfe to transmit the goods in bond to one Wilson, Johannesburg. Witness had the necessary documents made out for the transit of the goods. The goods were taken from the store on the 26th September, and on the 28th the "rail notes" were returned from the railway. Witness did not recollect giving them to Woolfe. The numbers on the cases received by witness into his bonded warehouse were the same as the numbers on the railway notes. Witness contended that when that was done his business was finished. While the cases were in his store they were not tampered with. He had since seen the alleged bogus cases. In no instance, with one exception (where the number was written in in chalk) did the numbers correspond with the cases to be forwarded. He first heard, early in December, that something was wrong: when a railway official told him that the cases had not been re-warehoused in Johannesburg. When witness heard that a fraud had been prepared, he, in company with a detective, traced certain of the original cases to Kimberley and Cape Town. If he had received notice immediately that there was anything wrong with the cases, he would have been able to have traced the cases at once. He did all he could to assist the authorities.

Mr. Gardiner: If there was a fraud perpetrated, were you a party to it?—No, certainly not.

Mr. Schreiner: We were very desirous of saying there is no reason to suspect Bonner at all.

Cross-examined by Mr. Schreiner: Witness had never known Woolfe by an alias. Woolfe called at the bonded warehouse, and told witness's clerks that he had just come from witness's office. That was not so. When the clerks heard that they began to load the goods. Woolfe handed witness the railway receipts on the Monday following. Witness had not since seen Woolfe. Woolfe's firm in Johannesburg paid witness the amounts due to him. Woolfe remained in Port Elizabeth about a week after the transaction. The person who supplied Woolfe with the cigars had not received payment for them. The goods were forwarded to J. Wilson, Johannesburg. Witness believed there must have been somebody there to receive them. Witness never sent a clerk with goods to the railway station.

[De Villiers, C.J.: Wouldn't it be safer to send a clerk?]

It would but it would be very expensive.

Cross-examination continued: Witness had never seen a clerk accompanying a wagon under such circumstances.

[De Villiers, C.J.: What do you do with the drivers who are strangers?]

We trust them all.

Mr. Schreiner: It is a peculiar thing that with such a business, you trust all humanity.

Cross-examination continued: Witness identified the photograph of Woolfe (produced). He supplied the police with 50 copies of it, which he got from a local photographer. Woolfe was a "plausible" looking man. Witness believed that the cases were taken charge of by the railway.

[De Villiers, C.J.: What is your contention?]

It is that these cases got to Johannesburg, and were taken from the store there. The case (produced) was not one of the cases stored in witness's warehouse. Witness only saw Manilla cigar cases in his store, and the one produced was not one.

William Frederick Wright stated he was chief clerk and warehouse-keeper at Port Elizabeth. He produced the right Mr. Bonner had to keep a bonded warehouse. He explained the procedure with bonded goods. Witness saw the bogus cases emptied. They all contained rubbish. In one there was a broken bottle, with a Port Elizabeth seal on it.

[De Villiers, C.J., asked if there was any suspicion of collusion between Woolfe and the railway people?]

Mr. Schreiner: We cannot say that. I am examining the checkers later on.

[De Villiers, C.J.: I cannot understand how it is that Wilson received goods at Johannesburg.]

Wilson was only brick and stone. Woolfe was managing the whole thing himself.

Andrew Kinmont, Railway Goods Superintendent, Port Elizabeth, produced

the railway receipts for the various cases. Although they were entered as 40 cases, there was a note stating that they were only 39 in number. He produced a consignment note for 21 cases of cigarettes going to Kimberley. They were consigned to "B. Watson." Witness knew nothing of the transaction until the return of the truck from Johannesburg. The cases only weighed 5,000 lb., whereas they should have weighed 9,290 lb.

Henry Mann, checker, in the employ of the C.G.R., Port Elizabeth, said he knew Woolfe, whom he had always taken to be a commercial traveller. On the 8th September last he saw Woolfe at the door of the Johannesburg shed. Woolfe brought goods there on a dray. He only saw a portion brought; the others were received by subordinate officials. He next saw the cases on the platform. According to the notes, he should have had 40 cases; he only saw 39 cases. Then he was informed by Arthur Guthrie's checker that there were two cases enclosed in one large case. The cases were put on a truck for Johannesburg. Subsequently he saw the cases again at Port Elizabeth, after they had been sent back from Johannesburg. He saw the seal of the truck broken. The cases had been opened, but otherwise did not seem to have been tampered with. He loaded the trucks with the cases to be brought round to Cape Town.

Mr. Schreiner said that, at the request of the defendant Bonner, the cases had been brought to Cape Town for the information of the Court, and were now in the vicinity.

De Villiers, C.J., said he had seen three or four wagons standing in the street loaded with boxes.

Cross-examined by Mr. Gardiner: Witness was absolutely sure the cases sent down from Johannesburg were the same as those he sent up. As to the double case, he saw through a slit of the outer case indications of another inside. On close inspection and by the insertion of a penknife, it would be found that it was not a case that was inside.

Re-examined: The goods were received by Gill and Arthur, the latter of whom was employed by Guthrie, the contractors. Arthur told witness that the large case contained another inside. The wagons conveying the goods to the station were private ones.

Mr. Kinmont (recalled) said that, although the goods were brought to the station on private wagons, the merchant would have to pay the contractor through the railway rate, as long as the goods were checked by the contractor's servants. The charge was embodied in the rates charged by the Government.

John W. Gill, checker in the employ of the C.G.R. at Port Elizabeth, said

he saw Woolfe bring the cases to the station. Mr. Mann was not there at the time. Guthrie's boys off-loaded the cases in the shed, and the checking was performed by Mr. Arthur. Mr. Arthur called out numbers, which witness entered. Witness had no conversation with Wolfe as to the number of cases. He heard Woolfe say to Arthur that the big one held two cases. He saw the cases brought back from Johannesburg in a sealed truck. They were the same as those he had seen Woolfe bring to the station at Port Elizabeth. He identified Woolfe by the photograph produced.

Cross-examined by Mr. Gardiner: He checked the number of cases, but not the numbers on the cases.

William Arthur, clerk in the employ of Guthrie and Co., Port Elizabeth, said he checked the cases as they were brought to the Johannesburg shed. The goods were brought in private wagons to the station. They generally checked the goods brought on private wagons to make way for the goods brought on the contractors' wagons. He only checked one number on a case. Woolfe told him about the double case. Woolfe made the remark across the forwarding note to that effect. Witness made a similar remark on the receipt note. The note was inscribed by Woolfe, "One case double." He identified the photograph produced as that of Woolfe.

Cross-examined by Mr. Gardiner: Witness did not know who made the pencil marks on the note produced. He could not say who put the number "7071" on the "double" case; he, himself, did not. The figures were on the case when it was pointed out to him. From looking at Gill working, witness thought that he (Gill) was checking the numbers.

Re-examined by Mr. Schreiner: It was only witness's supposition that Gill checked the numbers.

[De Villiers, C.J.: Did you know Woolfe well?]-No.

[De Villiers, C.J.: And why did you accept his statement?]-Well, as they stated that they were Bonar's notes, we accepted them.

[De Villiers, C.J.: Is that your way of doing business?]-We ought to check them.

[De Villiers, C.J.: Do you often omit to check them?]-It's not a common occurrence.

[De Villiers, C.J.: And why did you, on this occasion, omit it?]-I really cannot say. We were probably very busy.

[De Villiers, C.J.: Does the customer make any difference; would you check them in the case of one man and not of another, whom you know?]-No; that would make no difference.

[De Villiers, C.J.: Have you ever, before or after, omitted to check the numbers?]-That I cannot say.

[De Villiers, C.J.: It seems so extra-

ordinary that, if it's your custom, you omitted to do so on this occasion. Did Woolfe assure you that the numbers were all right on the notes he handed you?]-Yes, he said that there were 45 cases. When I counted them I found that there were only 39, and then he said that one was a "double" case.

[De Villiers, C.J.: But did he tell you that the numbers on the note were correct?]-No, he never informed me to that effect.

[De Villiers, C.J.: And although he said nothing about it you took it that they must be correct?]-Yes, I took it that they must be all right.

Gilbert Owen Smith, clerk in the office of the Controller of Customs, Cape Town, stated that he had turned up the documents in connection with the consignment in question. The value of the 19 cases was given as £712; and they were delivered to Jecks and Co., Cape Town. The owner's name was given as J. Craig.

Harry Slade, railway foreman, at Johannesburg, stated that a truck, No. 3,348, arrived at Johannesburg on October 4. Witness had the truck-book to support his statement. Amongst other things, it contained 39 cases. On October 6 the truck was off-loaded. Witness saw the cases; the cases outside the court were the identical ones taken off the truck. There was no possibility of the cases having been tampered with whilst in shed No. 1. Subsequently, they were taken to shed No. 2.

Charles Walter Berry, a checker, in the employ of the Railway Department, at Johannesburg, stated that the consignment purported to contain 40 cases, but contained really only 39. When the trucks were unloaded, they showed no traces of having been tampered with. Whilst the cases were in the shed, they were not tampered with.

Thomas Hannan, a railway checker, at Johannesburg, stated that he received the cases from shed No. 1 into shed No. 2. The cases remained in shed No. 2 until they were removed to the Customs. They were not tampered with whilst in shed No. 2.

Charles Dobson, railway inspector, Johannesburg, stated that in October last, he was called to the examining shed. He there examined 39 cases, delivered from No. 2 shed that day. Witness was present at the opening of the cases. They contained straw, bricks, slates, stones, and two broken bottles. The bottles bore a Port Elizabeth mark. There was nothing but rubbish in the cases. Subsequently, witness saw the contents put back in the cases, and the cases sealed up.

Daniel Harrison, a checker, at Johannesburg, stated that he received the 39 cases from shed No. 2 into the Customs. Witness examined one of the cases, and found that the contents were such as described. Witness then called Inspect-

tor Dobson to open the other cases. Witness corroborated the previous witness's examination as to the results of the examination, and the re-sealing of the cases. The cases were loaded on a truck, which was sealed, and sent back to Port Elizabeth.

Arthur L. Bollter, a member of the firm of Bollter Bros., cartage contractors, Port Elizabeth, stated that he knew Barney Woolfe well. Witness remembered that Woolfe engaged two wagons, the drivers of which had since left the firm's employment. Witness saw one of the wagons loaded up; he thought that the load was put on at Bonner's bond. Witness left the wagon and Woolfe outside the warehouse. He did not see any other loads loaded up. That was on a Saturday. On the following Monday, Woolfe ordered some more wagons. They were to meet Woolfe at the Victoria Quay. Witness accompanied the wagons, at Woolfe's request. Witness saw the wagons loaded; he thought that the cases put on the wagons were second-hand cases. Witness thought that there were three loads altogether. He went with one load to the railway; he believed that it went to the Johannesburg door. These goods did not come from Bonner's bond; of that there could be no doubt.

Cross-examined by Mr. Gardiner: Witness was paid a couple of days after the Monday. Woolfe then said that he was going to Johannesburg in a few days.

Charles Peary, formerly employed as a storeman by W. R. Jacks and Co., Port Elizabeth, stated that he knew Woolfe. Witness remembered that one day in October, 19 cases of cigars and cigarettes were delivered at the store. Witness saw Woolfe at the office; and he issued to Woolfe a receipt for the 19 cases. Subsequently the cases were sent to Cape Town. Some of the cases were in bad condition, and, while witness was putting battens on them, some cigars fell out of one.

Angel Wolf, watchmaker, of Cape Town, stated that the case produced in court was sold to him full of cigarettes by Woolfe, whose photograph witness recognised. Witness bought altogether four cases of cigarettes, and one of cigars; but the case in court was the only one of the five that witness had left. Witness had no idea that these cases were "running" the Customs. Woolfe was paid by cheque.

Cross-examined: Witness could not say on what date he paid Woolfe; he thought it was in September.

Herman May, lately chief clerk at Woolven's Agency, stated that in October last a man came to him and arranged for the storage of some cases of cigars and cigarettes. Witness identified the photograph produced as that of the man who came to him. Witness received 18 cases on October 8 and 9—one

case was damaged, and was not delivered by the Harbour Board. On October 12 five of the cases were delivered from the store to Wolf, the previous witness. The remainder were taken away by Woolfe.

Oscar Steven, C.G.R. detective, stated that he had traced the 19 cases through the docks to Wolman's Agency, and then the five cases to Wolf.

Charles Waugh, checker in the employ of the C.G.R., at Port Elizabeth, said that he had been in charge of the Kimberley door, and he received 21 cases of cigarettes from the man Woolfe on the 26th September last.

The witness Wolf (recalled) said that they made a payment of £10 odd for cigars and cigarettes.

By the Court: They did not consider the purchase very cheap, or think they were getting a special bargain.

Mr. Schreiner closed his case.

Counsel handed in the correspondence and copies of the Acts and regulations of the Customs, especially in so far as they affect the position of bonded warehousemen.

Mr. Gardiner submitted that it was never intended by the Act that a bonded warehouseman should be responsible for the custody of goods once they had passed out of his charge, and may be on the wagons going to the Railway Department. If this contention were not held good, then he submitted that if the defendant Bonner proved delivery to the railway of the proper or actual goods, he was absolved from any liability. They had proved at any rate the giving of a railway receipt by the railway authorities to Bonner. His learned friend might contend that this receipt was not given by a railway employee, but by one Arthur, who was employed by the cartage contractors. He submitted that the Railway Department were bound by the receipt given by Arthur, who, to all intents and purposes, acted as a servant of the Railway Department. He submitted further that the Railway Department were now estopped from denying that they had received these cases, and that they were genuine. Supposing it were held that the department were not estopped, then he submitted that they were liable to damages for negligence. Negligence had been admitted by the plaintiffs witnesses in not giving proper receipts. He contended that, but for the negligence of the Railway Department, in failing to take proper steps as to receiving the cases, the fraudulent person Woolfe would have been discovered, and the goods would have been recovered.

Without calling upon Mr. Schreiner,

De Villiers, C.J.: It is clear from the evidence that a bold and ingenious fraud was committed by Woolfe. He was the importer of the cigarettes and cigars which were placed in the defendant Bonner's bonded warehouse at

Port Elizabeth. After they had been in the warehouse for some weeks, he induced Bonner to make application to the Customs for surffiance to allow these goods to be taken to Johannesburg. When the rail notes had been prepared and other preliminaries had been complied with by the defendant Bonner, Woolfe managed on the 26th September to obtain possession from Bonner, not only of the goods (the cigars and cigarettes), but also of the rail notes relating to them, and upon these rail notes appear the proper numbers which appear upon the Customs papers. Woolfe having got possession of these documents and of forty boxes from Bonner, forthwith proceeded to send part of them to Kimberley and part of them to Cape Town—not immediately to Cape Town, but first of all to Jacks and Co., in Port Elizabeth, and from there to Cape Town. The remainder of the cigars and cigarettes were forwarded by Woolfe to Kimberley on the 26th. Then, on the 28th of September, having possession of these rail notes, Woolfe goes to the Johannesburg receiving part of the railway-station at Port Elizabeth, and there hands over certain thirty-nine cases to the officials of the Railway Department. Clearly, I agree it was the duty of these officials to check the cases, and to see whether they agreed with the numbers which appeared upon the rail notes; but they seem to have taken the word of Woolfe as sufficient reason for holding that the numbers corresponded. When I say "the word of Woolfe," I do not mean to say that Woolfe told them that the marks on the cases corresponded with the marks on the rail notes; but I say that the fact that Woolfe handed to them the goods and the rail notes amounted to a representation that the goods were the same as those referred to in the rail notes. The railway officials, taking this representation to be correct, did not efficiently check the goods. When they found there were only 39 cases instead of 40, they called the attention of Woolfe to the fact, and he pointed out a case amongst the cases, and said, "That large case includes another case, and that makes up 40." It so happened that that case was marked with one of the numbers which appear on the rail notes. By whom that number was placed is not made clear. It is suggested that the number was placed by the railway officials, but there is nothing to indicate that it was, and it seems far more likely that the numbers were placed there by Woolfe. The cases which were handed over by Woolfe were duly forwarded to Johannesburg to Wilson, to whom they were consigned, but there was no Wilson at Johannesburg to receive the goods. Consequently, they were kept there in the sheds of the Railway Department for some weeks,

and ultimately it was discovered that these cases, which had been forwarded to Johannesburg, instead of containing cigarettes and cigars, contained rubbish and fragments of broken bottles. I am satisfied that the cases which were found to contain rubbish at Johannesburg were the cases which had been delivered to the Railway Department at Port Elizabeth by Woolfe. When this was discovered, the fact was intimated to the Customs officials and also to the defendant Bonner. The Customs Department then demanded payment of duty from Bonner under his bond. The bond which is entered into by the warehouse-keeper is a very wide and comprehensive one. It is the general inland removal bond, and it would appear, where such a general inland removal bond is entered into, that no special bond is required in respect of any particular goods which are removed if the warehouseman applies for such removal from Customs. It would have been different if the removal had been applied for by the importer, because, under the 16th section of the regulations put in, the importer would then have been bound to give a removal bond. Bonner was not asked to give a removal bond, because he had already given a general removal bond, under which he is now sued. By that bond he acknowledged himself to be indebted to the Government in the sum of £2,000. Having read the conditions and obligations of the bond, the Chief Justice continued: It is clear then, under this bond, Bonner is liable for the duty, because the goods have not been duly rewarehoused according to law at Johannesburg. The defence is really raised by way of claim in reconvention, and it amounts to this, that Bonner had duly delivered the goods to the department, and that the Railway Department had failed to deliver the goods at Johannesburg, and in consequence of the negligence of the Government through its Railway Department in connection with the aforesaid goods, the defendants have wholly lost all control and possession of the said goods, and sustained damages to the amount of £1,358 10s., and the defendant Bonner further sustained damage to the extent of £58 1s. Then, further, that owing to the non-delivery of the said goods, and in consequence of the negligence of the Government in connection with the receipt and carriage thereof, the defendant Bonner has sustained serious loss in his business as a forwarding and commission agent. On this loss there has not been any evidence. The real question, therefore, to be determined is whether circumstances exist in this case which would entitle Bonner to claim damages from the Government in the sum of £1,358 8s. 10d., being the amount of duty which he is liable to pay the Government. The rejoinder puts forward the negligence of the

checkers, to which I have referred, as a ground of estoppel, and it is really upon the points raised in the rejoinder that the whole case at present hinges. The contention for Bonner is that there was negligence on the part of the checkers, that the checkers by their conduct represented to Bonner that the department had received the goods appearing on the rail notes, and that the Department is now estopped from denying that the goods had been duly received. I may say at once that there does appear to me to be a difference between a case where receipts are given for packages actually received, but with different marks from those appearing in the receipts and the case of *Standard Bank v. Union Boating Company* (7 Juta 257), where receipts were given for goods which had not been received at all. The real difficulty in Bonner's way is that it was his own act which enabled Woolfe to mislead the railway officials into the belief that the goods which he brought to the station were the same as those appearing in the rail notes. If Bonner had himself represented to the Railway officials that the marks appearing on the cases corresponded with the marks appearing in the rail notes he could surely not have relied upon the receipt given by such officials as a misrepresentation giving rise to an estoppel. In fact he did not make such a representation himself, but he did it through Woolfe by handing the goods and the rail notes to Woolfe as his agent for delivery to the Railway Department. If it be said that Woolfe had no authority to make a misrepresentation to the Railway Department it would be equally true that the checkers had no authority to make a misrepresentation in behalf of the department. As to the agency of Woolfe, it is true that he was the owner of the goods, but Bonner alone was treated as the owner as between him and the Government. His name alone appeared in the rail notes, prepared by himself, as the consignor, and his claim in reconvention is founded upon his title to the goods. So far, therefore, as the Railway Department is concerned, he cannot be heard to deny that he is the principal, and that Woolfe, whom he entrusted with the goods and the rail notes was his agent for such further dealings with the department as were necessary to complete the contract for the conveyance of the goods by rail to Johannesburg. It so happens that Woolfe did not consider it necessary to mark more than one case with marks corresponding to those appearing on the rail notes, but if he had marked all the cases with the corresponding marks before delivering them at the railway station, as he might so easily have done, there would not have been the semblance of a case in support of the claim in reconvention. The fact is, that the initial

cause which enabled Woolfe to perpetrate the fraud was the delivery to him of the goods and the rail notes. If Bonner wished Woolfe to have possession of the goods he might have told Woolfe to apply for a suffrance order himself, as the importer of the goods, in which case Woolfe would have given a bond before removal from the warehouse. Unfortunately in his desire to assist Woolfe Bonner placed it in his power to commit a fraud, for which, according to the ordinary rule, Bonner must now suffer.

The plaintiff does not object to the claim in reconvention for £58 1s., being for the amount of the freight paid by Bonner. There will consequently be judgment for the plaintiff in convention for £1,358 8s. 10d. against the defendants jointly and severally, and for the defendant upon his claim in reconvention for £58 1s.

As to the costs it is clear that the defendants must pay them, but the plaintiff's counsel has asked the Court to declare the defendants to be liable *in solidum*. His contention is that inasmuch as the Bond on which judgment has been given makes the principal and sureties liable *in solidum*, the costs incurred for the purpose of enforcing their liability should also be paid severally as well as jointly. It by no means follows, however, that the costs should always be payable in the same proportions in which the claim is payable. In the case of *Lery v. Calf* (1 Wat. 1), certain ship owners were held liable in different proportions on the claim in suit, but they were held liable on the authority of *Voet* (42-1-24) for equal shares of the costs. According to *Voet* if *consortes litis* are condemned in costs they ought to bear the costs in equal shares not only where they are condemned to pay the principal claim in equal shares but also when they have been condemned *singuli in solidum*. Without saying that according to our practice the Court would have no discretion in the allocation of the costs. I certainly consider that under a general prayer for costs the plaintiff is not entitled to claim costs *in solidum*. The sureties did not appear, which they might have done if the declaration had prayed for costs against them jointly and severally. The judgment will therefore be in the simple form of costs against the defendants.

Hopley, J., concurred.

[Plaintiff's Attorneys: Reid and Nephew; Attorney for Bowser: Trollip; Attorneys for Phillips and McNam: Van Zyl and Buissonne.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

CANTUM V. CANTUM. { 1904.
{ Aug. 24th.

This was an action for divorce. Mr. Williams appeared for the plaintiff, and the defendant was in default. Counsel said that the parties were married at Wellington in March, 1897, in community of property. In June, 1900, the defendant committed adultery with one Cupido Cupido, and since then deserted the plaintiff. There was no issue of the marriage. Plaintiff claimed a decree of divorce and forfeiture of the benefits arising out of the marriage in community.

Christian Cantum (plaintiff) stated that he went to Simon's Town in 1899, and while there he heard of his wife's unfaithfulness. When he went back to Wellington, he found his wife living with Cupido. The defendant told him she would rather have Cupido than the plaintiff.

Evidence having been called as to the relationship between Cupido and the defendant,

A decree of divorce was granted as prayed.

TRUTER V. TRUTER.

This was an action for restitution of conjugal rights, failing which, forfeiture of the benefits under the marriage in community. The parties were married on 15th April, 1903, at the Paarl. In October, 1903, the defendant deserted the plaintiff.

Mr. McGregor was for the plaintiff, and the defendant was in default.

Frederick Truter (plaintiff) stated that three months after he was married he went to Kimberley in the military service for a short period, and then came to Cape Town to work. Regularly he visited his wife at the week ends, but one Saturday in October he found her gone. There was no apparent reason for her desertion. Subsequently the defendant said to witness, "You can look for one, and I will look for one."

Order granted, the defendant to return to the plaintiff by 30th September, failing which, to show cause by the 15th October why a decree of divorce should not be granted.

Postea, October 17. The rule was made absolute.

HARPUR V. FINCHAM.

Building contract—Time limit—
Damages.

This was an action to recover certain moneys for work and labour done:

The declaration set out that about June, 1903, the plaintiff agreed to erect a certain building in Vryburg for the defendant for £1,500, the building to be completed and ready for occupation by 8th November, 1903. The plaintiff duly erected the building, and on the said date the defendant took possession. The plaintiff thereupon became liable for £1,500, less £1,340 10s. and £68 4s. 1d. paid on account, and he now claimed the balance, £91 5s. 11d.

The plea admitted the formal allegations, but the defendant denied that the building was completed by the 8th November. It was not completed until 15th February, 1904, and defendant had suffered damages to the extent of £960, which he claimed to set off against the plaintiff's claim.

Mr. P. Jones was for the plaintiff, and Mr. W. P. Buchanan (with him Mr. J. E. R. de Villiers) was for the defendant.

Wm. Harpur (plaintiff) stated that, at the request of the defendant, he tendered for a building at Vryburg. The defendant wanted the building completed in five months, but witness pointed out that he could not do that. Certain slabs which were ordered from England did not arrive in time, and the defendant was aware of this. The defendant said that boards could be put on the counter, so that the business could be carried on. When the slabs arrived in February, witness put them in. The specifications did not specify how the tiles were to be put in. He did some extra work on the buildings, but he had not charged for it. The defendant accepted the building as complete on the 7th November, with the exception of some slabs for the counters, which it was agreed should be put in afterwards. The defendant drew rent for the building from November. The slabs arrived on the 15th February, and were put in in a day. Witness received a demand from the defendant for a fine at the rate of £10 per day—160 days, £1,600. Defendant allowed £90 5s. 11d. as due to witness, and thus found a balance in his (defendant's) favour of £1,509 14s. 11d. Witness now claimed £91 5s. 11d., which was really the figure admitted by the defendant in a subsequent statement. The defendant appeared to be very well satisfied with the building, and remarked to him that the building was the best in Vryburg.

Cross-examined by Mr. Buchanan: Mr. Fincham left Vryburg about November, and the building operations were superintended, in his absence, by Mr. Pavert. He tendered for £1,427 to do the work in six or seven months. Mr. Fincham asked him to finish in five months, and promised to make the tender £1,500 if he would do so.

By the Court: The defendant received £12 10s. per month rent from the store

building which witness had built, and which was let as a butcher's shop.

Wm. Knight Norquay, butcher, Vryburg, said that he had had full occupation of the building since the 7th November; he had paid £12 10s. a month as rent to the end of June this year. The rent had now been reduced to £10 owing to the bad times. He was not inconvenienced by not having the slabs.

Mr. Jones closed his case.

The defendant, Arthur Wm. Fincham, of Wynberg, said that he went to Vryburg, for the express purpose of spending nine months there. He was away from February to November last. Pavert was to move into the new premises as soon as plaintiff could give possession, and was to remain in the meantime in the old premises, so as to continue the business. At the end of October it was arranged that Norquay should take over the business on the 1st November. Mr. Norquay went into the old portion of the building on the 1st November, on the understanding that he was to go into the new building when the plaintiff gave him possession. Witness's object in getting the work completed by November was to have the work under his eye while he was in Vryburg. He returned to Vryburg in February, and found that the plaintiff was still working at the building, being engaged on the verandah. He had never given the plaintiff to understand that he was dissatisfied with the delay. He had expected the £73 to be expended in labour, thus expediting the completion of the work. The plaintiff did not expedite the work, and thus was not entitled to anything more than the original contract price.

Cross-examined: He was not aware that the slabs had to be sent for from England until he had a demand for the money last March. He was not aware that he had suggested to the plaintiff that he should get the slabs from Cape Town. He did not remember having talked over the matter of the slabs with the plaintiff. It was quite possible that he had forgotten a conversation on such a matter. The main object of the special contract was to have the building completed before witness left Vryburg. He had suffered £73 damages. He had made a miscalculation in his demand for payment of a fine, and should have charged for 90 odd days instead of 160. They were liquidating the business of Pavert in the course of December. He was engaged in electioneering matters in Vryburg last year.

Re-examined: He was at Vryburg frequently between November and February, owing to electioneering matters. He was nominated in October.

Mr. Buchanan having closed his case was heard in argument on the facts.

Hopley, J., said it did not seem that the case of *Maryon and Carter*,

which had just been quoted, was in point in this case. There the plaintiff, who was a builder, and who was putting up a row of houses, sold the houses to the defendant, and undertook, for an additional £80, by a specified date, the houses should be completed, roofed, sashed, and paved in front, and should be occupied by tenants on not less than yearly tenancies. By the expiration of the time specified, the pavements had not been completed, as the plaintiff had contracted for, and therefore he was not entitled to the additional £80. But in this case they had an owner of property at Vryburg getting the plaintiff to tender for the rebuilding of his house, and accepting his tender of £1,427. No time limit was specified in the original contract, and the plaintiff might properly have occupied seven or eight months. To avoid unpleasantness, and to hurry up the plaintiff, the defendant offered him, in a letter dated the 11th June, better terms than his tender gave him, for which he exacted something from the plaintiff. The defendant offered to raise the contract price to £1,500, on condition that the building was completed in five months, reckoned from the 8th June, 1903, a fine of £10 to be imposed by the defendant for each day if the work were not completed on the 8th November. The plaintiff agreed to this proposal. The question was, had the plaintiff carried out his contract? Was the building complete on the 8th November? After reviewing the course of events after the 8th November, his Lordship said that the new premises were let from the 1st November to Norquay, who had become tenant, instead of Pavert, and no inconvenience seemed to have been suffered by the defendant, who must be taken to have acquiesced in the course adopted. Mr. Fincham had had his tenant, and drawn his rent from the 1st November; he had had all the benefits that he possibly could have had if the shop had been as complete as it possibly could be. It seemed to him (the learned judge) that for the defendant now to say that the plaintiff had not carried out his contract was taking a position that was wholly unreasonable, and wholly illegal. It seemed to him that the defendant had made such an acceptance of the work done, and the conduct pursued by the plaintiff that he could not now be heard to say that the plaintiff had not performed his contract. Judgment would be given for the plaintiff, as prayed, with costs, plaintiff to have his expenses as a material witness.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorneys: Hutton and Buchanan.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

1904.
Aug. 25th.

Mr. Close moved for the admission of George Barnes Shaw as an attorney. Applicant had lately been an attorney of the Transvaal. Counsel added that the case was on all fours with the cases of Hofmeyr and Kotze.

Application granted, subject to proof of service with an attorney in the Transvaal to the satisfaction of the Registrar of this Court, and oaths to be taken before the Registrar of the Eastern Districts Court.

Mr. Close moved for the admission of Frederick John Swan as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Graaff-Reinet.

Mr. Gardiner moved for the admission of George Henry Hunter as an attorney and notary.

Application granted, oaths to be taken before the R.M. of Dordrecht.

PROVISIONAL ROLL.

KOTZE V. ANDREWS.

Mr. Struben moved for provisional sentence on a mortgage bond for £200, with interest, and for the property specially hypothecated to be declared executable; the bond having become due by reason of the non-payment of interest.

Order granted.

BOESSEN V. DAY.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent. Counsel stated that the matter had previously been before the Court, and had stood over to enable the defendant to sell certain property in order to pay the plaintiff. The debt was £1,300 odd, and the movables realised considerably less than that sum.

Mr. Gardiner (for the defendant) opposed the application, and said that the property had been sold, and there was a prospect that everything would be in order on the 2nd or 3rd September. Certain informalities had arisen, which were beyond the control of the respondent, and, if allowed an extension of time, she would be able to satisfy the plaintiff's claim.

Ordered to stand over until the 12th September.

MASTER V. PIENAAR.

Mr. Howel Jones moved for the usual order upon the defendant to file an account in an estate of which he is executor in the estate of Hendrick Wernich. Usual order granted.

ROOS V. CHETTY.

Practice—Ejection—Motion.

Where the plaintiff had issued summons for ejectment.

Held, that ejectment could not be granted on motion.

Mr. M. de Villiers moved for provisional sentence for £50, upon certain lease, being rent for two months, due and unpaid, and also for an order of ejectment in terms of lease.

Mr. Roux (for the defendant) read an affidavit, in which the latter stated that he had made many and great improvements to the property, with the knowledge and consent of the plaintiff, having expended in this way over £400. He prayed that, until the plaintiff had paid him compensation for the improvements, he should not be ejected from the premises.

A replying affidavit by the plaintiff stated that there had been negotiations for the purchase of the property by the defendant. The property was sold to respondent upon certain conditions, but he failed to meet his obligations, and plaintiff afterwards let him have the house on a six months' lease. With regard to the alleged improvements, these were made while the respondent was owner of the property, but, instead of being improvements, they were a detriment. He denied that "improvements" were made with his knowledge or consent. He was entitled to £300 or £400 from the defendant for damage done to the property. He intended to sue the defendant for damage to the property.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The summons consists of two parts—a claim for provisional sentence and a claim for ejectment. As to the provisional sentence, there is practically no defence to that. The amount of rent is due, and provisional sentence must be given for the amount. As to the claim for ejectment, counsel for the plaintiff quite correctly said that the Court has on previous occasions ordered ejectment on motion, but in the present case, the plaintiff has not proceeded by motion. The plaintiff has proceeded by summons, and, having proceeded by summons for ejectment, he must also file his declaration. It is not in accordance with the prac-

tice of this Court to grant provisional sentence on a claim for ejectment. Of course, if there had been default of appearance by the defendant, then, judgment would be given in the ordinary way. But a defence has been raised in the present case, and the practice is that, the plaintiff having proceeded by summons, must file his declaration. Then the defence is raised that there is a right of retention for improvements. That claim for retention can be heard when the action is brought for ejectment. Provisional sentence will be granted for £50, and the plaintiff will be ordered to proceed to the principal case for the purpose of ejectment, with leave to add in his declaration a claim for damages.

Costs will abide the result. There will be provisional sentence for £50, with costs, the plaintiff to file his declaration upon his claim for ejectment, with leave to add a claim for damages.

KENNER AND CO. V. ISRAELSOHN BROS.

Mr. Russell moved for provisional sentence on a promissory note, dated Oudtshoorn, January last, for value received, the note having been dishonoured. Counsel applied for provisional sentence for £550, less £180 14s. paid on account.

Order granted.

POLLOCK V. PULVERMACHER.

Mr. W. P. Buchanan moved for provisional sentence upon a mortgage bond for £1,700, with interest, and for the property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest.

Order granted.

BEAKE V. CAROLESEN.

Mr. Van Zyl moved for provisional sentence on a mortgage bond for £700, with interest, and for the property specially hypothecated to be declared executable, bond having become due by reason of the non-payment of interest.

Order granted.

BOOTH AND SONS V. HARRIS.

Mr. Pymont moved for provisional sentence for £176 9s. 5d., with interest, being balance due on promissory note, bill of exchange, and dishonoured cheque.

Order granted.

MALCOLMSE AND CO. V. CARY.

Mr. W. P. Buchanan moved for the final adjudication of the partnership and

private estates of the members of the firm of H. B. Cary, of Tarkastad.

Order granted.

Counsel also moved for the appointment of a provisional trustee, the name of Peter August Reimers being suggested.

Application granted.

BECKER V. DE VILLIERS.

Mr. De Waal moved for provisional sentence for £400 upon a promissory note, with interest.

Order granted.

ESTATE OF GORDON V. WOOD.

Mr. Percy Jones moved for provisional sentence for £2,000 upon a mortgage bond, and for the property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest; counsel also asked for judgment, under Rule 329d, for £12, being an extra 2 per cent. interest on the said sum, over and above interest claimed on bond and agreed by defendant.

Order granted.

RUTTER V. BLOCK AND GOLDSTEIN.

Mr. Pymont moved for provisional sentence for £1,900, due on a mortgage bond, with interest, less £25 paid on account, counsel also applied for £14, premium of insurance; and for the property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest.

Order granted.

DE HETON V. COHEN AND KAPLAN.

Dr. Greer asked that this matter should stand over in view of a prospect of settlement.

Application granted.

Later, Mr. Greer moved for provisional sentence on a promissory note, a net sum of £164 11s. 2d. being due.

Order granted.

HOPKINS V. PLATJES.

Dr. Greer moved for provisional sentence on a mortgage bond for £100, with interest, and for the property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest.

Order granted.

ILLIQUID ROLL.

JOHNSON V. ERNIE. { 1904.
{ Aug. 25th.

Mr. Pittman moved for judgment, under Rule 329d, for £80, rent due, with interest *a tempore morae*, and costs of suit.

Order granted.

L. AND J. HERMANN V. VIVIERS.

Mr. Burton moved for judgment, under Rule 319, upon declaration, for £300, for 30 bicycles, and also for interest on certain promissory notes.

Order granted.

MURRAY AND CO. V. NIEBURG.

Mr. M. de Villiers moved for judgment, under Rule 319, for £170 17s. 6d., balance of account.

Order granted.

MOORREES V. PENTZ.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £52 10s., less £42 10s. paid on account, for goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

DEYZEL V. DEYZEL.

Mr. Gardiner moved for judgment in terms of the defendant's tender in his plea.

Order granted.

REHABILITATION.

Mr. W. P. Buchanan applied for the rehabilitation of Benzel Kaplan. The matter had, said counsel, previously been before the Court, but had stood over for an offer of a composition, this having been accepted by four-fifths of the proved creditors.

Application granted.

GENERAL MOTIONS.

GLASS V. GLASS. { 1904.
{ Aug. 25th.

Mr. W. Buchanan moved, on behalf of the petitioner, Agnes Glass, for rule *nisi* to be made absolute, in default of defendant's compliance with an order for restitution of conjugal rights. An affidavit by petitioner was now read as to the efforts made to discover the

defendant, who had formerly been in the employ of Texas Jack.

Rule made absolute.

Ex parte THE MUNICIPAL COUNCIL OF RONDEBOSCH.

Mr. M. Bisset moved for the rule *nisi* under the Derelict Lands Act to be made absolute.

Mr. Upington appeared on behalf of Aletta Barbara How, of Stellenbosch, to oppose.

From the petition of the Municipal Council, it appeared that a certain lot of land at Westerford, in the municipality of Rondebosch, formed the subject matter of the application. This land was registered in the name of Rudolph Cloete, but for some years past no rates had been paid upon it, and no building had stood there, the result being that an amount of £62 19s. 9d. had become due to the Municipality. Petitioners prayed for an order for the sale of the land, so that they might recover the sum due as rates, and authority to be given to the Registrar of Deeds to pass transfer. The rule *nisi* was granted on the 21st July.

Mr. Upington read an affidavit by Aletta Barbara How (born Cloete), widow of the late Captain How, and at present residing at Stellenbosch. She stated that she was one of the daughters of the late Rudolph Cloete, and that other children still survived. Her mother died at Stellenbosch in 1866, and her father died at Newlands in 1871, and deponent and other children inherited the estate. From the liquidation and distribution account filed in the estate of her late father and his predeceased spouse, it did not appear that the piece of land referred to in the rule had been brought up and allotted to the heirs. Owing to an act of omission the ground had been left unadministered, and deponent prayed that an executor dative should be appointed for the purpose of administering the same and paying out the proceeds, after satisfying the claim of the petitioners. She stated that the value of the said land was far in excess of the amount alleged to be due to the petitioners.

The further hearing of the case was postponed to next term, to enable an executor to be appointed.

DARTER V. DARTER AND BOARD OF EXECUTORS.

Mr. Close applied on behalf of Georgina Darter for an interdict to restrain the defendants from disposing of certain moneys, pending the hearing of a civil action, to be brought by the applicant against her husband.

The order was granted.

KUIL V. UNION-CASTLE CO.

Mr. Gardiner applied on behalf of the plaintiff to make absolute a rule nisi ordering the plaintiff to sue the defendants *in forma pauperis*.

The application was granted, Mr. Gardiner being appointed counsel.

DAVIDS V. ESTATE DAVIDS.

Mr. Roux applied on behalf of the plaintiff to have an order of the Court enabling him to sue *in forma pauperis* made absolute. He also applied for an interdict to restrain the defendant from disposing of certain properties.

[De Villiers, C.J., said the Court had to presume that the executors would not part with the property. He wished to know if they were men of means or men of straw.

Mr. Roux: We believe they are men of straw.

[De Villiers, C.J.: The estate may be of straw, and the executors may be men of means.]

An order calling on the defendants to show cause on the 15th October why the plaintiff should not sue *in forma pauperis*, and also why they should not be restrained from disposing of the property, was granted.

Ex parte HIGGS.

Mr. P. Jones applied on behalf of the plaintiff for leave to sell certain property. He said the applicant was executrix testamentary of the will of her late husband. In the estate there was a certain property, which had been lying idle, and bringing in no income for a number of years. She now wanted to sell that property for £150. The Divisional Council valuation of it was £50. The Master's report was favourable.

The application was granted.

Ex parte SEALE.

Mr. W. P. Buchanan moved for leave to raise a mortgage bond on certain property belonging to a minor, for the purpose of making improvements.

The matter was referred to the Master.

Ex parte BEARS SON AND CO., LTD.

Mr. W. P. Buchanan moved for an order approving certain resolutions, unanimously passed at meetings of the company, to reduce the capital of the company. The whole share capital of the company was represented at the meetings.

The application was granted.

HAMP V. HAMP.

Mr. Gardiner moved on behalf of the wife for an order on defendant to pay £30 to enable her to institute proceedings against the defendant for a decree of judicial separation, and for a sum of money to enable her to support herself. An affidavit was made by the applicant alleging that her husband had disposed of his business as a cabinetmaker for £1,200, out of which he would receive £500.

Defendant said he had no means. He could not supply his wife with the £30, nor could he pay a solicitor. His creditors had seized his business. He was providing for the children, and had sent moneys to his wife.

Mr. Gardiner said the action was for judicial separation, on the ground of desertion.

De Villiers, C.J., said the Court could give applicant leave to sue *in forma pauperis* upon her making application.

Mr. Gardiner said he would consent to allow the matter to stand over.

The Court ordered the matter to stand over until the 31st August.

[Before the Hon. Mr. Justice HOPLEY.]

Ex parte WOOLF. { 1901.
{ Aug. 25th.

Mr. Sutton moved for an order authorising the transfer of certain property.

Granted.

Ex parte OLIVIER AND ANOTHER.

Dr. Greer applied for the appointment of a *curator ad litem*. Mr. Christian claimed to be appointed.

The order was granted.

ELLIS V. SMITH.

Mr. Pyemont, on behalf of plaintiff, sought an ejectment order against the defendant.

Plaintiff's affidavit stated defendant, who gave himself out as a medical practitioner, undertook to rent a furnished house from her at £13 10s. per month. He did not return to sign the agreement. When plaintiff went to take over possession of the house from the then tenant, she found the defendant in possession. She demanded the rent from him. He promised by letter to pay the amount due, but had failed to do so.

Hopley, J., inquired if the furniture was plaintiff's.

Mr. Pyemont replied in the affirmative, and said that the plaintiff rented the house. Twenty-four hours should be sufficient time to clear out.

[Hopley, J.: He got in quicker than that.]

An order for the ejectment of the defendant from the premises by Saturday was granted.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

PETERSEN V. GRIFFITH. { 1904.
(Aug. 26th.

Negligence—Damages—Pleading.

This was an action brought by Martinus Petersen, of Diep River, to recover from John Griffiths, of Maitland, the sum of £50, damages sustained by plaintiff owing to the negligence of defendant.

The plaintiff's declaration stated he was a gardener, and owner of cart and horses, which he used for carting vegetables to Cape Town market. The defendant was a dairyman and farmer residing at Maitland. On the 31st May, plaintiff sent his cart and horse in the care of his brother to the Cape Town market. The cart was standing in New Church-street whilst the vegetables were being delivered. Whilst doing so, the defendant's cart, with two horses attached, came galloping along New Church-street, and rushed into plaintiff's horse. The pole of the wagon pierced the horse's chest and killed it on the spot. The collision also broke a window, which defendant replaced. Plaintiff called on the defendant on the 1st June, 1904, and told him of the occurrence. The defendant the following day called on plaintiff, and tendered him £15, which amount plaintiff declined to accept. In consequence of the accident, plaintiff claimed £30 for the loss of the horse, £6 15s. for hire of another horse, and £14 for loss of services.

The defendant's plea admitted the accident, but denied that it was due to careless driving. His horses bolted owing to a bridle breaking. Although not admitting liability, defendant tendered plaintiff £15 for the horse, which he refused to accept. He was still prepared to pay the same amount.

Mr. Sylvester Williams appeared for the plaintiff, and Mr. Rainsford for the defendant.

Martinus Petersen (the plaintiff) stated he was a gardener, and resided at Diep River. On the 31st May last he sent a quantity of vegetables on a cart to Cape Town market. The horse, although in good condition, was an aged one, probably about twelve years old.

To the Court: When witness bought the horse five years ago, he gave £37 for it. He would not have sold the horse for less. He considered the horse was worth £60.

Examination continued: Witness heard by telegram of the accident. He inspanned his cart and came into town. He got the defendant's address, and went to see him. Defendant asked him how much he wanted for the horse. Witness replied that he would take £30. Defendant said it was all right, and promised to fetch witness's cart. He did so. The next day defendant offered witness £15, which he refused to accept.

Cross-examined: Witness asked Mr. Griffiths to bring him a horse that was quiet. He would have been quite satisfied with that. Witness had not since purchased a horse. He had to hire one whenever he required it.

John Braun, horse dealer, of Wynberg, valued the plaintiff's horse at £35.

Mr. Rainsford: This horse was "bandy-legged," was it not?—No, indeed.

Samuel Goldberg, general dealer, of Diep River, stated he knew the horse in question. It was a good puller and clean worker. He valued it at from £30 to £35.

Mr. Rainsford: What was the age of the horse?—I do not know.

And yet you place a value on a horse without knowing its age?—We do not go according to age on the Flats.

You say you do not attach any importance to the age of horses on the Flats?—That is so. It makes no difference to us what a horse's age is.

[Hopley, J.: At the age of twenty-one a horse on the Flats can work with as much ease as a five-year-old?]

I do not think the horse was twenty-one.

[Hopley, J.: When does a horse get old on the Flats?]

I do not know, my lord.

Carl Kinney valued the horse at £45 or £50.

Peter Peterson, brother to the plaintiff, stated he was selling vegetables in Cape Town on the morning of the accident. He was standing on his own cart when he saw the horse bolting, and he immediately jumped down. The pole of the wagon pierced the breast of his horse, knocking it down and killing it. Witness did not notice that the harness of the defendant's horses was broke. The horses, after knocking witness's horse down, continued galloping until defendant controlled them.

Cross-examined: After the horses were captured Mr. Griffiths went to look at witness's horse. Defendant mentioned nothing about the bridle being broken.

To the Court: Witness followed the horses after they knocked his horse down, but could not overtake them.

Peter Solomon, an eye-witness of the accident, gave corroborative evidence.

Antonio Parkinson also gave corroborative evidence.

In cross-examination he admitted that the bridle was broken.

Abdulla Mahomed stated he heard the conversation between Griffiths and Petersen, the former offered the latter £15.

John Griffiths, the defendant, examined stated that one of the horses by means of the pole pulled off the bridle. The horses bolted and witness could not control them. They ran into plaintiff's horse and killed it. Witness had the harness three months at the time of the accident. Witness had never had any trouble with the horses before. They were young horses. He saw the horse lying dead and he did not think it was worth more than £15.

Cross-examined: Plaintiff refused to accept the £15 witness tendered him. Witness considered that a fair amount.

To the Court: At the time of the runaway witness was busy serving out milk.

[Hopley, J.: The weak part in the defendant's case is that he was not attending to his horses at the time of the accident and that he took no steps to prevent such an occurrence. Most people would do as he did, except a very careful man.]

Police-constable Rivet (257) stated he arrived on the scene shortly after the accident. The horse was dead. He valued it at about £12 or £15.

Witness had had vast experience of horses. He was transport-sergeant in the K.O.R.'s for two years, having charge of 800 horses and 200 mules.

[Hopley, J.: Have you any experience of buying or selling?]

I have sold them on the Parade for the Imperial Government.

[Hopley, J.: From what I know of the Parade, horses do not fetch their value there, especially horses the property of the Government. The witness has not seen the extravagant part of the thing. He has only seen Army horses sold.]

Evidence of value was given by James Louw, who stated he did not think the horse was worth more than £10. It was an aged horse, and seemed in poor condition.

Cross-examined: If it had been his horse he would have valued it at £12. This closed the evidence for the defence.

Hopley, J., asked what clause C (£14 for loss of service) meant?

Mr. Williams: It means the loss sustained through being deprived of the service of the horse.

[Hopley, J.: But he charges hire for another horse.]

Mr. Williams: I leave that matter to the discretion of your lordship.

Counsel having argued on the facts.

Hopley, J., said that although the case had been fought on the grounds of the defendant's carelessness and negligence, no mention was made in the declaration of that fact. Sooner than let the case stand incomplete, he proposed to allow the plaintiff to alter his declaration to read properly.

This was done.

Hopley, J.: In this case the plaintiff and defendant had had misfortune, and "bad luck," to use an ordinary parlance. The plaintiff had lost a horse, which to him seemed to have been a valuable one, and of which he seemed to be very fond. He thought the plaintiff's feelings on that point were really sincere. On the other hand, the defendant had had the misfortune to have his cart run away, and do a considerable amount of damage. The question as to whether the defendant's action could be brought under the category of negligence, was a question for the Court to decide. In the opinion of the Court he should be held liable. Although he sympathised with him, he (his lordship) felt that it would be wrong on his part not to hold him liable for neglect. It was not gross neglect. It was neglect that a good many people would be liable to incur under the circumstances. The defendant must be held legally guilty for the consequences of such negligence. It was the duty of the Court to fix on something that would be a fair price for the horse. The measure of damages should not be added to, by hire of other horses, and loss of services. The proper measure of damages was the value of the horse, as it was before it was killed. He had heard evidence on that point both from the plaintiff's and defendant's witnesses, and he thought that £25 would fairly meet it. It seemed unfortunate that the defendant, who seemed to be a reasonable man, did not carry his reasonableness a little further. There would be judgment for the plaintiff for £25 and costs.

GENERAL MOTIONS.

Ex parte PASCOL. } 1904.
Aug. 26th.

Mr. Sutton moved for an order authorising the alteration of the name, Andriana Maria Pascol, under which the petitioner signed an ante-nuptial contract, and for an order on the Registrar of Deeds to amend the name in a certain transfer of property.

Order granted.

Ex parte KLEYN.

Mr. Rainsford moved for an order releasing the petitioner's estate from sequestration. No creditors

appeared on the occasion of the first meeting on the 1st July, 1904, before the R.M. at Oudtshoorn, and the second meeting was adjourned in order to consider a compromise, and a majority of the creditors had signed in favour of the release.

Order granted.

BLIGNAULT V. WEPENAR AND OTHERS.

Mr. Burton was for the applicant, and Mr. Schreiner, K.C. (with him Mr. M. Bisset), appeared on behalf of the respondents, Snyman and Verschuur.

This was an application to have an award of arbitrators made a rule of Court. The parties had agreed to the award with the exception of the one particular clause, which now came before the Court.

Mr. Schreiner contended that the arbitrators had exceeded their powers, and applied for a remission of the third clause back to the arbitrators.

De Villiers, C.J., said that he thought if it had been intended that the arbitrators should deal with water beyond the boundaries of the farm Buffelsvlei, the memorandum of agreement would have been more specific, and he considered the arbitrators had gone beyond their powers in assigning any rights to farms outside the boundaries of Buffelsvlei. It might be that there were common law rights or they might be able to make good their position by immemorial usage, but the order of the Court would be that the clause in dispute would be remitted back to them for reconsideration, in accordance with clause 16 of Act 29 of 1898, and the costs of this application would follow the same line of provision fixed upon by the arbitrators in the general costs.

Ex parte FIENHABER AND ANOTHER.

Mr. Van Zyl moved for an order amending the name of the petitioner in a certain deed of transfer in which his second name had been omitted, and also that of his wife, whose name appeared as Augusta Dorothea instead of Dorothea Augusta in a certain ante-nuptial contract.

Order granted.

Ex parte DU PLESSIS.

Mr. Van Zyl moved for an order amending the petitioner's name on a certain deed of transfer.

Order granted.

Ex parte BEYLEVELD.

Mr. W. P. Buchanan moved for an order including the name "Joachim" in a certain deed of transfer.

Order granted.

Ex parte GOW.

Dr. Greer moved for an order authorising the Master to pay out a certain monthly allowance out of the inheritances of two minors to whom the petitioner was tutor.

An order was granted authorising the Master to pay out to Frederick Babb the sum of £6 10s. in settlement of a debt for board and lodgings, and £4 a month to each of the minors as suggested by him. The Master to report in case of any change in the circumstances of the minors which would render such payments unnecessary, the costs to be paid by the Master out of the inheritances.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr. Justice ROPLEY.]

PARKER V. REED.

{ 1904.
Aug. 29th.
Sept. 5th.

Pauperies—Noxal action—Horse—Damages—Abrogation of law by disuse—*Culpa*.

The plaintiff's horse, while standing in harness before a farrier's door, was kicked by the defendant's horse which had been brought there to be shod, and was being led by the servant of O., to whom the defendant had lent the horse. There was no proof of negligence on the part of the servant nor was there any evidence that the defendant's horse had previously been known to kick or injure any person or other horse.

Held, that although under the Roman and Dutch Law the defendant would, as owner, have been liable for damages, unless he tendered to surrender his horse as compensation, he cannot, under the law of the

Colony, be held liable in the absence of any culpa.

The case of Seavill v. Colley (9 Juta 39) followed.

This was an appeal from a judgment of the Resident Magistrate of Somerset East. The appellant sued the respondent in the Court below for £25 (less £5, to bring the matter within jurisdiction), for loss of a horse through the maiming of one of its fore legs by a kick from a stallion pony belonging to the defendant. The incident happened in front of a farrier's shop at Cookhouse, and the animal had to be shot in consequence of its injuries. The contention of the plaintiff was that the injuries were due to the negligence of the defendant's servant. The Magistrate gave judgment for the defendant.

The Magistrate, after setting out the facts of the case, gives his reasons as follows:

"To maintain this action plaintiff is required to prove that the injury was caused by the carelessness of the employee of the defendant. Evidence has been led to endeavour to prove that the stallion was a mischievous animal, and that the owner must have been aware of the stallion's vicious nature, and further that the stallion had no right to be at the place where he kicked plaintiff's horse. There are no decided cases in any of our Colonial Courts that I can find to assist the Court in arriving at a decision, but of reference to some of the cases heard in the County Courts in England, it is laid down that the owner of a domestic animal is liable only if he knows that the animal is accustomed to do mischief. The animal was produced on view in front of the Court and exhibited no signs of vice. It is contended on behalf of the defendant that defendant's horse was known to be vicious and that the damage resulted from a trespass for which defendant's boy was responsible. But there is no satisfactory proof that defendant's horse was of a vicious temper, and whether the horse had a right to be in front of the farrier's shop or not, is immaterial, because even supposing that there was negligence in this respect, the owner would only be liable for the ordinary consequences of his neglect, and that the horse kicking another horse was not a consequence of this nature. But I go further and say that it is reasonable to admit that the stallion had every right to be in front of the farrier's shop where the accident happened. It has not been proved that the stallion had a previous mischievous propensity. The animal was not what may be termed "a kicking horse" and the damage was not caused by the horse committing such an act as he might

naturally have been expected to commit. I have therefore no alternative but to enter judgment for the defendant, with costs.

Mr. McGregor was for the appellant; Mr. Schreiner, K.C., was for the respondent.

Mr. McGregor submitted it was a fair inference where the owner was aware, or, speaking generally, knew his animal had done damage, or that the animal belonged to the class that does damage—then it was only fair that the proprietor should make good in money any damage done by the animal. It was only fair because he had sufficient warning from the previous history of the animal, and it was rather too much to say that, because the horse was under the stern eye of the Magisterial Court that it was not a vicious animal.

Mr. Schreiner said that on the summons as it stood it was quite clear that his learned friend could have nothing to say. As far as negligence was concerned, there was an absolute answer in the fact that the boy, who was in charge of the horse, was not the servant, or the agent of the defendant. In England an action of this sort would have to be founded on negligence. The neat point their lordships would have to decide was whether a horse, tamed or not, carried with it the responsibility for any damage resulting.

[De Villiers, C.J.: The old authorities put a slave and a horse on the same footing, and held the latter to be a rational animal.]

Mr. Schreiner contended that the authorities were obsolete, as a horse could not be put on the same footing as a slave. Continuing, counsel said that if it was held that it was an inherent probability on the part of a horse to kick under certain circumstances, then it must be shown that the owner of the horse put it in those certain circumstances.

Cur. Adr. Vult.

Postea, September 5.

De Villiers, C.J.: This is an appeal against the judgment of the Resident Magistrate of Somerset East in an action for damages for an injury done to the plaintiff's horse by a horse belonging to the defendant. The injury was caused by a kick, but there was no evidence that the defendant's horse had previously done any similar injury, or that the servant who had charge of it was guilty of any negligence. In the absence of such evidence the Magistrate found a verdict of the defendant.

The question whether the owner of the animal is liable to make compensation for damage done by it has repeatedly been before this Court, but in every decided case there has been an element of *culpa*, which left no doubt as to the owner or custodian's liability. In the case, for instance, of dogs chasing ostriches, the

natural propensity of the dog to pursue a fleeing bird was held to impose on the owner, or custodian, the duty of preventing the dog from indulging in that propensity at the expense of the owner of ostriches, which are not trespassing on the property of such owner or custodian. If through failure of his duty, damage is done, he has been held liable for such damage on the ground of his *culpa*, and not of his mere ownership or possession of the dog. In the same way, seeing that it is part of the ordinary nature of animals, such as cattle, to wander wherever their instinct leads them, and so to commit trespasses, our law, quite independently of the Pounds Act, holds the owner liable for trespasses committed by such animals. So, also, it has been held in *Beatty v. Donnelly* (Buch., for 1876, p. 51) that the owner of a monkey is liable for damages for personal injury done by it, on the ground that the animal being *ferae naturae*, the owner ought to have known of its mischievous propensities, and guarded against their being exercised at the expense of others.

In the present case the Court has to decide upon the liability, or otherwise, of the owner of a horse for a sudden act of a violent nature, contrary to its usual habits. It is the case of mischief done by the vice of an animal, such vice having been causelessly stirred within it, and not excited by provocation from without. If the horse had been known to the owner to have the vicious propensity of kicking, he would be liable, not on account of his ownership, but on the ground that, with such knowledge, he did not guard against the probability or even possibility of its doing mischief. The question is, whether without such knowledge the owner should be held liable?

If the case had arisen for decision under the Roman law, there could be no doubt as to the result. According to the Institutes (4, 9, pr.), "a noxal action was granted by the Law of the Twelve Tables in cases of mischief done through wantonness, passion, or fierceness by irrational animals, it being by that law provided that if the owner of such animals surrender them in satisfaction for the damage, he is thereby released from liability, as, for instance, if a horse that is apt to kick does damage by kicking, or a bull with a propensity to butt does damage with its horns. But the action only lies in cases where the animal is acting contrary to its nature. If it is the nature of the animal to be fierce, the action is not available. Thus, if a bear runs away from its owner, and causes damage, the former owner cannot be sued, for immediately with its escape his ownership ceased to exist. The term *pauperies* is

used to denote damage done without any wrong on the part of the doer, for an unreasoning animal cannot be said to have done any wrong." This passage clearly shows that the liability attached to the owner, not on account of any negligence of his, but by reason of the bare fact of his ownership. According to the Digest (9, 1, 1, section 12), if the owner transferred the ownership, his liability ceased, and the person who acquired such ownership became liable. He also, like the original owner, could escape liability for damages by surrendering the animal which did the mischief. Some of the illustrations given in the Digest bear a very close resemblance to what actually took place in the present case. Thus, it is said by Alfenus (Dig. 9, 1, 5) that where an oetler was leading a horse which smelt at a mule mare, which on her part kicked and broke the oetler's leg, the owner of the mule was liable in the noxal action.

In regard to the Dutch law, the writers are not unanimous, but the preponderance of authority supports the retention of the Roman law in regard to noxal actions for injury done by animals. According to Van Leeuwen (Comm. R.D. Law, 2 Vol., Kotze's Transl., p. 323), "he whose animal causes damage to another must make compensation or deliver up the animal for the same. But if the animal be wild by nature, or otherwise of a mischievous propensity, as, for instance, a dog accustomed to bite, or a horse accustomed to kick, or the like, the owner will be liable to make full compensation for the damage done, without being able to get off by giving up the animal." In his note to this passage, Decker says: "Whether by our Dutch laws the owner can escape further liability by giving up the animal is, not without reason, a matter of doubt with many." Vinnius also in his Commentary on the passage in the Institutes already cited says: "At the present day the surrender of the offending animal (*noxæ deditio*) is not in use, but the damage done is assessed by the judge." On the other hand, Groenewegen (De Leg. Abr.), in his Comment upon the same passage, and Voet in his Commentaries (9, 1, 8), maintain that the Roman law remained in force in the Netherlands. It does not appear from any of the published reports I have consulted that the point was ever decided by the Dutch Courts, but I take it that if the present case had come before them for decision, they would have held the defendant liable, either to surrender his horse or pay the plaintiff the damages by him sustained.

The question remains whether the noxal actions are still maintainable in the courts of this colony. The Roman law placed injury done by a man's slave on the same footing as injury done by

his cattle, but it is obvious that since the abolition of slavery the noxal action for damage done by slaves must be considered as having been likewise abolished. As to animals, it does not appear that the noxal action has ever been brought in this colony, or, so far as I can ascertain, in any other colony or State of South Africa. In every case in which the owner of an animal has been held liable in this colony for mischief done by it, there has been proof of some degree of *culpa*, rendering the owner liable under the Aquilian law, rather than under the Law of the Twelve Tables. In no case has the owner tendered to surrender the offending animal, in order by that means to escape liability. It goes without saying that in a pastoral country like this cases of injury done by animals to each other or to human beings, without any fault on the part of their owners, must be a matter of very frequent occurrence. The fact that the persons injured have never sought to recover damages without, at all events, alleging negligence or circumstances from which *culpa* might be inferred, and the further fact that persons whose animals did the mischief have never attempted to escape further liability by surrendering such animals, go far to prove a general custom which is inconsistent with the rule of the Roman law. Not only is there no reported case in which any South African Court has recognised that rule, but there are several *dicta* of our judges which are somewhat at variance with the rule. In the case of *Le Roux v. Vick* (Buch., 1879, p. 29), Smith, J., in his instructive judgment, held that the owner of a dog is liable for damage done to an ostrich on a commonage, but he was careful to explain that it was the mischievous propensity of dogs and not the mere ownership which rendered the owner liable. "I am afraid," he added, "a suitor would scarcely think that, *moribus hujus seculi*, a judge was acting in accordance with the highest principles of equity in deciding that a Kafir dog was all the compensation he could obtain for the loss of a valuable breeding bird that had been bitten to death by that dog." In *Spies v. Scheepers* (3 E.D.C., 173), Buchanan, J., said that the liability for injury done by animals is founded upon the doctrine of *culpa* or negligence. It is obvious that he could only have referred to the law of this colony, because the liability for *pauperies* under the Roman law and Dutch law was independent of any negligence on the part of the owner. In *Graham v. Viljoen* (8 Buch., 126), the liability of the owner of a dog for injury done by it was placed on the ground of the mischievous propensities of dogs generally, and not of his mere ownership of the dog which did the mischief. In *Eastern Telegraph Company v. Cape Town Tram-*

ways Company (17 Juta, 95), I ventured to point out that our law requires some degree of *culpa* to render any person liable for injury done to others by reason of the otherwise lawful user of his own property. The Judicial Committee, which affirmed the judgment in that case, seems to have misunderstood my remarks in regard to the case of *Fletcher v. Rylands*. I did not say that the law of this colony differs from the law as there laid down, but I remarked that I should not be prepared to hold it to be a binding authority in this court if the question of *culpa* did not enter into the decision of that case, and I indicated that the want of due care taken by the engineer in that case would constitute *culpa* as defined in our law. It is true that by our law a master is liable for damage done by his servant while acting within the scope of his employment, although the master may have exercised due care in the selection of his servant. The *culpa* of the servant is deemed to be the *culpa* of the master who employed him, but if the analogy of the Roman law were to apply, the master should, by forthwith dismissing his servant, be relieved from liability for injury done without any personal negligence on the part of the master. A servant is a rational being, which the animal is not. The Roman law treated them both as equally capable of doing an injury, and allowed the master of an offending slave to surrender him in the same way as the owner of an offending animal could surrender him in lieu of paying compensation. The liability followed the animal, or the slave, as the case might be, and only attached to the owner so long as he remained the owner. It was a primitive law which is hardly consistent with modern notions regarding the nature of animals, and their relations to their owners, and others than owners. If that law were still in force, some extraordinary results might follow. Supposing, for instance, a valuable horse were causelessly and contrary to its usual habits to commit a serious injury, and were then sold at a high price to a person who had never heard of the injury. The purchaser would be liable in damages to the person injured, unless he were prepared to surrender the animal. The seller may have spent the money, or have left the country, and the purchaser would find that with the horse he had purchased a liability, which he could only get rid of by getting rid of the horse also. If such is still the law, it must, of course, be enforced, but it appears to me fairly to fall within the principles laid down in the case of *Seavill v. Colley* (9 Juta, 39). The presumption is that the law relating to *pauperies* is still in force, but this presumption cannot prevail in the absence of any recognition, judicial or otherwise, of the existence of such a law, and

in the face of repeated decisions, which require proof of some degree of *culpa* in order to attach liability to the ownership, custody, or use of property. In the absence of any evidence of *culpa* on the defendant's part, I am of opinion that the Magistrate gave a proper judgment, and the appeal must, therefore, be dismissed, with costs.

Hopley, J., concurred.

[Appellant's Attorneys: Michau and De Villiers; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

REX V. KEENE. { 1904.
{ Aug. 29th.

Native area—Act 28 of 1883, sec-

tions 21 and 22—Acceptance of licence subject to condition—Aboriginal native.

Where the Governor has by Proclamation defined any area as one, within the limits of which it shall not be competent for any Licensing Court to authorize licences in terms of the 21st section of Act 28 of 1883, it lies upon any one who denies the validity of the Proclamation to prove that the area is not one to which the section is applicable.

The acceptance of a licence purporting to be subject to such a Proclamation issued by the Governor is an admission by the licence-holder that the area within which his licence holds good is one to which the Act is applicable.

This was an appeal from a decision of the A.R.M. of Molteno, by which the appellant was ordered to pay a fine of £10, or two months' imprisonment, with hard labour, for supplying an aboriginal native with a bottle of brandy. Mr. W. P. Buchanan was for the appellant, and Mr. Howel Jones appeared for the Crown.

Mr. Buchanan said that the accused was summoned under the Act 28 of 1883, which had been applied to the district of Molteno by the Proclamation 10 of 1904, for selling a bottle of brandy to one John Human. Human, in evidence for the prosecution, said that his mother was a Hottentot and his father was a German; while, for the defence, the accused said that he had repeatedly served Human openly, and Human had told him his father was a German and his mother a Cape woman, and from his

appearance he concluded that there was white blood in his veins, and that he was a Cape boy. Counsel contended that it was not competent to proclaim the Magistracy of Molteno under section 22 of the Act 28 of 1883; otherwise Cape Town could be proclaimed, and no person would be safe in giving his own native a glass of liquor of any kind.

[De Villiers, C.J.: The only point in your favour is that the summons ought to have been for acting contrary to the licence, and not for contravening the section of Act 28.]

Mr. Buchanan then proceeded to argue that the Crown must prove that liquor was sold to an aboriginal native, and between aboriginal native and native there was a vast difference.

[Hopley, J.: What is an ab-original native?]

It must be very hard to define.

[Hopley, J.: You had better be careful; some of us may be involved in this matter.]

That just shows the hardship on licensed victuallers.

[Hopley, J.: Would you go so far as to say that any one born in the country was a native?]

According to the dictionary meaning aboriginal natives are the descendants of the first inhabitants of this country, but I cannot claim that myself.

[Hopley, J.: You say this man may be a native, just as you and I are, and not an aboriginal native?]

Simply because an ab-original native's ancestors were here from the start.

[Hopley, J.: The moment his blood is infused with the blood of other people he ceases to be an aboriginal native?]

Mr. Buchanan proceeded to quote the case of *Queen v. Parrott* (9 C.T.R., 460), in which it was held that the appearance of the person was the truest test of all, but in this case Human had long hair and straight features.

[Hopley, J.: This is his father.]

Yes, my lord. Proceeding, counsel asked the Court to look into the difficulty experienced by licensed victuallers in distinguishing between natives and non-natives. If this conviction stood, it would mean that licensed victuallers would not be able to sell to any man of dark colour, whether he was a Spaniard, an Italian, a Frenchman, or even the Northern Scots, some of whom they knew were dark, like "Dark Douglas." The question was whether Parliament should not meet the difficulty without thrusting the responsibility on the licensed victuallers, who would be simply forced to total prohibition to all persons of dark colour.

Mr. Jones said there was no authority against him on the question of the framing of the summons. Attempts had been made to prove that these Proclamations were *ultra vires*, but they had

been all set aside, and counsel contended that it was a sufficient admission on the part of the appellant when he accepted his licence that natives congregated in the Molteno district. The question in this case was whether Human was not a Hottentot, and if he was a Hottentot, it was perfectly clear he was an aboriginal native. In all cases of this kind that had come before the Supreme Court, the Magistrate's opinion on the personal appearance of the native was largely accepted. The licence was accepted under the Proclamation.

De Villiers, C.J.: The appellant was charged with a contravention of section 22 of Act 28 of 1885, "in that he did wrongfully and unlawfully sell or give a quantity of brandy to an aboriginal native, namely, one John Human, within the limits of an area proclaimed by the Governor under the 21st section of the Act." The Court has held in various cases that, if a proclamation is issued in an area to which it is not legally applicable, there can be no charge of selling contrary to the Proclamation. There have been cases in which evidence has been given that the area is one in which the Proclamation is wholly inapplicable, and the fact that such area has formed part of the seat of magistracy has been an important factor in coming to the decision as to whether it is such an area or not. In a subsequent case, namely, the case of Brown, the Court held that where a licensed holder accepts his licence subject to a proclamation, that that is an admission by the licence-holder that the Proclamation is applicable to that particular area. In the present case, we find that the licence of the appellant has been accepted subject to the Proclamation. That in itself is evidence that the area is one to which the Proclamation is applicable, and in the absence of other proof on the matter, in my opinion there is not sufficient evidence that this area is one to which the Act is not applicable. It is therefore no longer necessary to charge the accused with selling contrary to the licence, because, if this area was one to which the Proclamation was applicable, the accused was rightly charged for a contravention of section 22 of Act 28 of 1885. Therefore, in regard to the objections as to the form of the summons in the present case, I am of opinion that it cannot be sustained. I come next to the objection on the merits. The defence is that the man to whom the accused sold the liquor—this John Human—was not an aboriginal native. Amongst aboriginal natives included in the Act are Hottentots, and the question therefore is, can this man be fairly called a Hottentot. The man himself says: "I consider myself a Hottentot," which he is not likely to have said if he had not been one. His friends looked upon him as a Hottentot, and it is an important statement

that he looked upon himself as a Hottentot. It is true he said his father is a German, but he only heard that by repute. He does not say whether he has ever seen his father. But then there is other evidence that his father was a Bastard, and that his father was darker than he was. The Magistrate saw the man, and, although the man had straight hair, the Magistrate was satisfied that he was a native, and following the usual principles I think the Court would not be justified in interfering with the decision. The Magistrate has had a far better opportunity of judging the man's nationality than this Court. The man admits he is a Hottentot, the Magistrate found him to be a Hottentot, and I am of opinion the conviction ought not to be interfered with. The appeal must be dismissed.

Hopley, J., concurred.

[Appellant's Attorneys: Walker and Jacobshon.]

GENERAL MOTION.

Ex parte COHEN AND { 1901.
KAPLAN. { Aug. 29th.

Mr. D. Buchanan moved, as a matter of urgency, for an interdict restraining Saed and Co., of 330, Hanover-street, from removing any machinery from the premises until certain arrears of rent were satisfied.

A rule was granted, calling on the respondents to show cause why they should not be interdicted from removing any goods, pending an action, the rule to operate as an interdict in the meanwhile, and to be returnable by the 12th September, with leave to the respondents to apply to have it discharged.

Postea (September 13th). Rule made absolute, but the Court refused an order to attach all goods of respondent wherever they might be found.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HASSERIS V. MARKS.

Landlord and tenant—Extension of lease—Evidence—Damages.

This was an action in which the plaintiff (M. J. Hasseriis) sought an order of ejectment, and damages fixed at £250 against the defendant (J. E. Marks), who is proprietor of the Columbia Steam Laundry, Cape Town.

Plaintiff's counsel mentioned that since filing the pleadings the defendant had given up possession of the premises, so

the sole issue would be the matter of damages.

Plaintiff's declaration stated he resided at Observatory-road, and was the registered owner of certain premises in Cape Town, in which the defendant carried on the business of laundryman. In May, 1899, plaintiff let certain buildings, machinery, plant, and fixtures to one Fule for the period of a year. Thereafter the lease was renewed for a further period, ending May 31, 1904. Fule, with the consent of the plaintiff, let the building to the defendant, who had remained in possession until the expiration of the lease. In May it was agreed that defendant should continue in possession during the month of June on payment of £40. Thereafter in or about the month of June, plaintiff gave defendant notice to give up the premises on the 1st July. He refused to quit or give up possession. Plaintiff, to the knowledge of the defendant, required the premises, plant, machinery, etc., for the purpose of carrying on the business of a laundry, and, in consequence of the defendant's action, had been prevented from so doing. In consequence he claimed damages estimated at £250. The defendant's plea admitted the formal allegations, and also the lease to Fule, and the subletting to defendant. With reference to the paragraph of the declaration in which the plaintiff said the defendant was given a month's tenancy, the defendant held that he was given a monthly tenancy, terminable with a month's notice. He admitted the plaintiff demanded possession, but said that he did it wrongfully and unlawfully. On the 29th June, defendant gave the plaintiff notice that he would give up possession on the 31st July, and tendered him a month's rent, which he refused to accept. He denied that he had any knowledge of the fact that the plaintiff intended carrying on a laundry business himself.

The plaintiff's replication admitted the offer of the defendant to pay rent for the month of July, but he considered the offer totally inadequate.

Mr. Upington for plaintiff; Mr. Wilkinson for defendant.

Mr. Upington said that since possession had been obtained, an examination of the premises showed that the machinery and plant had been badly used, and had the plaintiff known that when drafting his pleadings, he would have claimed for it.

The plaintiff, examined, stated that prior to 1897 he carried on business as a laundryman in Observatory-road and Cape Town. Owing to ill-health, he had to lease the Cape Town premises to one Fule, who with plaintiff's consent sublet them to defendant. In May last, defendant's manager interviewed witness, and asked him if it was possible to remain in possession for the month of June, as they had been very busy during the month of May, and had been unable

to remove their machinery. Witness consented, and said he would take £40 for the month's rent. The lease was not one that was terminable by a month's notice. Witness required the premises for his own use, as he intended restarting a laundry business, or else letting them on better terms to somebody else. During the month of June, witness cabled to Chicago and England for new machinery, and also purchased a horse and wagon, because he determined to take the place over himself. Witness went to the laundry several times during the month of June to ascertain how the defendant was getting on with the removal of his machinery, but he seemed to be doing nothing. Towards the end of June, witness felt sure that defendant would not be out by the end of the month. At the end of June the defendant's manager tendered witness £40 as rent for the month of July, and also gave a month's notice. Witness then took legal advice, in consequence of which he declined to accept the cheque. Witness went to the defendant's laundry at Wynberg on the 29th June, to endeavour to arrive at an amicable settlement. Witness offered him the premises for three months at £60 a month. He refused to accept those terms. Witness saw a notice on the door of the defendant's premises in Cape Town stating that the business would be moved to Wynberg on the 16th June, but that the wagons would call at Cape Town, Sea Point, and Kalk Bay weekly. The date had been changed from the 16th May. Witness was unable to get the premises in July. Defendant gave up possession on the 2nd August. The machinery was in a frightful state. Witness claimed £250 damages, made up as follows: Rent for two and a half months, £60; upkeep of horse and wagon, £10; placing premises in decent working order, £75.

By Maasdorp, J.: That state of affairs would have existed if the plaintiff had got the premises in June.

Witness (continuing) stated he found the laundry business very successful. He made about £80 a month profit whilst working the Cape Town laundry.

Cross-examined by Mr. Wilkinson: Witness did not know all the damages that had been caused to the machinery when he filed his pleadings. Had he done so, he would have claimed more than he did. Witness did not leave the arranging of the damages to his attorney.

[Maasdorp, J.: It might be well if he had.]

Cross-examination continued: Witness only claimed damages for loss on machinery and horse hire. He did not claim damages through not being able to carry on his business. The defendant did not hold the place on a monthly tenancy. Witness gave him a month's notice, although it was not necessary.

Amelia Hasseriis, wife to the plaintiff, gave corroborative evidence with regard to the conversation that took place between defendant's manager and plaintiff when the former asked for the premises during the month of June.

Henry Wrensch stated he was an attorney practising in Cape Town. In company with plaintiff, witness visited the defendant at his Wynberg office. Witness asked him what he intended doing, and he said he had given his agent instructions to communicate with the plaintiff's attorneys. He gave as his reason for not clearing out the fact that the Wynberg Municipality had not laid the gas to his new place.

Mr. Upington said he could if the Court wished call evidence as to the state of the machinery, but as there was no claim for that he thought it would be wasting the time of the Court.

Maarsdorp, J., said that would form another cause of action. The defendant probably had not come to meet that.

Mr. Upington then closed his case.

Joseph Edwin Marks, the defendant, examined, stated he took the premises over from a man named Fule. When the lease terminated, he sent his brother to interview the plaintiff, and, in consequence of the report his brother made, he gave him instructions to forward a cheque for £40. Witness had the place on a monthly tenancy, terminable on a month's notice. Witness found that he could not get his machinery out in time, so he offered the plaintiff a month's rent at the beginning of July, which he refused to accept.

In cross-examination witness denied that when he sent the cheque, on the 9th May for the June rent that it was to secure his tenancy. He did not want a month's extension; he wanted it for an indefinite period.

Thomas Craven Marks, brother to the defendant, and manager of the laundry, stated he, at the instance of the defendant, interviewed plaintiff about taking over the premises. The plaintiff agreed to let them have it for three, six, or twelve months, if necessary, at £40 a month. Witness sent him a cheque for one month's rent on the 9th May. When the cheque for the month of July was tendered, the defendant refused to accept it.

In cross-examination, witness denied that he agreed to take the place for a month only from plaintiff. He got the place for an indefinite period. Witness did not send the cheque on the 9th May to secure the tenancy of the premises. They intended, if possible, to remove their laundry business by the 15th June.

Edward William Biffin, clerk in the defendant's employ, said he was present when plaintiff and defendant's manager had a dispute about the rent. The manager said plaintiff was taking advantage of the defendant.

Mr. Wilkinson closed his case.

The defendant, re-called, said he often paid his rent in advance to Fule.

In reply to Mr. Upington, witness admitted that he had done a good business in the plaintiff's premises. He made about £75 a month.

This closed the case, and counsel having been heard in argument on the facts. His Lordship delivered judgment, and said it appeared in this case that the defendant was in the beginning of May last in the occupation of certain premises in Plein-street belonging to the plaintiff, which he was using for the business of a laundry, under a lease which was then in existence, but which was to expire on the last day of May. At that time it also seemed that the defendant was engaged in setting up the business of a laundry and erecting machinery in another place at Wynberg, where he intended to remove his business, on leaving the plaintiff's premises. At that time the defendant became aware that he would have some difficulty in completing the new place before the end of May in consequence of the work he had to perform in the erection of his machinery, and also because of some works for the completion of which the Municipality were to some extent responsible. The defendant thereupon sent his brother as his agent to the plaintiff's place to endeavour to get an extension of the lease, for the purpose of enabling him at greater leisure to remove from one place to the other the plant he required. What took place between the brother and the plaintiff was the question in dispute. A contract was there entered into between the defendant's agent and the plaintiff, in the presence during part of the time of the plaintiff's wife. There was a direct conflict of evidence between the parties as to what took place. The plaintiff stated that, upon being informed that the defendant wished for an extension of the lease, he told Mr. Tom Marks that he was willing to extend it for a few months, if necessary. Tom Marks told him that they did not wish it for longer than a month, and thereupon a contract was entered into for the hire of the place for the month of June. The defendant's agent, on the other hand, stated that he informed the plaintiff that they would require the place for an indefinite period, which they could not then fix on, and that the plaintiff answered him that they could have it as long as they liked at the rental of £40. The Court had now to decide whose evidence it had to believe. He wished to state in starting that in testing the evidence they had on the part of the plaintiff a direct contract for a period of a month at a rental of £40, and on the part of the defendant they had a statement that an agreement was entered into, that the place should be held for as long as the defendant pleased at a rental of £40 per month.

Now, it struck him that the contract, as alleged by the defendant's agent, was of a very unbusinesslike character, and one would expect if his statement was correct that the receipt would state more details. Such an indefinite contract considering the manner in which the parties had done business hitherto certainly seemed strange. But he would not on that ground have thought it necessary to doubt his statement. It was evident that Mr. Tom Marks was sent by his brother to enter into a contract with the plaintiff, the object in view being to have the period extended so as to cover any time that was required to comfortably remove from one place to another. When the agent was at the plaintiff's place he told him that he thought he could move out of the place in a month. This was about May 9, consequently they expected to be out of the place by about June 9. It seemed to him that they thought that that would be the time required to get out. The agreement, therefore, would be made to meet that difficulty, and the agreement to extend the lease to the end of June would have met this difficulty. The question then arose as to whether it was the intention that the place should be vacated before the end of June. On reference to the notice that was put up at the defendant's place of business, they had some light thrown on the view the defendant held. In March they thought they would go by the end of May, they thought fifteen days would be sufficient to clear out. But at the beginning of May they found they had miscalculated, and they intended to be out of the place by June 15, as the notice signified. He did not see any reason for them to enter into a lease that would take them much beyond that period. If that was so, they would not want an interminable lease. They seemed to be aware of their circumstances, and of the time that would meet their difficulties, and they fixed that time to be somewhere in the month of June. Consequently, he came to the conclusion that he could accept the evidence given by the plaintiff and his wife that they offered to plaintiff to let the property for more than one month if necessary, but defendant would not accept it. The Court had to decide what damages the plaintiff was entitled to. The defendant had, according to his own admission, offered £45 per month, and he (his lordship) took it that that would be a fair claim for the use and occupation of the property after the expiration of the lease. There would therefore be judgment for that amount, with costs.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

ESTENBERG v. COOPER. (1904.
(Aug. 30th)

Defamation — Verbal injury —
Theft—Damages.

The defendant made a statement to others that the plaintiff had committed theft and qualified the statement by adding that the plaintiff had removed goods of his after they had been duly attached by the Messenger of the Magistrate's Court.

Held, that although such removal might not constitute theft in the proper sense of the term, yet that as it was, at all events, a dishonourable act, the statement was defamatory and constituted a verbal injury to the plaintiff.

This was an appeal from a judgment of the Resident Magistrate of Jansenville, the appellant, Nicholas J. Steenberg, having sued the respondent, Philip Cooper, in the Court below for £20 damages for alleged slander and defamation. The Resident Magistrate gave judgment for the defendant with costs.

The summons set out that the defendant had on May 10 last informed sundry persons that the plaintiff had stolen half the mealies out of the coop. The allegation was made in Dutch. The defendant pleaded the general issue.

From the evidence, it appeared that the defendant denied having accused the plaintiff of stealing the mealies, though he said that the plaintiff had removed some mealies.

The Magistrate, in his reasons for judgment, said that, from the evidence recorded, it appeared that a quantity of mealies belonging to the plaintiff were attached by the Messenger of the Court on the 2nd May last, in execution of a judgment obtained against plaintiff by defendant, and that on the 10th May the Messenger was at the plaintiff's farm for the purpose of removing the mealies to sell them. The summons said that the defendant al-

leged that plaintiff had stolen half the mealies, while the defendant said that what he did say was that certain of the mealies had been removed between the 30th April and early in May, and that he believed the plaintiff was the man who had removed them. The question now arose, did the defendant make use of the language stated in the summons? He (the Magistrate) was satisfied that the defendant did use the language complained of, and he was unable to accept the defendant's version of what he said. Having come to that conclusion, it was clear that the defendant was liable. The Magistrate proceeded to discuss the question whether the original owner could be charged with the crime of theft if he had, as a matter of fact, removed goods under attachment, and he went on to say that he had come to the conclusion that the plaintiff could not have been convicted of stealing the mealies in question if he had made away with them, as suggested by the defendant. This action, therefore, fell to the ground, and judgment must be given for the defendant. If this suit (the Magistrate added) had been brought in a superior court, the question between the parties would most likely have been decided upon exception, but the form of the summons adopted by the plaintiff's attorney did not allow of this course being followed here. The defendant would be granted his costs of suit. If it were held that he was wrong legally, and that he should have found for the plaintiff, he should only have allowed him one farthing damages, without costs.

Mr. McGregor was for the appellant; Mr. Gardiner was for the respondent.

Mr. McGregor said that the misapprehension seemed to have arisen from the fact that the Magistrate had not broadly followed the principle of Roman-Dutch law that there was slander where there was *injuria*. It was quite true that the word used was the Dutch equivalent for steal. Such an accusation being made on the country-side by a business man against a farmer undoubtedly constituted an injury to the plaintiff. There was no doubt this allegation was made with a intention of injuring the plaintiff.

Mr. Gardiner contended that slander had not been proved, because the allegation of the defendant did not amount to accusing the plaintiff of a crime. The defendant did not say that the mealies had been removed subsequently to attachment. If the Court were against him on that point, counsel then submitted that removal after attachment was not a crime.

De Villiers, C.J.: This is an action for defamation, the defamation consisting in the defendant charging the plaintiff with theft. It was not denied that the charge of theft was made, the Magistrate so found it; but then (said the

Magistrate) the word "theft" was qualified by the defendant saying that the plaintiff had taken the goods after attachment, and inasmuch as that was not theft, there was no defamation, and consequently there should be judgment for the defendant. On this point the Magistrate has erred. It is quite possible that Mr. Gardiner may be right in saying that where a person is charged with being a thief, and the word "thief" is qualified by words which would not imply anything dishonourable or disreputable, then in such a case there is no defamation. But in the present case, even if it would not be theft on the part of the plaintiff to remove the goods "in attachment," it would, in my opinion, have been a highly dishonourable and disreputable act. Confidence was placed in him by leaving the goods with him without security being taken, and there can be no doubt that the statement that he removed those goods was defamatory. Our law does not agree with the English law in requiring for the purpose of the finding of a person guilty of defamation that there must be proof that a crime was alleged. It is clear, to my mind, that the words used conveyed the meaning that the plaintiff had been guilty of a dishonourable or a disreputable act. The only question which remained was what damages should be awarded. The Magistrate said that if he had found for the plaintiff, he would have given a farthing damages. That would certainly not have cleared the plaintiff's character. There was no attempt on the part of the defendant to prove that there was any truth in the suggestions he had made. It is poor compensation to a man to have a farthing damages awarded him when he seeks to clear his character, and show that he has not been guilty of a dishonourable act imputed to him. It appears to me that the Magistrate would have been quite justified in giving at least £5 damages. The appeal will be allowed, with costs in this Court, and judgment entered for the plaintiff for £5 damages, with costs, in the Court below.

Hopley, J., concurred.

[Appellant's Attorney: P. Cloete; Respondent's Attorneys: Van Zyl and Buissinne.]

SOLOMON V. STEFANI.

{ 1904.
Aug. 30th
Sept. 5th.

Sale and purchase—Non-delivery of goods sold according to sample—Damages.

The defendant, a merchant in this Colony, purchased boots

in separate lots and at different prices from the plaintiff, a manufacturer in London, and paid part of the price. On arrival of the boots in the Colony, the defendant rejected several lots, which were wholly unmerchantable and not according to sample, and gave notice to that effect to the plaintiff.

Held in an action to recover the balance of the price and the cost of insurance and freight paid by the plaintiff, that as the plaintiff had failed to deliver certain boots according to sample, the defendant was entitled, by the actio empti, to claim in reconviction delivery of such boots or damages for non-delivery.

Held further, that the measure of damages was the difference between the contract price and the price at which the defendant could purchase goods according to sample in the local market, and that in the amount of the contract price should be included the expenses which under his contract the defendant had to bear for the conveyance of the boots to South Africa.

This was an appeal from a judgment of the Assistant Resident Magistrate of East London.

From the record in the Court below it appeared that an action had been brought by the present appellants in the Court below for £107 9s. 11d., on certain bill of exchange, with noting charges and interest from the 10th March last, the said bill of exchange having been dishonoured. The respondent had pleaded a claim of a similar amount against the plaintiffs for breach of contract, in that goods supplied by them were not according to contract. The matter arose out of a shipment of boots sent by the plaintiffs to defendant on his order. It was alleged that a quantity of the goods were unmarketable and unmerchantable, having been packed damp, and that they appeared to be shop-soiled. The defendant had a survey prepared, and he forwarded it to the plaintiffs, who, however, returned no acknowledgment.

The Magistrate, in his reasons for judgment, said that the total price of the shipment seemed to have been £358

15s. 4d., and that the defendant had paid £300 on account, but he denied that he should pay the charges for freight, wharfage, etc. The plaintiffs said that a balance was due to them of £58 15s. 4d. for the goods, and £48 14s. 7d. for freight, wharfage, etc. The Magistrate found that, in accordance with the survey, goods of the value of £64 14s. 10d. were unmerchantable, that the defendant was entitled to be allowed £17 8s. 2d., proportion of charges, and also £20 as damages, being the difference between the English cost price and the local market price of the goods, making a total of £102 3s. He gave judgment for the plaintiffs for £107 9s. 11d., as claimed, and found for the defendant on the counter-claim for £102 3s. As in the opinion of the Court, added His Worship, the plaintiffs did not act reasonably in response to the letter sent by the defendant, and the surveyor's report, costs were awarded to the defendant.

Mr. McGregor, for the appellants. A. Solomon and Co., of London, England; Mr. W. P. Buchanan was for the respondent, Antonio Stefani, East London.

[De Villiers, C.J. (to Mr. McGregor): Do you appeal on the question of costs?]

Mr. McGregor: Both costs and law. Counsel said that one point was that the defendant could not go and choose which of the goods he would have, and which he would not have. He must either accept or reject the whole consignment. If the consignment were not good enough, then he must reject the consignment as a whole.

Hopley, J., remarked that it would have been very awkward if the defendant had had to reject the whole lot and sue the plaintiffs in London for the return of the £300 which he had paid.

Mr. McGregor said that of the whole shipment £294 worth was rejected. He quoted the case of *Irrim v. Berg* (Buch. 1879, 183) and submitted that the Magistrate was wrong in allowing the defendant £20 damages for loss of profit. Again, it appeared that there had been no attempt at sale by the respondent of the goods that he rejected. He contended that the defendant having bought a consignment of boots, could not be allowed to select a certain number of the best and then reject the remainder, and be allowed a loss of profit on those he rejected. If the whole consignment were rejected by the purchaser, then there was a chance of disposing of it, but if only the bad material were rejected, then the plaintiff was simply left with so much waste. Counsel contended that there had been delivery by the plaintiff to the defendant, who had had physical possession of the boots. Defendant had written to the plaintiffs saying that he had goods at plaintiffs' risk.

[De Villiers, C.J.: What do you suggest? That he should have thrown the goods out of door?]

In the case of *Greenshields* the goods were sold. Counsel went on to contend that, though there had not been acceptance by the defendant, there had been delivery by the plaintiff. He quoted, on the question of delivery, the case of *Theron v. Africa* (10, Juta). Assuming for a moment that the Court were against one on the question of the whole consignment, Mr. McGregor submitted that the Magistrate had awarded an excess of damages. There ought, he urged, to have been a total dismissal of the defendant's claim in reconvention. He maintained that there had been no wantonness on the part of the plaintiffs that should be specially penalised.

Mr. Buchanan submitted that there had been no delivery of the rejected articles, that this was a divisible contract, and that defendant was entitled to reject the unsatisfactory goods. On the question of damages, counsel contended that defendant was entitled, as measure of damages, to the difference between cost or purchase price in London (England) and market price in East London.

De Villiers, C.J.: In this case the plaintiffs sued the defendant in the Court of the Resident Magistrate of East London for £107 9s. 11d. upon a bill of exchange. This bill of exchange represented the balance of what was owing to the plaintiffs on a sale of boots and shoes, and also the costs of insurance and freight for these goods from London to East London. Part of the purchase price had been paid. The defendant did not deny having purchased the boots, but his defence was that he had a claim in reconvention for damages sustained by him by reason of the defective condition in which some of these goods arrived in this colony. It is clear that the defendant never accepted these goods—the defective goods—because, as soon as the defect was discovered, the boots were set aside, and notice was given to the plaintiffs that they were kept for and on account of the plaintiffs. As to the defective condition, there could be no doubt; two experts gave their evidence that these boots were wholly unmerchantable, that they were shop-worn and shop-soiled, and that the defendant could not have been expected to accept these goods. It appears also that these boots were purchased in different lots, and it was in separate lots that they were rejected. The defendant did not accept part of a lot and reject part; but where he rejected, he rejected the whole lot, on the advice of experts. It is not, therefore, like the case of *Irrine v. Berg*, where a quantity of goods has been bought at a certain price, and the whole accepted

and re-sold, and then an attempt made to recover damages for the lot which was not up to sample. It is a case where the vendor has failed to deliver certain goods corresponding to sample and the purchaser is entitled by the *actio empti* to claim delivery of such goods or damages for non-delivery. The only difficulty in the case is as to what should be the measure of damages. The way in which the Magistrate arrived at the amount was to take the purchase price in England, then to add to that purchase price the cost of insurance and freight, and then, in order to ascertain the damages sustained at this end, he deducted the difference between the purchase price in England and the market value in South Africa. But in ascertaining what is the cost price to the defendant, the Magistrate should have added to the price in England the cost of freight and insurance. He should have added the sum of £17 8s., which formed the cost of freight and insurance, to the price, for the purpose of ascertaining the damages. It is clear that that is the measure of damages which has always been recognised by this Court—the difference between the contract price and the market price at the place where the goods are to be delivered, but, in ascertaining the contract price, it is not enough to ask what was the original price. To the amount of that contract price must be added the expenses which under the contract the purchaser was bound to pay of conveying the goods to the place where they were delivered. The difference, therefore, between the measure of damages, as found by this Court, and as found by the Magistrate, is £17 8s. 2d. The judgment of the Magistrate was for £102 3s., on the claim in reconvention; that ought to be £84 14s. 10d. On the claim in convention, he gave judgment for the plaintiffs (the present appellants) for £107 10s., thus leaving a very small balance in favour of the plaintiffs. As to the costs, I consider that the Court should not interfere with the decision of the Magistrate. The costs were incurred on the claim in reconvention, and the defendant succeeded on that claim. As to costs in appeal, it is quite clear that the appellants now succeed in obtaining a substantial reduction in the amount awarded to the defendant in the Court below. The result, therefore, will be that the judgment of the Court below is amended by reducing the judgment for the defendant from £102 3s. to £84 14s. 10d. That being a substantial reduction, the plaintiff will have to pay the costs of appeal.

Hopley, J., concurred.

[Appellants' Attorneys: Walker and Jacobson; Respondents' Attorneys: Findlay and Taft.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

CLOETE V. CLOETE. 1904.
Aug. 30th.

This was an action for divorce, brought by Anna Cloete, against her husband, on the ground of his adultery.

The declaration set out that the parties were married at Colesberg, in March, 1897, and on 15th July, 1899, he wrongfully deserted the plaintiff.

Mr. Van Zyl was for the plaintiff, and the defendant was in default.

The plaintiff stated that she lived happily with her husband until 15th July, 1899, when, without the slightest warning, he deserted her without any reason. At the same time another woman, named Du Plessis, left the village of Colesberg. She had since written to her husband, but got no reply.

A witness, named Maber, said that he was appointed by the Dutch Reformed Church, at Elliott, to inquire into the defendant's conduct, and found him living with the woman Du Plessis, as her husband.

Decree of divorce granted, the defendant also to forfeit all benefits under the marriage.

VAN DER MERWE V. COLONIAL GOVERNMENT. 1904.
Aug. 30th.
Sept. 5th.

Scab Inspector—Acts 28 of 1889 and 20 of 1894.

M., a duly appointed scab inspector, during the Martial Law regime failed to obtain a permit from the Military to visit his district and discharge his duties. The evidence showed that he was always ready and willing to perform the same. He was thereupon suspended by the Agricultural Department, but did not receive the letter notifying his suspension.

Held, that he was entitled to the full amount of his salary accruing during the period of such suspension.

This was an action to recover salary due from defendants.

The declaration set out that the plaintiff was a scab inspector, and he sued the Government through the Colonial Secretary for £311 10s., as salary due to

him. About February, 1900, the Colonial Government agreed to employ the plaintiff as a scab inspector for the field-cornetries, numbers 2, 3, and 4, of the Aberdeen division, at a salary of £200 per annum, payable monthly, with an allowance of £25 per annum for forage. It was also agreed that the agreement should be terminable upon one month's notice. The defendant paid the plaintiff his salary up to the 28th February, 1901, but wrongfully and unlawfully refused to pay salary from the 1st March, 1901, until 19th July, 1902, and he claimed that the amount of £311 10s. as and for the said salary.

The plea admitted the formal allegations, but set out that it was a statutory appointment, and that it was competent under the Act of 1899, for the Minister for Agriculture to dismiss or suspend the plaintiff from his employment. During the period between 28th February, 1901, and 19th July, 1902, the plaintiff did not discharge his duties, and on the 6th June, 1901, the Minister for Agriculture lawfully suspended the plaintiff from his appointment, and the plaintiff acquiesced in the suspension. Subsequently the plaintiff was authorised to take up his appointment from 19th July, 1902, and he took up his appointment from that date.

The replication denied that the plaintiff was lawfully suspended, or that he acquiesced in the suspension.

Mr. Upington (with him Mr. Gutsche) was for the plaintiff; and Mr. Schreiner, K.C. (with him Mr. Howel Jones), was for the Government.

David van der Merwe, plaintiff, stated that he was first appointed on the 20th February 1895, under section 6 of Act 20 of 1894, and subsequently under the Act 28 of 1899. In 1901 the district of Aberdeen was disturbed owing to an invasion of the Boers, and in January of that month he saw the Civil Commissioner, and reported to Mr. Robertson that he had difficulty in carrying out his duties. Prior to that date he had been paid through the Civil Commissioner's Office. The Commissioner, when he was asked for a pass, said he would not take the responsibility of allowing him to perform his duties. Witness also tried the commandant, but could not get a pass. The Civil Commissioner told him to keep himself quiet, and the Government would pay. At the end of March, 1901, he went to the office for the purpose of drawing his salary, and the clerk said that he had had a wire from the department not to pay. In April he wrote, along with Mr. Naude, another sheep inspector, about his salary, but he got no reply. In May he wrote himself to Mr. Davidson, and received no reply. He did not receive a letter in June, 1901, purporting to suspend him from his official duties. In October, 1901, he received from the Chief Inspector (Davidson) a circular, with re-

gard to the cleansing of infected stock. About this time he was desirous of standing for the Municipal Council of Aberdeen. He went and saw the Civil Commissioner (Mr. McGuinness), who told him he could not stand, as he was in the Government service. Mr. McGuinness approached witness with a view to his taking employment as a rinderpest demonstrator, and he afterwards showed witness a telegram from the Government, stating that they did not sanction his appointment. From time to time he saw the Civil Commissioner with regard to his salary, and the latter said it would come all right. Witness was never told he would not be paid his salary. In the middle of 1902, witness received through Mr. McGuinness a wire from the department, authorising him to resume duties. After he resumed, he went to see Mr. McGuinness to draw his salary. He asked Mr. Drew, a clerk, what about his back salary, and Mr. Drew said it would be all right; Government would pay him. Witness knew that Naude was suspended in June, 1901. Naude showed him the letter he had received, suspending him. Witness never received such a letter.

In cross-examination by Mr. Schreiner, the witness denied that in June he received a letter from the Government notifying him that they intended to temporarily cease payment of his salary and allowance. Naude showed him a letter which he received in these terms. Witness was unable to carry out his duties, but he thought he was going to get paid his salary. He was told so. Witness was not aware that the military regarded him as being somewhat disloyal, and that on that account they would not allow him to go about the district.

Re-examined by Mr. Upington: Naude had received his salary for the period for which the Government had refused to pay witness.

Wm. H. McGuinness, R.M. and C.C. of Aberdeen, gave evidence as to certain interviews with plaintiff, and as to correspondence which had passed relative to plaintiff's duties. In October, 1901, witness advised Van der Merwe not to stand for the Municipal Council. Both Naude and Van der Merwe used frequently to come and speak about their salaries, and witness told them that it was a matter for the Agricultural Department. Van der Merwe was not suspended through witness. Witness had no notice of his being suspended.

Naude, formerly a scab inspector, at Aberdeen, deposed that in March, 1901, he went with plaintiff to the Civil Commissioner for the purpose of getting their salaries. A clerk informed them that a wire had been received containing the instruction that no money was to be paid to them until further notice. Witness was shown the telegram. The Civil Commissioner told them to be satisfied, as the Government would pay them.

The Commissioner at that time was Mr. Green. He expressed surprise that Government had not paid them, at any rate, half their salaries to enable them to live in those hard times. Witness received notice that he was suspended, and subsequently he was instructed to resume duty. He showed the suspension notice to Van der Merwe.

Mr. Upington closed his case.

Mr. Schreiner called

Charles Alfred Currey, Under Secretary for Agriculture, who produced a copy of a letter written to sheep inspectors on the 4th June, 1901. Attached to the copy was a list of inspectors to whom copies were sent, and this included the plaintiff. Witness signed the letter himself. No letter ever came back through the Dead Letter Office. In February, 1902, a list of sheep inspectors was published, and those who had been suspended were denoted by an asterisk. An asterisk appeared in the cases of Van der Merwe and Naude, among others. Witness could not now, of course, produce a messenger who could swear the letter was posted. The thing happened three years ago, and the correspondence sent from the office daily was very great.

Mr. Upington contended that the posting of the letter must be proved before it could be put in.

Mr. Schreiner said it was impossible to now produce better evidence as to the posting than could be offered by Mr. Currey. It would be ridiculous to suppose that they could call a messenger who could depose to the posting of this particular letter. There was strong presumption, he urged, that, in accordance with the practice of the officials, the letter was posted.

Mr. Currey said the list of scab inspectors to whom copies of the letter were directed was made up in the copy-book after the letters were prepared for despatch.

Maasdorp, J., intimated that he would admit the letter for what it was worth. The authorities showed that the letter was admissible, and he was the more disposed to admit it in view of the witness's statement that the letters were prepared before the list of addressees was copied into the book.

Mr. Upington asked that before the letter was put in, he should be allowed to cross-examine the witness in regard to this.

Maasdorp, J., assented.

In cross-examination, the witness said he could not swear that in this instance the letters were prepared before the list was made up. This, however, would be in accordance with the common office practice. He regarded the copy as proof that the letter was prepared ready for despatch.

In reply to Mr. Schreiner, the witness said the list would be prepared from the letters lying ready for despatch by an

officer in the department. It would be part of the duty of the same officer, having made his list, to enclose these letters in envelopes and address them. Witness did not affix his own signature to the copy. His original signature on the letters were copied into a book by a clerk.

Maarsdorp, J., said he had understood that the witness's own signature appeared on the copy. In the altered circumstances, he thought the copy was not admissible unless the person who made the copy was produced.

Witness said he would endeavour to produce the clerk who made the copy.

In answer to further questions by Mr. Upington, the witness said it was not correct, as stated in the plea, that the Minister suspended the plaintiff on the 6th June.

[Maarsdorp, J.: Did you, as the agent of the Minister, suspend this man from his appointment?]

No, my lord.

[Maarsdorp, J.: Then what did you do?]

I wrote this letter saying that his pay was stopped because he could not do his duties.

In further cross examination, witness said he understood that certain inspectors had been previously suspended by the head of the sub-department. He thought Van der Merwe was suspended before the letter of June. He did not know that Naude had been paid £225 as salary between March, 1901, and February, 1902.

Peter du Toit stated that in June, 1901, he was in the Department of Agriculture. He prepared the letter produced on instructions which in ordinary course would be multiplied in copies, and he would fill in the names of the sheep inspectors.

Allan Reid, one of the Government's attorneys, stated that he gave notice to the plaintiff's attorneys to produce a letter, dated 6th June, 1901. Naude and Van der Merwe had been jointly written up as the recipients of the one letter.

Mr. Schreiner closed his case.

Mr. Upington said that the main question which arose in the case had already come before the Supreme Court in *Muller v. The Colonial Government* (12 Sheil, 947), in which the Government had been held liable on a contract with the plaintiff for conveying mails, though none had been despatched. If there was any impossibility in the present case, it did not arise on the part of the plaintiff. The impossibility was caused by the fact that the plaintiff could not get a pass from the military authorities, and the Government had not in any way aided him in his efforts to procure a pass. The plaintiff had always held himself ready to perform his duties.

[Maarsdorp, J.: Why should the Government put him in a position to perform the work?]

Mr. Upington said that an employer was bound to provide facilities for his workmen. If the employer had the key of the premises where the workman was to do his work, he was bound to open the premises before he could claim the services. The Government had made no attempt to procure a pass for the plaintiff from the military authorities, though the plaintiff had made application to the Civil Commissioner to help him to get this pass. The plaintiff was stopped from performing his contract by something analogous to public authority. Voet (19—2—27) laid it down that where the services were not rendered owing to the intervention of public authority, the party contracting to render the services was entitled to recover the covenanted reward under the contract.

Under such circumstances, the plaintiff was in a much stronger position than that of a servant who had fallen ill, and to whom the master was still bound to pay his wages. Even where the illness was caused by the misconduct of the servant, the master was still bound to pay his wages (*Lookson v. Stones*, 7 Weekly Reports, p. 134, and *K— v. Raschen and Another* (38 L.T.R., p. 38). Taking the analogy of incapacity caused by illness, the plaintiff in the present case was certainly entitled to recover salary where the incapacity was caused by no fault inherent in himself. The same principle was laid down in *Fraser on Master and Servant*, pp. 317-320. The plaintiff had therefore made out his case, assuming that he had not done any of the work whatsoever. But the letter to the Minister of Agriculture in June, 1901, suspending the services of the plaintiff constituted a waiver. If the contract had already determined, why was it necessary to suspend the plaintiff? The plaintiff had never been legally suspended under the Act. The Act never contemplated suspension *mero motu* by the Minister, but evidently had regard to a temporary suspension pending investigation. The Government had its remedy by giving the plaintiff one month's notice under the contract, but it did not do so because it wanted to avail itself of his services at the earliest possible moment. It wanted to have the benefit of the contract, so far as that was obtainable, without paying for it. The Government had never called upon the plaintiff to perform his duties, and when he was willing and anxious to carry out the work, it would give him no help whatever to enable him to do so.

Mr. Schreiner, in replying, said that this was an action brought by a servant on a monthly contract to recover salary from his employer. The plaintiff, in

the first place, had to establish the fact that he had discharged the duties which he had undertaken. He ought never to have made this a cause of action. He had mistaken his remedy, which would have been the presentment of a claim for compensation if he had been prevented from fulfilling his contract by causes over which he had no control. In the present case, the plaintiff had frankly admitted that he had not performed the duties of the office. In the passage of Voet already referred to (19-2-27) it was further laid down that where the servant was absolutely incapable of rendering the contracted services, he had no right to the stipulated reward. It was evident that the plaintiff had not, and never could have, performed the duties required. The military authorities, who were in control at that time, rightly or wrongly suspected the plaintiff, and considered that he might have a baneful influence if he was allowed to go amongst the farmers, and consequently had refused to give him a pass. In case of illness, Voet (19-2-23) laid down the principal that where the illness was short and temporary, wages would be paid. But contrast that with the present case, where the services were not rendered during such a long period as that from February, 1901, till July, 1902. The case was analogous to that of a lease where the lessee was prevented from the enjoyment of the property by the incursions of the enemy or brigands. A modification was introduced by the General Law Amendment Act (8 of 1879), but in reference to contracts of hiring like the present remuneration was suspended during the incapacity of the servant. *Nathan's Common Law*, vol. 2, pp. 812 and 813. *Thorne Stuttaford and Co. v. McNally*, 8 Juta, 143). The case of *Muller v. The Colonial Government* did not apply at all. Muller was always ready and willing to perform his contract, and it was the fault of the Government that he could not carry out the contract. It was altogether in the hands of the Government as to whether he was supplied with the material necessary to performance, and that material had not been supplied. But in this case the Government had not failed; it was a third party, the military authorities, who rendered the plaintiff incapable of discharging the duties. That might have been a hardship on him, and many people had to suffer hardships at such a time, but it did not entitle him to claim salary for services that never could have been performed. The plaintiff denied that he had received the notice of suspension, but even if the letter had not been delivered the surrounding circumstances showed that he must have known of it. He remained silent, and apparently acquiesced in the suspension, and so

had prejudiced the Government. If he had given notice that he was going to claim salary for the period during which he had rendered no services, the Government would at once have done what it was entitled to do—namely, to dispense with his services by giving one month's notice. The Minister of Agriculture, under section 7 of Act 20 of 1894 had the absolute right of suspension or of dismissal. Either the plaintiff was suspended or not. If he was suspended, then *cadit questio*. If he was not suspended, then he came under the other branch of the argument that he had not discharged his duties. The onus lay on the plaintiff. He had not discharged his duties, and he had not proved that the inability was caused by the fault of the Government.

Mr. Upington, in reply, said that as to the remedy being by way of compensation, a claim for compensation had been lodged, and the Commission had refused to entertain it.

Maaasdorp, J.: Considering the importance of this case, I should have preferred to have dealt with the arguments which have been advanced and with the authorities cited in a written judgment, and to have made it quite clear. I have taken into consideration all the legal points that have been raised this morning, and I think I would consult the convenience of both parties after all by delivering judgment at once, because any other delay may be a source of inconvenience to the parties. It appears that the plaintiff in this case was appointed as a scab inspector by a letter of appointment written by Mr. Currey, the Under Secretary for Agriculture, on the 24th February, 1900. That appointment was made under section 10 of Act 28 of 1899. Under that section the Minister has power to appoint, and from time to time suspend, dismiss, or remove any inspector appointed over any areas. Mr. Currey, acting as the Under Secretary for the Minister, and which full authority from him, wrote this letter of appointment, and amongst the stipulations contained in it we find one to the following effect: "It is clearly understood that this appointment is terminable upon one month's notice." Now, in my opinion, the Minister who had the power to make the appointment, had the power to introduce that stipulation, and the service having been undertaken under the condition therein contained, the plaintiff in this case has now the right to avail himself of it, and the plaintiff would therefore be entitled at any time to receive a month's notice, unless, of course, he was suspended for misconduct. On his appointment, the plaintiff entered upon the duties of his service, and continued to render these services until January, 1901. At that time he was prevented from further continuing his work by the operation of martial law, which came into force

about that time. Notwithstanding that, his salary was paid for one month longer, and after that he received no salary until he resumed his duties in July, 1902. Now it seems to be pretty clear that the plaintiff was prevented from doing his work by certain persons over whom neither party had any control. It was not within the power of the defendant to induce the military authorities to remove the obstacles which they placed in the plaintiff's way, nor was it in the power of the plaintiff himself to do so under the administration of the martial law. It seems that it was necessary for any person to move about the district to obtain a pass from the military commandant of that district, and the plaintiff being a resident in the village of Aberdeen, and his sphere of work lying outside, it would have been necessary for him, in order to perform his work, to go into the country. But he could not do so without obtaining a pass from the military, and the military have refused to furnish him with such a pass, it became impossible for him to perform his services. Now, this is one of those cases in which neither the employer nor the servant had any control, and it will be necessary to consider from the nature of the service what the effect of such an obstacle would be. It would seem upon the reference to the Scab Act that the employment of an inspector does not require any daily work. The performance is not to be daily, nor is there any provision for any constant employment. Upon reference to section 22 of Act 20 of 1894, we find a provision which necessitates the inspector to do certain work for four months. It is to the following effect: "Every inspector shall once at least in every four months inspect all the sheep within his district." That is the only provision which requires, fixes, and regulates work to be performed by the inspector. It is quite possible that that work might be disposed of within a portion of that time. Then we find that the rest of the work, as I understand it to be performed, would be of an intermittent character. His duties are to see that the flocks of the farmers are kept clean, and whenever he receives notice that there are any infected flocks, he must take necessary steps to have them cleaned. The work is of such a character that he may be called upon at any time to perform it, and he must do it at once. The result of this is that for a month, or even two, at a time the plaintiff is not called upon to do any active work, though still in the employment of his duties, and, consequently, though he is ready and willing to proceed with the work, there may be no necessity for him to be employed for a month or more, and then he must resume his work. The nature of the plaintiff's work will affect the

legal position of this case. The plaintiff, in January, 1901, was not in a position to proceed with his work because of the operation of martial law, and he did no work, as he admits, until July, 1902, but what was his position during all that time? The contract was still in force; he could have been called upon at any time to perform these duties if the obstacles were removed which prevented him from doing so, and the obstacles may have been removed at any time. Martial law is supposed to be only in force when military exigencies require it. At any time martial law might have been dispensed with, and the plaintiff would have been in a position to proceed with his work, and under the circumstances he held himself ready to come forward and do his work. As he said, during that period he could not undertake any other work, and consequently he was debarred from other work. Well, it seems to me, he was prevented from doing his work, which he might have resumed at any time, and further, it seems to me that from time to time he had interviews with the two Civil Commissioners, and made inquiries as to the position in which he stood, and he was assured that as long as he kept quiet he might rest assured that his salary would be paid. Now, I don't take it that the Magistrate had any authority to bind the Government if the Government had taken steps to suspend or otherwise deal with the plaintiff, but I take these assurances from the Magistrate as merely indicating that the plaintiff himself at that time was ready and willing to perform his services, and these services were available. Another circumstance also occurred, which is of some slight importance, and might be of later importance. It seems during this period he received a circular, and that circular contains instructions from the Chief Inspector of sheep as to the manner in which certain duties were to be performed. Now, it has been said, as he was suspended, this circular was sent by mistake, because the work could not be performed by him, but at any time he may have resumed the work, and upon the resumption of such work he would have had his instructions from Mr. Davidson upon how to perform such work. This is also an indication that he was considered at that time as holding himself at the services of the Government. In July, 1902, martial law was repealed, and we find that the plaintiff was immediately called upon to resume his work. There was no new appointment, and that is an indication that there was no dismissal or suspension because then it might have been necessary to take other steps to reinstate the plaintiff when he did resume his work. Now, consequently, we have here cer-

tain circumstances which exist in two of the cases cited by Mr. Upington; that is to say, there was no termination of the contract, and the servant was content and willing to perform his work at any time that the work may have been required, and at the cessation of the obstacle which prevented him from working he resumed work at once. I may say I deal with the case up to this point without reference to the letter in which an intimation is said to have been given to the plaintiff that no salary would be given to him. I treat that letter, so far, as not being in existence. Referring to the authorities cited by Mr. Upington, we find, in the case of *Muller v. The Colonial Government*, the following circumstances existed, which influenced the Court in finding in favour of the servant. It appears that a contract was kept open, and, that being so, the servant had to hold his services at the disposal of the employer. There was no suspension of termination of the contract, and there is also this further circumstance, that the work might have been accumulating during the period when the services ceased, and that that accumulation of work might have been disposed of later on. In that case, the Court held under these circumstances that the servant must be considered as being in continued service, and, that, consequently, his wages must be paid. In the English case in *Fraser*, I find on page 132 that the circumstances were somewhat similar, but I may say here that I do not rely wholly upon the English authorities, because they are to some extent different in principle from our law, but I merely take these cases as illustrating the general equitable principles on which a case of this kind may be decided. *Fraser* says, on page 142: "In England the servant's right to wages during sickness depends upon whether the contract remains in force, or is rescinded by the employer in consequence of the servant's incapacity to fulfil his part of it." In this important principle the question arises whether the contract is rescinded, or whether it remains in force, or whether the man is in a position to insist upon the services to be rendered, or whether he has released the servant to seek other employment. In the judgment of Lord Campbell, we find the following remarks: "(1) Instead of being dismissed he returned to the service of the defendant when his health was restored, and the defendant employed him and paid him as before." There, again, we have got a similar circumstance, to what exists in the present case, and I think the equitable principle there laid down amounted to this: that where a master is prepared to hold the servant bound to his contract, and according to the contract, the servant may be called upon to come forward and do his work,

and when the contract prevents him from being free to earn wages in some other capacity, then the master cannot claim any abdications of the wages for the time the services are not actually performed. If the case ended here, I would certainly come to the conclusion, under all the circumstances, the plaintiff is entitled to be paid for the time he was willing to work. It is argued that there was, after all, a suspension of his services, and that consequently the case ought to stand in a different position, because then the master must have been taken to have indicated that the contract was at an end, and that the servant should have consulted his own interests by seeking other employment. In the plea, it is alleged that the Minister for Agriculture lawfully suspended the plaintiff from his employment, and the plaintiff acquiesced in the suspension. Now, it seems to me when that plea was drawn the correct circumstances of the case were not quite before the pleader, because if they stood as they do now upon the evidence, then it would be quite clear that there never was any suspension of the plaintiff from his service. Mr. Currey, who was the Under-Secretary for Agriculture, and he acted mainly in disposition of this business, stated positively that he never suspended the plaintiff, and that the only thing that might bear the construction would be the letter of June 4. Mr. Currey does not say it bears that construction, and that the only steps taken are steps in accordance with the letter of June 4. If we refer to that letter, and it is of some importance, we find this: "I am directed to inform you that inasmuch as you are unable to obtain a pass to travel about your area, and for this and other reasons you are unable to properly perform your duties as sheep inspector, the Secretary for Agriculture has given instructions to temporarily cease payment of your salary and allowance. When you are again authorised to resume duty, your salary and allowance will be paid as heretofore." (Signed, Charles Currey. I wish to say this, that two questions arise in respect of this letter. The first is whether it was ever received by the plaintiff, and the next is even if received by him, what would be the effect of it. Upon the question of fact, when the evidence was given, certain evidence was adduced to prove the circumstances under which this letter was written, and I have come to the conclusion that I would be entitled to infer from the evidence that this letter was written and posted, and I don't see any reason to vary my opinion now. I think there is sufficient evidence to prove it was written and posted, but in this case the question remains whether it came to the knowledge of the plaintiff. There are cases in which a letter having been posted, it is presumed it was received,

Mr. Upington read a replying affidavit by the plaintiff, Moses Aronstein, who said that he was afraid that the defendant had an intention of absconding. He would, however, be prepared to meet the defendant half way.

Counsel having been heard in argument,

Hopley, J., said he was not satisfied that the defendant could not make a better offer, or a better arrangement. He ordered a writ of civil imprisonment to issue. It would then remain for the defendant to make a better offer if he thought fit, or to offer some security.

Mr. Upington said he believed that there was a sum of £40, which had been attached in the name of Maisel Bros.

Hopley, J., said he should make no order upon that point.

Mr. Upington applied for costs of the application.

Hopley, J., said that costs would be allowed as prayed.

SINGE V. DORFMAN AND PIEMER.

Mr. Struben moved for provisional sentence on certain conditions of sale for £77, balance of purchase price of certain plots of ground, with interest.

Order granted.

INSOLVENT ESTATE COETSEE V. COETSEE AND VAN DER WALT.

Mr. Alexander moved for a provisional order of sequestration to be made final, declaring the private estates of Susanna Coetsee, Stephanus Nicolas Coetsee, and the late Johanna E. van der Walt insolvent. The action was brought by the trustee of the partnership estate. The insolvent partnership's accounts showed a deficiency of about £550.

Mr. Van Zyl (for the executor testamentary in the estate of the late Johanna Elizabeth van der Walt) read an affidavit sworn by the executor, Frank Rossouw, who stated that the sequestration of the private estate would not benefit the partnership creditors, inasmuch as there was already a deficit of £72 odd, and the sequestration would involve further expense on the estate. Counsel also read an affidavit by Susanna Coetsee, who said that her private estate disclosed a deficit of about £80 odd, and that sequestration would cause further expenses to be contracted.

Hopley J., said that the affidavits seemed to show that the defendants were hopelessly insolvent.

Mr. Van Zyl said that the only point they could take was that the private creditors would be prejudiced by further expenses being incurred.

Hopley, J., said that he did not see any reason why the private estates should not be declared insolvent.

Final order granted as prayed.

BAM AND OLIFF V. BLOOM.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Defendant said that he raised no objection.

Order granted.

MAXWELL AND EARP V. KLEGER.

Mr. Lewis moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

STURK AND CO. AND OTHERS V. CARALIS.

Mr. Percy Jones moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

LOMBARD V. ESTATE CLARK AND STEYTLEH, N.O.

Mr. Alexander moved for provisional sentence for £150, rent due by virtue of a notarial lease, with interest, and costs of suit.

Order granted.

FURMAN V. ZERF AND ZERF.

Mr. Alexander moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for a net sum of £31 13s. and costs, £19 10s. having been raised on levy.

Defendants offered £1 a month each. Both said they were out of work, one having been unemployed for three months and the other for seven months.

Cross-examined: Adam admitted that about £160 was due to them on a school contract at Somerset Strand, but said that there was a counter-claim of £120.

Decree granted, with costs, to be suspended upon each defendant paying £1 a month, with leave to the plaintiff to apply again for an increased order.

CAPE DISTRICT BUILDING SOCIETY V. JACOBSON.

Mr. Russell moved for provisional sentence on a mortgage bond for £700 odd, with interest, and for the property specially hypothecated to be declared executable.

Order granted.

COLONIAL MUTUAL LIFE ASSURANCE CO. V. BROOMBERG.

Mr. Struben moved for provisional sentence on a mortgage bond for £4,000.

and for the property specially hypothecated to be declared executable, the bond having become due by reason of non-payment of interest.

Order granted.

PORTER V. KADER.

Mr. J. E. R. de Villiers moved for a provisional order of sequestration to be made final.

Order granted.

WILSON, SON AND CO. V. NYMAN AND WIFE.

Mr. M. Bisset moved for provisional sentence on two acknowledgments of debt for £104 6s. 1d., less £25 paid on account, and also for £175 6s. 1d., with interest and costs.

Order granted.

ROBERTSON AND CO. V. HEATHORN.

Mr. M. Bisset moved for a provisional order of sequestration to be made final.

Order granted.

HALES, CAUD AND CO. V. BOESEN.

Mr. Percy Jones moved for the final adjudication of the defendant's estate as insolvent.

The Registrar said that there had been no set down.

Ordered to stand over, pending set down.

Later in the day a final order was granted.

BROWN V. COHEN.

Mr. Rainsford moved for provisional sentence on a mortgage bond for £2,000, with interest, less £500 paid on account, and for the property specially hypothecated to be declared executable, bond having become due by reason of non-payment of interest.

Order granted.

ILLIQUID ROLL.

KOPPEL, LTD. V. KIRBY. { 1904.
 { Aug. 31st.

Mr. Struben moved for judgment, under Rule 329d, for £52 11s., with interest and costs, being balance of account.

Order granted.

DE VILLIERS V. CUSHING SYNDICATE.

Sir H. Juta, K.C. (for the syndicate) said that this was a motion for leave to purge default of plea, and enter appearance.

Mr. Burton (for the plaintiff) opposed the motion. He said that the plaintiff now applied for judgment for £10,000, purchase money of the farm Langverwacht, in the division of Stellenbosch, purchased by the defendants from the plaintiff, plaintiff tendering and offering to pass transfer, and also for interest on £2,250, from the 3rd February last.

Sir H. Juta formally moved for leave to enter appearance. He read an affidavit by George Trill, chairman of the syndicate, who said that there had been negotiations with a view of effecting a compromise, and that the plaintiff's attorney definitely promised not to enter appearance until the 19th August, to give an opportunity of a compromise being arrived at. On the 19th August a letter was sent to the plaintiff's attorney by the syndicate, in which they said that the plaintiff's terms were wholly unreasonable. Plaintiff still retained his property untouched, and uninjured, and it was as valuable to him now as it was before. The syndicate had decided that, inasmuch as it was impossible for them to carry out the contract on the terms arranged, because of the difficulty in regard to providing sureties, the same must be abandoned. They offered £500 damages for cancellation of the contract, and £15 incidental expenses. The solicitors of the company, deponent added, were instructed to enter appearance, and he was surprised to hear from them that the matter had been set down in default of appearance, on Thursday, the 25th August. Counsel also read an affidavit by Mr. Lawton, the syndicate's solicitor.

Mr. Burton read lengthy affidavits by Mr. Standen, the plaintiff's attorney, who said he believed the sole object of the motion was to delay the applicant in obtaining judgment. It transpired from the correspondence that the plaintiff had been willing to cancel the sale on condition that the syndicate paid him £1,000 by noon on the following Friday, and a further sum of £500 in three months' time. Deponent added that the farm would not realise at auction anything like the sum offered by the syndicate; it was purely an agricultural farm, and did not contain minerals. It was, however, specially valuable to the defendant syndicate, because of its water supply and other reasons.

His Lordship: What were they going to mine there?

Mr. Burton: Tin, I believe.

Sir H. Juta read a replying affidavit by Mr. George Trill, who repeated that the sale to the syndicate was upon terms that the syndicate were unable to carry out.

Mr. Burton The defendants are not entitled to cancel their contract simply because they are no longer able to fulfil a condition of their own making *Stewart v. Ryle* (5 Juta, 146) *Smidt and Warner v. Harris* (5 H.C., 193) in which case Lawrence, J., discussed the difference between English and Roman-Dutch law as to the rights of a vendor. These cases show that the inability of the purchaser to fulfil his contract does not disentitle the vendor to sue for the purchase price, provided the vendor makes tender. In April, 1904, the syndicate entered into a new arrangement with the vendor.

[Hopley, J.: In asking me for provisional sentence you ask me to decide a very important point of law. It hardly seems to me to be a case for provisional sentence.]

They had ample notice, and knew that the negotiations could not be carried out after the 19th, and yet they did nothing till the 23rd.

The Court refused provisional sentence and ordered pleadings to be filed. Costs to be costs in the cause.

INSOLVENT ESTATE OF LUCKE V. BELL.

Mr. P. S. T. Jones moved, under Rule 329d, for an order on the defendant to take transfer of certain property purchased from Lucke, who had been rehabilitated.

Granted.

WIENER AND CO. V. JACOBS.

Mr. M. Bisset moved, under Rule 329d, for judgment for £69 4s. 6d., for goods sold and delivered, less £15 paid on account.

Granted.

ZEEDEBERG AND DUNCAN V. GODLIEB.

Mr. Struben applied for judgment, under Rule 329d, for £72 5s. 2d.

Granted.

TRUTER V. DE VILLIERS.

Mr. Gutsche, moved for an order declaring the respondent to be of unsound mind.

Mr. Rainsford appeared for the *curator ad litem*. He did not oppose the application.

Affidavits were read made by Dr. Dodds, and others, showing that the woman was insane, and that she was confined in Valkenberg Asylum.

Order granted, Mr. A. R. Truter being appointed curator of property and person.

REHABILITATION.

{ 1901.
{ Aug. 31st.

Mr. Gutsche moved for an order for the rehabilitation of David Roelof Naude, who surrendered his estate in 1895, with a deficiency of £485.

Granted.

Mr. Alexander moved for the rehabilitation of Carel Aaron van der Merwe, who became insolvent in February, 1902. The account was confirmed in March, 1904. The consent of four-fifths of the creditors had been obtained, in accordance with the provisions of section 117 of the Ordinance.

Granted.

GENERAL MOTIONS.

Ex parte WALSH.

Mr. Rainsford moved to make absolute a rule under the Derelict Lands Act.

Granted.

Ex parte RUBIN.

Mr. Close moved to make absolute a rule for the appointment of a liquidator in the partnership firm of Claas and Rubin.

Mr. McGregor appeared on behalf of Claas.

A number of affidavits were read on either side, from which it appeared that there was only a minor difference of opinion between the parties as to the method in which the firm should be liquidated. The parties carried on business at Calvinia as general dealers.

Mr. McGregor urged that the applicant was not justified in the circumstances in rushing into court, and that therefore he should be made to pay the costs.

Hopley, J., said he thought the costs should come out of the estate.

The rule was made absolute, costs to come out of the estate.

Ex parte JOUBERT.

Mr. M. de Villiers moved to make absolute a rule authorising the amendment of a certain transfer.

Granted.

Ex parte SAVAGE AND SONS.

Mr. Schreiner, K.C., moved to make absolute a rule authorising the registration of a certain bond.

Granted.

VAN EEDEN V. VAN FEDEN.

Mr. M. Bisset appeared for the wife to move for an order on the defendant, Benjamin Jacobus Eeden, to pay the

sum of £20 as maintenance money to her, pending the result of an action instituted by her for judicial separation, on the grounds of cruelty.

Mr. Upington appeared on behalf of the respondent.

It was stated on affidavit that the parties resided in the division of Van Rhyn's Dorp, the defendant being a farmer there. Defendant had sent to his wife £25. Petitioner originally asked for £30 to enable her to proceed with her action, and for £20 for maintenance. Inasmuch, however, as defendant had sent £25, petitioner did not proceed with the prayer in respect of the £30. It was stated on behalf of the respondent that the joint estate of the parties was small, and that the £25 he had contributed bore a reasonable proportion to the value of the assets in the estate. He was unable to contribute more, and stated that the petitioner's parents were still alive, and were well-to-do.

Hopley, J., said he did not think that under the circumstances £20 was an unreasonable amount to ask for. The wife could not be left penniless, for she was a full partner in the joint estate, of which the defendant had been in full possession for something like a year. He thought, too, the estate was of more value than the respondent made out. An order would be made for the payment of the £20, the matter of costs to stand over until the trial.

ELLIOTT BROS. V. BARTLETT AND OTHERS.

Mr. P. S. T. Jones moved to make absolute a rule nisi granted by the Chief Justice, calling upon respondents to show cause why there should not be an attachment and sale of the usufructory rights of the first respondent, Sarah Ann Bartlett, in certain farms, and of the interest in the farms of the second respondent, Percival Douglas Bartlett. Applicants had obtained judgment for £900, and took these proceedings to satisfy the judgment.

Mr. Russell appeared for the respondents, and asked that time should be allowed for the payment of the debt in order that the mother might be allowed to raise money by mortgaging the property.

The rule was made absolute, with costs, as against Percival Douglas Bartlett. In regard to the mother, the matter was ordered to stand over until the 15th October.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

INSOLVENT ESTATE ESHACK { 1904.
V. ALLIE. { Aug. 31st.
{ Sept. 1st.

Undue preference—Ord. 6, 1843—
Sec. 84 and 88.

This was an action brought by the trustee in the insolvent estate of Moosa Eshack to declare a certain seizure of goods by the defendant, null and void, and to recover their value, £240 and £91 in money, and promissory notes to the value of £120.

The declaration set out that the estate was sequestrated on the 29th April, 1904, Eshack was indebted to the defendant in the sum of £63, and at a time when his liabilities by far exceeded his assets, he transferred goods by a collusive arrangement to the defendant of far greater value than £63. The defendant took money, in amount £91, and promissory notes to the value of £120, and plaintiff claimed accordingly.

The plea admitted that in April, 1904, the insolvent was indebted to the defendant in the sum of £63. It was agreed that Eshack should return the goods in the ordinary course of business.

Mr. W. P. Buchanan (with him Mr. D. Buchanan) was for the plaintiff; and Mr. Gardiner (with him Mr. Roux) was for the defendant.

Cornelius Muller, clerk, in the insolvency Department, produced the minutes of the meeting in the insolvent estate of Eshack.

Edmund Thomas, trustee, of the insolvent estate, stated that the claims of the creditors at the second and third meetings amounted to £265 18s. 5d. In the schedules filed by the insolvent, the liabilities amounted to £695 0s. 4d., and the assets set down were £466 15s., but witness was unable to collect the debts, which were the sole assets. The estate was insolvent on the 31st March.

Cross-examined by Mr. Gardiner: He could not give any details with regard to the 31st March, but from the information he got from the insolvent, he concluded that he was insolvent on that date. The insolvent partly ascribed his insolvency to the theft of these goods. He was unaware that the insolvent was carrying on business under another name.

Frederick Wiener, managing director of Wiener and Co., Ltd., stated his firm were the petitioning creditors in the estate. Their claim still stood at £226. The insolvent was to give witness the promissory notes that were alleged to be taken by the defendant. From the beginning of March the firm stopped supplying the insolvent with goods.

Harold MacQueen, traveller, in the employ of Messrs. Wiener and Co., stated that he was in the insolvent's shop on March 25, and he saw general merchandise, including a large brass scale, the goods being to the value of between £80 and £100. On the following Tuesday he saw goods in the kitchen and the passage to the value of £60 or £80. On April 4 he found the shelves dismantled, and a considerable portion of the stock taken away. The goods were cleared out of the passage.

Cross-examined by Mr. Gardiner: He wasn't paying particular attention to the value of the goods when he visited the place.

Mahomed Dala, an importer, stated he was in the insolvent's shop towards the end of March, and he saw goods to the value of about £60, and in the passage and kitchen goods to the value of about £200. The defendant told witness that he removed the goods, because the insolvent owed him £63, and witness said the goods were worth more than £63.

Cross-examined by Mr. Gardiner: Eshack did not open a shop in Stuckeristreet after his insolvency; it was opened by his assistant. Everything in the shop amounted to the value of £250.

Mahomed Ahmed stated that he was in the employ of Moosa Eshack, and kept the books of the shop, along with the latter. The goods in the passage and kitchen amounted to £200 or £250. He saw the defendants' partner burst the box open, and take the contents.

Cross-examined by Mr. Gardiner: He told the detective that he did not know what the defendant's partner took from the box. He knew that if the goods and the money had not been taken away, Eshack would have been able to pay his debts.

Samuel Stead, a carpenter, stated that he saw a quantity of goods in the passage of Eshack's shop at the beginning of April. The goods were put in a wagon between eight and nine o'clock in the evening.

Moosa Eshack stated that in March his liabilities exceeded his assets. He had money to the amount of £91 in his box. He was at Wellington when the goods and the books were removed.

Cross-examined by Mr. Gardiner: If the goods had not been removed he would have been able to settle with his creditors. When he went to Wellington he did not think he would be insolvent.

Mr. Buchanan closed his case.

For the defence,

Abdul Gafoor, partner with the defendant, stated that Eshack owed the firm £63 at the end of March. About the beginning of April he asked for payment, but could not get it. Eshack was present when he took away the goods from the passage. He did not take more than £63 worth of goods.

Cross-examined by Mr. Buchanan: Eshack did not offer to sell him the shop. He merely went to the shop to get his money.

John Lancaster, law agent, stated that the buyer of the shop believed at the time that Eshack would pay his liability.

Pandora Sahemi stated he bought the shop from Moosa Eshack. The arrangement was that he should buy everything in the place. The stock was valued at £113. Witness took £63 off the price. Gafoor took nothing except goods from the passage. Witness had a lease of three years from the landlord, but Eshack was not present when the lease was signed.

Cross-examined by Mr. Buchanan: Witness was half-way through the taking of stock when Gafoor came in. The whole of the stock amounted to £113.

Sathe, a general dealer, stated that he took stock of Eshack's shop along with the last witness. The stock came to over £100. Gafoor demanded his money, and Eshack asked him to wait until the stock was taken.

Cross-examined by Mr. Buchanan: He valued all the goods in the passage and the shop.

Another general dealer stated that Eshack told Mr. Lancaster he had sufficient money to pay the merchants. Eshack was present when a cartload of goods was taken away.

Cross-examined by Mr. Buchanan: He weighed the goods again when he took stock.

Charles Benjamin, wagon driver, stated that Gafoor hired his wagon about two months ago to take away goods from Eshack's shop.

Haffies Ishmail stated that he let a room to Gafoor in January to store goods. The last witness brought goods to his place between five and six o'clock in the evening. There was plenty of room for more goods if Gafoor had wished to store them.

Detective Wight stated that Eshack complained on the 4th April to the C.I.D. about the theft of certain goods. Subsequently he found the goods stored at Ishmail's shop. Mahomaji made a statement to witness that he did not see Gafoor take the money back.

Cross-examined by Mr. Buchanan: He did not proceed criminally in the matter.

John Robertson, clerk, in the employ of Rowland Hill and Co., stated that the insolvent was a customer of the firm. He bought goods in March last for his shop at Wellington.

Counsel having been heard in argument on the facts,

His Lordship, in giving judgment, declared the alienation of the goods to the value of £63, to be an undue preference. The defendant ordered to return the said goods, or to repay the value to the trustee, and also declared to have for-

feited the claim for a similar amount against the insolvent, and to return other goods to the value of £77, or repay the same, with abatement from the instance on the other claims.

[Plaintiff's Attorneys: Harsant and Harsant; Defendant's Attorneys: Zietsman and Bosman.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

INSOLVENT ESTATE GOLD—
BERG V. BERT. { 1904.
 { Sept. 1st.
 { " 2nd.

Insolvency—Undue preference—
Ordinary course of business—
Ord. 6, 1843—Sec. 86 and 88.

This was an action brought by John Andrew, trustee in the insolvent estate of Goldberg Bros., of Diep River, against Sarah Bert, wife of Julius Bert, to have a certain mortgage bond set aside and declared null and void, as an undue preference.

The declaration set out that the estate of Goldberg Bros. was placed under compulsory sequestration by an order of this Court on the 29th April, 1904, and the plaintiff was duly elected sole trustee thereof on the 16th May, 1904. At the first meeting of the creditors defendant proved as a preferent creditor against the estate for £400, and interest alleged to be due in preference on a certain mortgage bond passed by insolvents in favour of the defendant, on the 23rd February, 1904, and specially hypothecating certain landed property belonging to the insolvents. Plaintiff said that the bond was passed at a time when the insolvents contemplated the surrender of their estate, and that they intended thereby to prefer the defendant before their other creditors. The said preference was received by the defendant by a collusive arrangement, mutual understanding, or common consent, and plaintiff claimed that the bond should be set aside as an undue preference, under the 84th section of the Insolvent Ordinance, and defendant should be declared to have forfeited the amount of her claim against the estate, under the provisions of the 88th section.

The defendant, in her plea, admitted the formal allegations, but denied the allegations in paragraphs 4 and 5, as to

undue preference, and said that the bond was made in her favour in the usual and ordinary course of business, *bona fide*, and for valuable consideration.

Mr. Burton (with him Dr. Greer) was for the plaintiff; Mr. Van Zyl was for the defendant.

Cornelis Johannes Muller, clerk in the Master's Office, produced a record of the proceedings in insolvency, from which it appeared that the provisional order was granted on the 14th March, and that the plaintiff was appointed curator of the estate on the 19th March. The estate was finally adjudicated on the 15th April. The election of the trustee was confirmed on the 11th May. The third meeting was held on the 10th June.

John Andrew (trustee in the insolvent estate) said that creditors had proved against the estate to the amount of £1,946. The assets actually realised amounted to £217. Then there were unrealised assets in the way of immovables, as represented by the two-storey building mortgaged to the defendant. The building was put up to public auction, and the highest offer received was £900 made by the defendant. The insolvents had also paid £22 on plots of land, for which witness credited them. The debts outstanding amounted to £235, and witness credited the insolvents with £25 as the value of these debts. He estimated the deficit at £782. Witness had also prepared a statement of affairs as at the 29th February last. In this statement he gave insolvents credit for £1,000, as the value of the building, and £400 for the stock-in-trade, and these, with other items, drawn out on a liberal basis, made the assets £1,609, against which were liabilities amounting to £2,024 11s. 11d. Witness proceeded to describe the condition of the books kept by the insolvents, and said that, taking the whole books as they stood, they were absolutely worthless. Witness put in certain promissory notes given by the insolvents in favour of the defendant, also certain cheques. He could not trace proper records of the transactions, but he found the following receipts entered from the defendant: April 20, £100; April 30, £100; May 11, £100. One bond was passed for the promissory notes. The defendant proved against the estate for a second bond of £400, the property having already been bonded for £500.

Cross-examined: He did not think the insolvents had kept a stock-book: he had not seen one, but, judging from the worthless condition of the books that had been kept, he should say no stock-book would be kept. Many of the entries in the books were in Yiddish, of which he had been supplied with a translation by the insolvents. The defendants undoubtedly were insolvent on the 29th February in fact, were insolvent six months before that date. He did not consider

that the goodwill of the business was worth anything; there was no goodwill to an insolvent business. There were two horses in the estate, but neither of them was sound. One of the animals was shot, and the other was on the "road to destruction when the veterinary inspector was offered 30s. for it, and he accepted the money as his fee.

Ferdinand Karie, law agent, Cape Town, spoke to having convened a private meeting of the insolvents' creditors at his office on the 11th March last. The meeting, he said, was called at the insolvents' request. It was then resolved to sequester the estate. It had transpired that a bond had been passed by the insolvents a little while before the meeting, and the creditors at once decided not to entertain an offer by the insolvents of 5s. in the £, afterwards increased, he believed, to 10s.

Saul Albou, of the Cape and Kosher Meat Supply Company, gave evidence as to transactions they had had with the insolvents.

Cross-examined: He asked the insolvents to pass a bond in his favour in February, and said that he would stand security against any creditors. He subsequently found that the insolvents had passed a bond in favour of the defendant, and he then lost confidence in them.

Wm. Alderton, manager for Spicer, Langley and Co. (creditors against the insolvent estate), also gave evidence.

Phillip Mostyn Beaufort, Messenger of the Supreme Court, said he valued the stock-in-trade of the insolvents at £400. He could not say whether there was a stock-book in the books he collected from the insolvents.

Evidence was led to show that the books were handed to the trustee as received from insolvents.

Mr. Burton closed his case.

For the defence,

Julius Bert, the husband of defendant, said that Goldbergs approached him in March, 1903, a year before the sequestration, with a view to getting a bond over this property. He wrote to the Goldbergs a letter, dated April 8, 1904, stating that his wife would lend £300 on the property. The date of that letter was a mistake, which he could not account for. The date should have been April 3, 1903. Promissory notes were given for the amount, which was paid in instalments on the understanding that it was to be a first mortgage on the property when it was complete. As a result of another letter from the Goldbergs, a new loan of £500 was raised on first bond, Mrs. Bert agreeing to take a second bond for the £300. The matter was delayed by the Goldbergs from time to time. Witness offered to advance Goldberg another £200 if he brought him a valuation of the property at £1,300. He promised to bring it, and witness, on the 22nd December,

gave him £5 on account. In January he brought witness a valuation of the property at £1,000. Witness refused him any more, but decided to advance him £65 to make up £400. Goldberg did not bring the bond, and witness consulted his attorney on the matter. His attorney sent demanding a bond, or payment of £300, on the promissory notes, with interest. Afterwards, on February 22, witness got the bond, and a cheque was given covering interest and attorney's charges. Witness signed a promissory note to Clark and Bohm for £50, as security. Afterwards, Clark and Bohm offered to take £40 for the note, and witness gave that amount. Afterwards, witness proved against the estate on the promissory note. Witness did not know anything of the financial position of the Goldbergs. He regarded the property as security for the sums he advanced. He never tried to get the Goldbergs to prefer him over the other creditors. The transaction was a *bona fide* one.

Cross-examined by Mr. Burton: It was arranged when the advances were made that a bond should be passed when the building was put up. Witness repeatedly asked for the bond, but did not press for it until he heard of the valuation of £1,000. Witness was surprised when he heard that the Goldbergs had become insolvent.

Sarah Bert (the defendant) gave evidence of a similar nature.

John Robert Lancaster, law agent, said Bert came to him about a certain £300, and he wrote a letter to the Goldbergs, as the result of which a second bond over the property was prepared, a cheque being handed to Goldbergs for £65, to bring the amount of the bond up to £400.

Nathan Goldberg, one of the insolvents, bore out Mr. Bert's statement. When the bond was finally passed, witness and his brother were doing well, but one of his creditors who had wanted a bond on this property began to press them, and they were forced to call a meeting of creditors. The bond was given according to arrangement, which should have been completed long before, and which he and his brother put off with a view to getting more, and these was no preference for Mrs. Bert.

Cross-examined: He said nothing about the bond arrangements before the Master, because he never got a chance to speak. He did not give the bond to Mrs. Bert before, because he wanted to get more money out of her. He did not know that it made any difference to Mrs. Bert's position whether he gave her the bond or not.

Cross-examined: He said he paid £55 for the land on which the property mortgaged was built. He estimated the value of the property at £1,326, because that was

the amount he spent upon it. In his statement of assets, he put his horses down as worth £55.

By the Court: The creditors began to press the firm for money soon after they had given the bond in dispute.

Abe Goldberg, the other partner in Goldberg Bros., also gave evidence.

David Carlick, formerly in the employ of insolvents, said he took stock for the insolvents in January last, and made entries in a book which he packed up for the trustee. He did not see the book among those produced in court. He regarded the position of Goldberg Bros. at that time as passable.

The plaintiff, John Andrew (recalled), denied a statement made by one of the insolvents that he had never called upon them for vouchers. He had, he said, on several occasions called upon Nathan Goldberg for vouchers. They had had the utmost difficulty in obtaining information from Nathan Goldberg as to the estate. The vouchers had been deliberately retained by the insolvents, and were now produced by counsel for the other side for the purpose of assisting their case, vouchers that ought to have been in his (the trustee's) possession.

Hopley, J.: After stating the facts of the case, proceeded: There was correspondence amongst the parties, which, as far as he could see, in spite of one or two rather suspicious circumstances, was genuine enough. It was necessary to consider what it was these documents promised. It seemed to be a genuine transaction that the defendant advanced the money, and received promissory notes, it being all the while understood that she would receive a first bond on the property. This was varied by her agreeing to take a second bond for £300. At the same time, plaintiff said that she required the Goldbergs to pass the second bond at the time when the first was passed. That would have been a business arrangement, and in the ordinary course of business. He could not understand what object there was in delaying the passing of the bond to Mrs. Bert until the completion of the building. The building was completed in September, and still no bond was passed, nor did Bert go and insist that a bond should then be passed. In December, the Goldbergs went to the Berts for another £200, but on a valuation of the building at £1,000, Bert, according to his own statement, began to be alarmed, and thought it was high time that the bond should be passed. Afterwards, Bert and his wife considered they would be safe in advancing £65, a sum which made the total amount advanced £400. This £65 was advanced, and the bond passed. He considered that up to that time the plaintiff had no security, and that, as to the whole amount, with the exception of the £65, the bond must be held

to be an undue preference. The first thing to be considered was whether the Goldbergs were in an insolvent state at the time—whether their assets were less than their liabilities. It appeared to him perfectly patent that the trustee's estimate of the insolvents' position at the time when his bond was passed was a very much juster one than the insolvents themselves made, and that the assets at that time were not so large as the liabilities justly calculated. If that were the case, the presumption in law would arise that the men contemplated insolvency at the time; but apart from that, there was sufficient evidence that the Goldbergs were contemplating insolvency in the sense which previous rulings of the Court had indicated. Once it was found that the Goldbergs contemplated insolvency, if they passed a mortgage bond, it must be taken as an undue preference, unless it could be protected as being in the usual and ordinary course of business. That was the point upon which the whole case turned: was this transaction in the usual and ordinary course of business? The whole circumstances of the case seemed to him to be unusual and extraordinary. It would be against commercial policy to hold that such a transaction should be protected by the 86th section as being in the usual and ordinary course of business. The public had to be protected, and if once it were held that a transaction of this kind was good, it would not be necessary for people to go and mortgage until they got right into the middle of their difficulties. In such an event a man could go to another with an underhand document and say: "Give me a thousand pounds. Here is my note of hand, or any other document you want—so long as it is not given publicly—pledging me to give you a mortgage on my property." The second party would advance the money, and hold the document, and as soon as the debtor began to be in difficulties, there would be nothing to prevent the second party, if this was the usual course of business, from going a week or so before the debtor became insolvent, and getting a bond registered. In the meantime, other people would be deluded into the belief that the debtor was a man with whom they could advantageously deal. They would have no knowledge of this liability, and would look upon him as a man possessing so much property, having no knowledge of this encumbrance. It seemed to him that one must hold that such a transaction was unusual and extraordinary, and could not be protected. In the present case, £335 was advanced prior to the bond being given, and this was wholly unsecured. On the day the mortgage bond was passed, a further sum of £65 was advanced. He thought the justice of the case would be met if the bond were set aside in so far as concerned the £335, leaving it good

as regarded the £65, and the judgment of the Court would be to that effect. As regarded the costs, the case was a very hard one, and there was no doubt the defendant had acted *bona fide* in the matter. Collusion had been charged, and the defendant had appeared, and clearly disproved this, while she had also succeeded to some extent. Under the circumstances, the Court would make no order as to costs. Each party would therefore have to pay their own costs.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorney: G. Scanlen.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

KELLY AND CO. V. HERMANN. { 1904
Sept. 1st.

This was an action to recover the sum of £305 11s. 9d., balance of account due for goods sold and delivered.

The declaration set out that between 18th March, 1898, and January, 1900, the firm of B. Schocher and Co., in which the defendant was a partner, bought goods from the plaintiff to the value of £1,575 10s. 3d. £1,296 18s. 6d. had been paid on account, and there was still a balance of £305 11s. 9d., which the plaintiff was entitled to claim from the defendant.

The plea set out that the partnership was dissolved on the 12th August, 1899, the deed providing that Schocher should be responsible for all debts and liabilities of the said business, and that he was to indemnify the said defendant. The plaintiff was informed of the deed of dissolution.

Mr. W. P. Buchanan (with him Mr. P. S. T. Jones) for plaintiff. Mr. Schreiner. K.C. (with him Mr. Upington), for defendant.

The evidence of Mr. Michael Kelly, taken on commission, set out that the defendant formerly carried on business under the style of B. Schocher and Co., of Pietersburg. Schocher had left the country, and his whereabouts were unknown. Between March, 1898, and January, 1900, his firm supplied Schocher and Co., with goods to the extent of £1,575 10s. 3d. Between March, 1898, and May, 1899, the said firm had paid £1,269 13s. 6d., and there remained a balance of £305 11s. 9d. After the 12th August, 1899, £26 7s. 10d. was booked against the said firm on account of goods, but Hermann had refused payment of this. He was not aware of the dissolution of partnership at the time mentioned by the defendant. He never consented to release any of the partners of the firm.

Bernard Hermann's evidence, also taken on commission, set out that the partners had his consent to the dissolution. Schocher took over all the liabilities. The plaintiff was satisfied that Schocher should take over the liabilities. The defendant made no secret of his departure.

George Hughes and Ernest George Ireland testified to Schocher taking over the liability of the defendant.

Evidence was then called for the defendant.

Joseph Hermann, defendant, stated that since 1899 he had been carrying on business in Cape Town. Formerly, he was in business in Pietersburg, in partnership with Schocher. In 1899 there were four or five creditors on a dissolution of partnership. Witness and his partner saw the plaintiff, who seemed satisfied to release witness from any liability. The letter he received on October 1 by Mr. Kleinfenberg, was not accompanied by any account. Notice was given to all creditors, including Messrs. Kelly and Co., that the partnership was dissolved.

Cross-examined by Mr. Buchanan: He was positive that Kelly let him out of his liability altogether. Schocher got about £250 more than witness. Schocher was to indemnify him to his creditors. In August Kelly did not say anything about the amount that was owing for six months.

Maasdorp, J., intimated that the evidence was highly unsatisfactory, and the case was ordered to stand over for further evidence *sine die*, with leave to either party to call further evidence before the Commissioner, or to produce evidence in Court.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSE.

SKIPPOON V. DE WITT. { 1904.
Sept. 2nd.
" 5th.

Architect — Quantity surveyor —
Innocent misrepresentation —
Peritia artis — Privy of contract.

W., a building owner, had employed the defendant, an architect and quantity surveyor,

to take out certain quantities for a building he had commissioned plaintiff to erect. The defendant's estimate fell far short of the quantities which were actually required, but plaintiff had accepted defendant's estimate as correct, and in consequence made a tender for the erection of the building, which involved him in loss. This loss the plaintiff now sought to recover by way of damages from the defendant. Held, that as there was no privity of contract between plaintiff and defendant, the former could not recover.

Semble: (1) That an innocent misrepresentation made by a person who is under no legal obligation to make any representation affords no ground of action. *Tait v. Wicht* (7 Juta 156).

(2) Every professional man spondet peritiam artis and is liable to any person who employs him for loss arising from his innocent misrepresentations.

This was an action brought by Robert Skippon, a builder and contractor, to recover from Anthony de Witt, architect, £469 5s. 4d., being the amount of damages alleged to have been suffered by the plaintiff by reason of the defendant's miscalculation in certain bills of quantities.

The declaration set out that about April, 1903, the defendant, on behalf of one F. Williams, prepared plans and specifications for the purpose of erection by the said Williams of certain premises on the Lansdowne-road, Claremont. The plaintiff tendered for the erection of the said premises to the defendant. The bills of quantities purported to represent and should have represented the correct quantities of work and material required for the erection of the premises in accordance with the plans. The usual charge was 2½ per cent., but the defendant had charged the plaintiff 5 per cent. The plaintiff, relying on the quantities, tendered for £2,697, but the bills contained so many errors that he had suffered damage to the extent of £469 5s. 4d., and he also claimed a refund of £8 13s. 2d., an amount which was overpaid.

The plea admitted the formal allegations, but set out that no satisfactory tender was received until 26th May,

when the plaintiff tendered £2,697, which tender was a lump sum. The plaintiff did not supply priced bills of quantities as required by the conditions of the contract, and the defendant denied that the quantities were the basis of the plaintiff's tender. The defendant did not represent the said quantities to be absolutely accurate but merely approximate estimates. The work done and materials supplied by the plaintiff, did not in certain respects, according to measurements, exceed the quantities estimated in the defendant's bills of quantities, but in other respects fell short of such estimate of quantities, and after making a due and proper deduction of items, which so fell short, and other items, the balance in respect of the plaintiff's work and labour supplied was about £150 short of £2,697. The negligence and misrepresentation were denied.

Mr. Close (with him Mr. M. Bisset; was for the plaintiff; and Mr. Schreiner, K.C. (with him Mr. Upington), was for the defendant.

[De Villiers, C.J.: Are you at one as to the degree the defendant has mistaken the quantities?]

Mr. Schreiner: No, our measurements are widely different.

[De Villiers, C.J.: Would it be possible now to find out the correct estimates?]

In many cases quite possible.

[De Villiers, C.J.: If the parties can agree upon this the whole case would be simplified.]

Mr. Close: We wrote to them suggesting the employment of Mr. Babbs, who, on several occasions, has been employed by the Court as a referee in building cases.

[De Villiers, C.J.: What do you say to Mr. Babbs?]

Mr. Schreiner said if his lordship would order his appointment his client would have no objection whatever.

De Villiers, C.J., said in case it became necessary, then they could refer to Mr. Babbs. For the present the Court would assume that there were errors.

Robt. Skippon, plaintiff, stated that he tendered for the contract in the usual way, and he got quantities, drawings, and specifications from the defendant before he tendered. The tender was based on the quantities supplied by the defendant. The lump sum included the item, "allow 5 per cent. for architect's fees." The usual allowance for quantities was 2½ per cent. £140 was paid for the bills of quantities. The defendant received 5 per cent. on £2,697, which included the 5 per cent., and £8 13s. 2d. was the amount overpaid. In June, 1903, he signed a contract with Mr. Williams, and then proceeded with the building. Some time after the building had been started, he discovered that the quantities were wrong, and on several occasions he told Mr. De Witt of the de-

ficiencies. As he went along with the work he measured the details, and just about the time the building was completed, he had a list of the errors drawn up and sent to the defendant. He had received nothing for the items the defendant had miscalculated. The claim was a fair and reasonable calculation for the extra work he had to do through the defendant's errors. He had lost money on the contract.

Cross-examined by Mr. Schreiner: It was the wet weather which prevented him from starting the contract until July. He never actually ceded the contract to Small and Morgan. It was very probable he visited the defendant's office a few days before the tender, and told the defendant that business was bad, and that he was anxious to get some work. He had no recollection of asking the defendant as to what the tender would amount to, and that Mr. De Witt had said that Mr. Williams was not likely to pay anything more than £2,700. When he brought back the drawings to Mr. De Witt he had already made the calculations marked in pencil. He was unable to say what insurance premium he paid on the building, and if £50 was ridiculously high other items might be found to be ridiculously low. Long before the letter was written, the defendant's attention was drawn to the shortage, but he had never actually told the defendant that he held him responsible.

[De Villiers, C.J.: If your quantities had been correct you would have tendered higher?]

Witness: Yes, my lord.

Then you might not have got the tender?—That is so, my lord.

Mr. Schreiner: Now, just be careful. Did the defendant not tell you that Mr. Williams would not pay more than £2,700.—Never a word.

Re-examined by Mr. Close: Items such as insurance, £50. were just merely put down to arrive at the total sum. The contingencies were usually put down as he did, and not for making up for architect's errors. Assuming his account to be correct, he had never known a bill of quantities to contain so many glaring differences as that of the defendant.

Robert Charles Orr, architect and quantity surveyor, stated that at the plaintiff's request he measured up the whole building. The bill of quantities was handed to him for inspection in September last. In measuring up the work, he had found on the amounts required by the plans and specifications attended to, with the exception of some windows. Where the schedule of quantities did not contain what was required by the plans, he calculated the price on the same basis as that of the schedules. As a measure of damages, he thought £469 a reasonable sum to claim. The whole of the bad work in

the roof was omitted from the quantities.

Cross-examined by Mr. Schreiner: Two or three windows required by the plans were omitted. He was quite certain that the prices were on the quantities before the 28th September. The plaintiff did not consult witness before he tendered for the building.

David Boyd, manager to Messrs. Small and Morgan, stated he had checked their account with the plaintiff, and that the matter of £469 had not been received from Williams. The contract price included the 5 per cent., and it was an error of his firm to pay on the full amount of £2,697.

Cross-examined by Mr. Schreiner: Small and Morgan had never claimed £469 from Williams.

Mr. Close closed his case.

Anthony de Witt (defendant) stated that on the quantities, he was quite clear he prepared them for Mr. Williams, and not for any builder. Originally on the bills of quantities 2½ per cent. was stipulated, but as he had to do the work a second time, 5 per cent. was put down. There had been a tender for £2,850, but Mr. Williams was dissatisfied with that. He was positive that he mentioned the sum of £2,700 to Skippon. The plaintiff never told him he would be held responsible for the shortage. Certain of the quantities were short and some lower, but as they stood, he would not call them erroneous.

Cross-examined by Mr. Close: The builder had no recourse against the defendant, as he had to satisfy himself that the quantities were right. Skippon had no benefit from the first plans. The 5 per cent. was charged because there were two sets of quantities. It was usual to charge 2½ per cent. whether the job went through or not. It would lie with the builder whether he took the quantities as a guidance; the contract did not state that he should take witness's quantities. To what extent the quantities might guide the contractor, he did not know, neither did he care.

Re-examined by Mr. Schreiner: There were two kinds of contracts, a quantity and an entire contract, and in the present case it was a lump sum contract. As far as he was concerned, he denied that he had any contract whatever with the plaintiff.

By De Villiers, C.J.: He would expect the quantities should be as nearly correct as possible. Bills of quantities were given with a view to the guidance of the tenderer, but he need not necessarily rely entirely on them.

Norris Cowan, quantity surveyor, stated that he had made measurements on the spot, and gone over the bills of quantities. The plaintiff's estimates were very far from being correct. He found the plaintiff well within the price of his tender.

Edmund Sherman, architect and quantity surveyor, stated that he had checked the last witness's work, and he corroborated his evidence.

Francis Wyatt Williams stated that he did not wish to exceed £2,700 in the contract. There was £170 odd, as per contract, due to the contractor. It was simply a portion of the retention money.

Cross-examined by Mr. Close: The plans were drawn by the defendant, according to the money witness could provide.

Mr. Schreiner closed his case, and counsel were heard in argument on the facts.

Cour. Adr. Volt.

Posten (September 5th).

De Villiers, C.J.: This is an action for damages alleged to have been sustained by the plaintiff by reason of the defendant's negligence and misrepresentation. The negligence consisted in failing to include in certain bills of quantities prepared by the defendant, as quantity surveyor, many particulars of work which ought to have been so included, and the misrepresentation consisted in representing to the plaintiff, as the intending contractor for the building of a house for a Mr. Williams, that the bills of quantities correctly described the quantity of work actually required to be done. The evidence shows that the defendant had been employed by Williams as architect, and that in order to prepare the bills of quantities required by intending builders, the defendant also performed the duties of a quantity surveyor. After he had taken out the quantities, prepared the plans and specifications, and drafted the contract which was to be entered into with the builder, the defendant communicated with the plaintiff, with the view of obtaining from him a tender for the erection of the building. The bills of quantities and other documents just mentioned were handed to the plaintiff, who tendered to do the work for £2,697. The amount of that tender was based upon the data appearing on the bills of quantities. Among the items appearing on these bills of quantities was the following: Allow 5 per cent. for quantity surveyors' fees, such amount to be paid to the architect." In filling up the amounts opposite to the different items the plaintiff allowed the sum of £111 in respect of this particular item, and in making up the amount of his tender, he certainly allowed for and included the fees which he would have to pay to the quantity surveyor on behalf of Williams, the building owner. That the money was to be paid on behalf of the building owner, and not on his own (the plaintiff's) behalf, would appear from the 78th clause of the contract, the concluding part of which reads as follows: "Before signing the contract, the contractor is to satisfy himself that there has been a sufficient amount taken in the bill of quantities for everything necessary to

carry out the contract in accordance with the specifications, the drawings, the dimensions, and the architect's requirements, as no allowance will be made for any omission and shortcoming. Allow an amount of 2½ per cent. upon the total estimate for the quantity surveyor's fees. Such amount is to be paid by the contractor to the architect upon the amount of the several certificates, but a quarter of the total amount is to be paid out of the first certificate." After the plaintiff had commenced the work, he discovered, as he alleges, that the defendant had undercalculated the amount of work to be done, but he completed the work, and now seeks to recover from the defendant the additional sum for which he would have tendered if the bills of quantities had been correct. An initial difficulty was pointed out by me during the argument that the plaintiff would not have succeeded in his tender if it had exceeded the limit of £2,700, which Williams had placed on the cost of the building. The answer given was that, in point of fact, there was a loss on the contract, and that for that loss, at all events, the defendant should be held liable. Unfortunately the evidence as to such a loss was extremely vague and unsatisfactory, the plaintiff being wholly unable to say what the amount of the loss was. The pleadings, moreover, do not raise the question whether there has been a loss on the contract, but in the view which I take of the case on its merits, it is unnecessary to discuss the question as to the measure of damages any further. For the purpose of my decision, I will assume that there has been an under-calculation upon the face of the bills of quantities, and that the plaintiff has sustained some damages in consequence. In charging the defendant with misrepresentation, the plaintiff does not allege that it was made knowingly or wilfully or with the intention of deceiving the plaintiff. In the absence of some allegation of that nature, the plaintiff cannot succeed unless there was a legal obligation upon the defendant to furnish the plaintiff with absolutely correct bills of quantities. A similar question was considered by this Court in *Tait v. Wicht* (7 Juta, 156), and it was there assumed that an innocent misrepresentation made by a person who was under no legal obligation to make any representation at all would not be a good ground for an action to recover damages for a loss resulting from a contract entered into in consequence of such misrepresentation. "Fraud," it was added, "could not exist as a ground of action for the plaintiffs having been induced to enter into a contract resulting in loss, unless the person guilty of it had a fraudulent motive." It has not been suggested in the present case that the defendant knew that the bills of quantities were otherwise than correct,

or that he was influenced by any fraudulent motive. The doctrine of estoppel cannot aid the plaintiff, for his object is not to estop the defendant from denying the correctness of the statements appearing on the bills of quantities, and the defendant, so far from denying their correctness, insists upon it that they are substantially correct. The action is based upon the incorrectness of those statements, and the question to be determined is whether, in the absence of fraud, the defendant is liable for damages resulting to the plaintiff from his having acted on those statements. It is evident that the plaintiff might have protected himself by employing an independent surveyor to take out the quantities for him. He based his tender upon the quantities supplied to him, but he also increased the amount of his tender by the sum which he would have to pay to the quantity surveyor on behalf of the building owner. The payment came out of the building owner's pocket, and not out of his own pocket. It was therefore not too much to expect of him to have an independent measurement at his own expense before entering into the contract. But whether this was to be expected of him or not, I am clearly of opinion that if, upon the facts of the present case, it appeared that the plaintiff had employed the defendant to make the measurements, the latter would be liable for inaccurate measurements, resulting in loss to the plaintiff. This liability would arise, not out of any guarantee or misrepresentation, but out of the legal obligation resting upon a professional person to exercise reasonable skill and care in the performance of the work which he contracts to perform for reward. This obligation he owes to the person who employed him, and the question therefore in the present case is whether the defendant was employed by the plaintiff. A very important test in such a case is, as was said in *Hooper v. Reid* (9 Sheil, 637): "Who paid the quantity surveyor?" But it is not the only test, for in that very case stress was laid on the fact that it was at the request of the builder that the quantity surveyor had undertaken the work. This was inferred from all the facts proved in that case, including the fact that by direct agreement between the builder and the quantity surveyor, the former was to pay, and did pay for the work. The building owner in that case had employed the defendant as architect to prepare the plans and specifications, but, as the Court understood the evidence, the plaintiff had employed the defendant as quantity surveyor. It was unnecessary, moreover, to decide the point, seeing that, in the opinion of the Court, the plaintiff had already received from the building owner whatever he might have been entitled to by way of damages. The head-note would have been more correct if it had read thus: "An

architect who is also a quantity surveyor, and is employed and paid by a builder for taking out quantities for the construction of a building, is liable for any loss caused to the builder owing to his negligence in taking out the quantities." In the present case, there does not appear to me to be sufficient evidence of any contract between the plaintiff and the defendant. The only way in which such a contract could be established would be by holding that by the concluding portion of the 73th clause of the contract, Williams stipulated for the payment of the quantity surveyor's fees to the defendant, and that the defendant, by accepting the benefit of this stipulation, entered into a contract with the plaintiff, to supply him with accurate bills of quantities. But if the plaintiff is to have the benefit of the circumstance that such a stipulation was made on behalf of the defendant, then the defendant should also have the benefit of that part of the clause which throws on the plaintiff the obligation of satisfying himself as to the accuracy of the bills of quantities supplied to him. Due notice was thus given to the plaintiff that the handing to him of the bills of quantities was not intended as a guarantee of their accuracy. In the case of *Hooper v. Reid* there was direct payment of the quantity surveyor's fees by the builder, and there was no clause in the contract between the builder and the building owner, similar to the 73th clause of the contract now in question. That case, therefore, cannot be regarded as an authority applicable to the present case. In my opinion, the plaintiff has failed in proving that the plaintiff employed the defendant as his quantity surveyor, or that the defendant made any false and fraudulent representation to the plaintiff, or that he gave any guarantee as to the accuracy of his measurements, and there must consequently be absolution from the instance upon the declaration as originally framed. At the trial an application was made for an amendment of the declaration by adding a claim for £8 13s. 2d., being a sum over paid in error by the plaintiff. The defendant did not object to the amendment, and did not dispute the accuracy of this claim, and I am satisfied that if it had been embraced in the declaration as originally framed, the defendant would have tendered to pay the amount. There will, therefore, be judgment for the plaintiff for £8 13s. 2d., but the plaintiff will have to pay the costs.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

COHEN AND KAPLAN V. } 1904.
SAED AND OTHERS. } Sept. 5th.

Mr. D. Buchanan (for the plaintiffs) moved as a matter of urgency for an order for the attachment of the respondent Saed for contempt of Court in disobeying a rule nisi restraining him from removing certain machinery and stock-in-trade from premises situate at 330, Hanover-street.

Mr. Sylvester Williams (for the defendant) said that he was prepared to return the goods, and pay the costs of the proceedings. The defendant had acted in ignorance of the order of the Court, and had only taken advice that morning.

The defendant gave evidence to this effect.

An order was granted, attaching the respondent for contempt of Court, unless he should, before 5 p.m. this day (Monday) return the machinery, implements, and stock to the premises, 330, Hanover-street, from which he removed the same, respondent to pay costs.

SEAGULL AND CO. V. ARONSON.

Mr. Close moved, as a matter of urgency, for removal of trial to Circuit Court at Port Elizabeth.

Mr. Upington appeared to oppose.

It was stated on affidavit for the applicants (the plaintiffs) that the next Circuit Court would be held at Port Elizabeth on the 12th inst., and that it would be more convenient, and would facilitate the trial if the action were set down for hearing there. The plaintiffs resided at Port Elizabeth, where the contract, in respect of which the action was instituted, was entered into.

For the respondent, it was stated that defendant, who was an hotel keeper at Riversdale, would have to close his hotel if the case were tried at Port Elizabeth, as the attendance of himself and his wife as witnesses was required. Moreover, to go to Port Elizabeth would entail considerable inconvenience, and additional cost to the respondent. Respondent asked that the case should be removed to Riversdale Circuit Court, failing which, it should be set down for trial in the Supreme Court.

Mr. Close consented to the removal of the trial to Riversdale.

An order was made accordingly, costs to be costs in the cause.

STOFFBERG V. ALTSCHUL.

Sale and purchase—Magistrate's finding on facts.

This was an appeal from a decision of the Acting Resident Magistrate of Calvinia in a case in which the plaintiff, now respondent, sued for restoration of a certain cart, the property of the plaintiff, or for payment of the value thereof. £20. defendant, it alleged, having illegally and wrongfully possessed himself of the cart. The Magistrate gave judgment for the restitution of the cart, failing which, for £13.

From the record in the Court below it appeared that plaintiff had agreed to purchase a cart from the defendant, and had taken delivery of it. The purchase price of the cart was £13. He arranged with defendant to pay him in a few days, but during his absence from the farm the defendant came, and removed the vehicle. This happened several days after the sale. For the defence, evidence was led to show that there was no sale of the cart, which defendant had offered to sell for £14. The cart was removed from defendant's place by plaintiff's servants without the former's knowledge. After the cart was taken by plaintiff, defendant saw him, and said he must return the cart, or pay him £14 10s. Plaintiff asked him to allow negotiations to stand over until he returned from a journey to Reitsfontein, but he declined to do so, and said he would send for the cart. Subsequently, he sent his servants to get the cart from the plaintiff's place. The Magistrate found that there had been a sale of the cart for £13, and gave judgment accordingly.

Mr. McGregor appeared on behalf of the appellant; respondent was not represented.

Mr. McGregor argued that the facts did not justify the Magistrate's finding. He submitted that there was no consensus, and that whatever the facts were, unless the plaintiff offered the money, this being a cash transaction, he could not sue for the performance of the contract by the other party.

De Villiers, C.J.: The Court is always loth to interfere with the decisions of Magistrates, where questions of fact are involved, but it does appear to me in the present case that the Magistrate has not given due weight to the probabilities of the case. Taking the evidence as a whole, the impression left on my mind, certainly was that there must have been a misunderstanding between the parties. The whole conduct of the defendant showed, at all events, that he did not

consider there had been a sale of the cart for £13. Looking at the case as a whole, the improbability of the plaintiff's version is such that I think the Magistrate ought to have given absolution from the instance. Then there is another point. The plaintiff has never paid for the cart; yet, although he admits it was a sale for cash, he now claims re-possession of the cart, without tendering the money. Then the Magistrate gave judgment for the return of the cart, or payment of £13 damages, without any tender on the part of the plaintiff to pay the purchase price. Now, in my opinion, this cart being sold for cash, it was a condition that before the plaintiff could get possession of the cart he should be ready and willing to pay the money. That seems to me to be an additional reason for altering the judgment of the Magistrate. The appeal must be allowed, with costs, and judgment altered to absolution from the instance, with costs in the Court below.

[Appellant's Attorneys: Van der Byl and De Villiers.]

MILES V. JAGGER AND CO.

Contract of service—Misconduct—Dismissal.

The plaintiff, who had been engaged by the defendant to perform the general duties of a clerk, either in the defendants' store or in the accounting office, used insolent language towards his superior, in consequence of which he received a month's notice, and was transferred from the store to the accounting office. Before the expiration of the month, the plaintiff flatly refused to perform the duties of a ledger clerk, upon which the defendant tendered him his salary up to that date and dismissed him.

Held, that the tender was sufficient and that the defendant was not bound to pay salary for the unexpired portion of the month.

This was an appeal from a decision of the Assistant Resident Magistrate of the Cape.

The appellant sued Messrs. Jagger and Co. in the Magistrate's Court for £18 for work and labour done from the 1st June to the 15th July. This amount was claimed as damages. The plaintiff was an assistant in the employ of the

defendant firm, and worked up to the 23rd June, when he was dismissed. The defendants filed a written plea, in which it was admitted that they owed the plaintiff £8 2s. 5d. They stated that on the 15th June the plaintiff misconducted himself in such a manner as to prejudice their business, in that he used insulting and abusive language to the manager of the department in which he was employed. He was thereupon given a month's notice, and transferred to another department. On the 23rd June he refused to do certain work, and he was therefore dismissed. Defendants had tendered the plaintiff's salary up to the 22nd July.

In his evidence, the plaintiff said that on the 23rd June he refused to do some clerical work, stating that he was engaged as a checker, and was not going to be a clerk for the money. On behalf of the defendants, it was stated that defendant was engaged as a checker, but was distinctly told that he would have to do whatever he was told, either in the storeroom or the office. The Magistrate gave judgment for the defendants, with costs.

Mr. Alexander appeared for the appellant; Mr. W. P. Buchanan for the respondent.

After hearing Mr. Alexander, and without calling on Mr. Buchanan, the Court dismissed the appeal, with costs.

De Villiers, C.J.: According to the evidence of Mr. Westerton, who is a partner in the firm of Jagger and Co., the plaintiff was engaged on the distinct understanding that he would have to perform the general duties of a clerk either in the defendant's store or in the accounting office. He was first of all given the duties of a checker, and it was while performing the duties of a checker that the first trouble between him and the defendant firm arose. This occurred on the 15th June, and in consequence of what one might almost call insolent language on the part of the plaintiff, he was told he would no longer remain in the forwarding department, but that he would have to go to the accounting department, and a month's notice was given him. It seems to me that there was some consideration shown to him, considering the language he had used towards one of the heads of the firm in the store. He accordingly went to the accounting department, and after he had been there a few days, he was asked to do the duties of ledger clerk, which he did. Then he went back to the accounting department, and next day he was again asked to do the work of ledger clerk. He flatly refused, and not only did he refuse, but he used language in the presence of the other clerks which was certainly calculated to be subversive of all discipline in an establishment of the kind. He used language wholly improper towards his

immediate superiors. The question is whether he was asked to do work which he was not bound to do. Upon this we have the evidence of Mr. Westerton that he would have been bound to do this work, and the fact that he had previously done the work goes far to show that he, at all events, considered he was bound to do it. Then the question of salary, though it is not conclusive, is of some importance. It appears that the ledger-clerks received the same salary as he did, viz., £12. The request made to him to do this work does not seem to have been an unreasonable one. According to Mr. Westerton's evidence, if it is correct—and I suppose the Magistrate thought it correct—he could have been called upon to do a ledger clerk's work. Upon his flatly refusing to do this work, the firm was, in my opinion, quite justified in there and then dismissing him. They offered to pay his wages to that date, but refused to pay him anything further. The Magistrate very properly gave judgment for the amount of the tender. The appeal will be dismissed, with costs.

Hopley, J., concurred.

[Appellant's Attorney: J. Buirski;
Respondents' Attorney: C. Bernard.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

APPEALS.

OOSTHUYSEN V. WASSUNG. { 1904.
Sept. 6th.

Sale and purchase—Return of goods.

This was an appeal against a decision of the Resident Magistrate of Mossel Bay, in which he found for the plaintiff for £94 16s. 6d., the amount of a promissory note.

The Magistrate, in his reasons for judgment, said the action was for a balance of £94 16s. 6d., due by defendant on an overdue promissory note for £288, of which plaintiff was alleged to be the legal holder. Defendant did not deny his signature to the bill, or his liability to plaintiff, but took exception to charges for £15 4s. 6d., made by plaintiff for cart hire, attendance, and dis-
count. He considered these charges were

contemplated by defendant, when he signed the promissory note: the conditions of sale and the subsequent verbal agreement, between the defendant and plaintiff and plaintiff's attorney, all seemed to show that defendant was aware of the fact, that if he failed to meet the bill when due, the mules would be seized, and sold at his personal risk, and expense. He did not credit the statements for the defence that the plaintiff was to cry quits on the transaction on receiving back the mules, as defendant had then had the use of the animals for nine months to ride transport with, etc. Moreover, plaintiff, as auctioneer, was responsible for the amount paid out on the day of sale, and subsequent sales showed the plaintiff sold the same class of mules at public auction for £10 each, showing that the market price had fallen considerably. The plaintiff incurred the debt of £15 4s. 6d., through defendant's neglect in not meeting the bill. The balance of £94 16s. 6d. was clearly due to the plaintiff.

Mr. Close was for the appellant, and Mr. Pyemont was for the respondent.

Mr. Close contended that the taking back of the mules was a cancellation of the whole agreement. The Magistrate was entirely wrong in saying that there was no denial of the debt. The plaintiff based his case on the fact that he would not take over the mules because they had gone down in value, but in this particular case it was clear that the mules had gone up in value. Counsel contended that the Magistrate's reasons were rather flimsy, starting off, as he did, by the assertion that the appellant did not deny his liability.

Mr. Pyemont contended that the evidence bore out the Magistrate's finding. Was it likely if there had been no condition the defendant would have given up the mules? The evidence was very strong with regard to the condition. The Magistrate who heard the whole of the evidence said he did not believe the evidence of the defendant that the plaintiff was agreeable to cry quits on the transaction.

De Villiers, C.J.: The defendant bought fourteen mules at an auction sale held by the plaintiff at the rate of £20 per mule. Credit was given for three months. At the end of three months the defendant was unable to pay, upon which a promissory note was taken for the purchase price of £280, to which was added the sum of £8, for discount making £288. When this note fell due, the defendant was still unable to pay the amount, and not many weeks afterwards the plaintiff went to the defendant's farm for the purpose of obtaining a settlement of this account. It is quite clear that the plaintiff was very anxious to have his money, as he began to doubt the stability of the defendant, and he then asked the defendant to let him

have the mules back. The defendant seemed quite willing to fetch the mules, and handed them back to the plaintiff. The important question is what took place at that meeting. According to the defendant, himself and his brother, who was present, the mules were handed to the plaintiff in full satisfaction. They were to be given back to the plaintiff in full settlement of the amount, which was owing, and the brother supports this. When the plaintiff was called the first time in re-examination, he made the following statement: "I took back these mules for a debt owing to me as my own property. The defendant had nothing whatever to do with them." Now, this statement is inconsistent with the case laid before the Magistrate. The case then made was that the plaintiff was merely an agent for the sale of these mules on behalf of the defendant, so that he would not have taken them as his own property. The only circumstance in favour of the plaintiff is the fact that he retained the promissory note. But then, against that, we have the fact that at the time when these mules were handed over to the plaintiff, he took a promissory note from the defendant for one mule which had died, the amount being exactly the same for which the mule had been purchased. This circumstance seems to me more consistent with the defendant's statement that the mules were given back in full settlement. I am quite satisfied, if the plaintiff had sold these mules at a profit, nothing more would have been heard of it. There was a drop in the price of the mules, and they did not realise the price anticipated. It seems to me the probabilities are entirely in favour of the defendant, and the Court is wholly unable to sustain the judgment of the Magistrate. All the circumstances seem to point to this, that the mules were handed over in full satisfaction, and for these reasons the appeal should be allowed, with costs, and judgment entered for the defendant, with costs.

Hopley, J., concurred.

[Appellant's Attorneys: Herold and Gie.]

SPECIAL CASES.

ESTATE BELL V. BELL.

Will—Construction.

This was a special case stated for the decision of the Court. The declaration set out that the first plaintiff, Katrina Petrus, was the mother of the defendant children, and the second plaintiff, John Furzen Drummond Elliot, was the executor dative of the estate of the late Albert Bell. On 30th May, 1886, Albert Bell executed a

will, which provided *inter alia*, "that Katrina Petrus shall during her lifetime receive a life interest in the estate, not to exceed £50 sterling." The value of the estate amounted to £2,489. The first plaintiff contended that under the will, during her lifetime and until her marriage, she was entitled to receive from the estate an annual sum of £50, and that the second plaintiff was entitled before distribution of the residue of the estate between the defendants to set aside for the first plaintiff such a sum of money as, being invested, would produce the annual amount of £50. The *curator ad litem* of the minors subscribed to the contention of the plaintiffs that an annuity of £50 was payable to Katrina Petrus until her remarriage or death, and to an immediate realisation of the estate to produce such an annuity on investment.

Mr. Close was for the plaintiff, and Mr. W. P. Buchanan represented the *curator ad litem* for the minors and the other defendants.

Counsel having been heard,

De Villiers, C.J.: The parties to this suit are in the happy position that they are entirely at one as to what the judgment of the Court should be. There are minors interested, and these minors are represented by counsel, and he also, after full consideration, has come to the conclusion that the contention of the plaintiff in regard to the clause of the will in question is the correct one. The clause is as follows: "The said Katrina Petrus shall during her lifetime receive a life interest in the estate, not to exceed £50 sterling." The meaning of this clause is extremely doubtful. Any decision now holding that this £50 amounts to an annual payment would be a decision that could be quoted hereafter as an authority in similar cases, but seeing that the point is extremely doubtful, and all the parties are agreed, I consider this one of those cases in which the Court is quite justified in exercising its power to sanction the settlement of the doubtful question between the parties, all parties interested in the estate agreeing to the construction of the will. In view of the doubtful construction, the Court authorises the disposition of the estate in accordance with the contention of both parties to the estate. Costs to come out of the estate.

STEYN V. STEYN AND	{	1904.
OTHERS.		Sept. 6th.
		" 7th.
		" 8th.

Legacy—Ademption—Sale of bequeathed property.

A testator by his will bequeathed his farm J. to his son

William, and his farms K. and L. to his sons Isaac and the plaintiff, subject to certain intricate fidei commissary substitutions. Attached to the bequest of the farms K. and L. was a direction to the effect that in case the testator should sell them and buy other ground in substitution for them, such other ground must be looked upon as bequeathed on the same stipulations as mentioned in regard to K and L. The testator did sell farms K. and L., and he bought two other farms, one of which he gave in occupation to William and the other to the plaintiff, but there was nothing to connect the sale of the former with the purchase of the latter, or to bring such giving of occupation to two of his sons into relation with the direction in the will.

Held, that there was an accomplishment of the legacies.

This was a special case submitted for the decision of the Court.

The plaintiff is Johannes Christian Steyn, personally and in his capacity as the natural Guardian of his minor children.

The defendants are:

(1) Douw Gerbrand Steyn, personally and in his capacity as Executor Testamentary of his deceased wife, Elizabeth Sophia Johanna Steyn (born Lessing);

(2) Elizabeth Sophia Johanna van der Walt (born Lessing), married in community of property to Nicolaas Albertus van der Walt, and assisted by him as far as need be, in her capacity as the Mother and natural Guardian of her minor children, Douw Gerbrand Steyn and Maria Magdalena Steyn;

(3) William Johannes Abraham Steyn, personally and in his capacity as the natural Guardian of his minor children;

(4) Isaac Jacobus Steyn, personally and in his capacity as the natural Guardian of his minor children,

1. The plaintiff is a son of the first defendant and his predeceased spouse Elizabeth Sophia Johanna Steyn (born Lessing), and claims herein both on his own behalf and also, as their natural guardian, on behalf of his minor children and further descendants under the will hereinafter referred to.

2. The defendants are:

(a) Douw Gerbrand Steyn, personally and in his capacity as executor testamentary of his deceased wife Elizabeth Sophia Johanna Steyn (born Lessing).

(b) Elizabeth Sophia Johanna van der Walt (born Lessing), married in community of property to Nicolaas Albertus van der Walt, and assisted by him as far as need, in her capacity as the mother and natural guardian of the minor children, to wit, Douw Gerbrand Steyn and Maria Magdalena, of herself and her deceased husband, Douw Gerbrand Steyn, a son of the first defendant and his wife.

(c) Willem Johannes Abraham Steyn, a son of the first defendant and his said deceased wife, and he is sued personally and in his capacity as the natural guardian of his minor children.

(d) Isaac Jacobus Steyn, a son of the first defendant and his said deceased wife, and he is sued personally and in his capacity as the natural guardian of his minor children.

3. On the 24th January, 1903, the said Douw Gerbrand Steyn and his said wife, Elizabeth Sophia Johanna Steyn, who were married in community of property, executed the mutual will, copy of whereof is hereunto annexed, marked "A," together with a true translation marked "B."

4. Under the said will the testators, *inter alia*, bequeathed to the plaintiff and the fourth defendant, Isaac J. Steyn, the portions owned by them of the farm Groenkloof and Geelsbekfontein, situate in the division of Colesberg, and further bequeathed to the third defendant their farm Jakhalsfontein, situate in the same division—both bequests being made subject to certain conditions mentioned in the will. Among these conditions were:

(a) The reservation of a life interest by the surviving testator, and

(b) The payment of an amount (on the bequest) of £1,500 by the third defendant and £400 by the plaintiff and the fourth defendant.

5. In the case of each bequest it was provided that the beneficiary should take as fiduciary heir with remainder over to the children of such beneficiary and further remainder over to the children of such children—such *fidei commissum* extending to the fourth generation of *fidei commissary* children, "or further in caseth law allow it." The mode of such devolution is set out in the said will.

6. It was further provided in respect of the bequest to the plaintiff, and the fourth defendant under clause (d) of the terms constituting the said bequest that in the event of the testators selling the said ground and buying other ground, such other ground should be deemed to be bequeathed subject to the like stipulations and conditions as those previously set out.

7. At the date of execution of the said will the said farms belonged to and formed a part of the said estate of the said testators.

8. After the date of the execution of the said mutual will, but prior to the death of the said testatrix, as hereafter mentioned, the several farms mentioned in paragraph 4 hereof were sold and transferred to a purchasing syndicate by the first defendant at a very good price, namely, £25,000, and thereafter, but still prior to the death of the testatrix, the testator purchased and received transfer of certain other ground, to wit, the farms "Wilbeestvley," in the division of Albert, bought for £7,500, and "Palmietfontein," in the division of Colesberg, bought for £7,750. Upon the purchase thereof the former farm was given in occupation to the third defendant and the latter to the plaintiff.

9. The testatrix died suddenly on the 3rd February, 1904, and no other will was made by her and the testator after the sales of the farms referred to in paragraph 4 hereof.

10. a. Besides the three sons herein aforementioned there was further issue of the testators, to wit:

1. Three daughters, viz., Elizabeth S. J. Steyn, now married to Jacobus Kruger; Hester Catharina Steyn, and Johanna Steyn, and

II. A son, Douw Gerbrand Steyn, married in his lifetime to the second defendant, but deceased at the date of the execution of the said will. The minor children mentioned in paragraph 2 (b) hereof are the issue of the said marriage.

b. By a former marriage of the testator, before his marriage with the testatrix, there was issue, to wit, one daughter Geertruida Catherina, now married to J. L. Venter.

c. The said children and other descendants are likewise interested under the said will as legatees and heirs, and the mode and extent of their interest will appear on reference to the said will.

11. During the lifetime of the testatrix, the fourth defendant, Isaac Jacobus Steyn, signed the acknowledgement hereunto annexed marked C bearing date the 18th May, 1903. The sum of £1,000 mentioned in the said acknowledgement was duly paid over to the said Isaac J. Steyn by his said parents on condition that he should not inherit any landed property either under the said will or any other will of his parents, the said money having been given to him for the purpose of buying ground therewith. The said Isaac J. Steyn does not personally claim to be entitled to any share or interest in or right to any part of the land mentioned in paragraph 8.

12. The first defendant has not decided whether to adiate and accept the benefit of usufruct as to his late wife's share of the joint estate until the questions in doubt raised in this suit are determined by this Honourable Court.

13. The plaintiff contends:

a. That by the sale of the first property bequeathed to the third defendant

there was an entire ademption of the property bequeathed to him.

b. That by virtue of the provisions of the will as referred to in paragraph 7 hereof the whole of the "other ground" purchased by the testators, as mentioned in paragraph 8, became and was substituted for and should in law be deemed to be in place of the ground mentioned in the bequest to him and the fourth defendant as contained in the said will and to be bequeathed accordingly, or, alternatively, that the half of aforesaid farm "Palmietfontein," referred to in the said paragraph 8, became, and was substituted and should be deemed to be so bequeathed accordingly.

c. That by reason of the matters above set forth, and particularly those set out in paragraph 11 hereof, and by virtue of the *jus accrescendi* the fourth defendant became and was divested of all and every right, title and interest in and to the aforesaid ground or any part thereof, and the right, title and interest therein and thereto accrued to and in favour of the plaintiff for himself and his children and descendants.

d. That by virtue of the premises the plaintiff is entitled to an order declaring that the half of "Palmietfontein" should be deemed and taken to be and should devolve as if properly bequeathed to him in terms of and subject to the provisions of the said will and should that the due date be dealt with and duly made over and delivered to him accordingly.

14. The first defendant personally and as executor of his wife contends that as to the bequest of land in the will both that to the third defendant and that to the plaintiff and the fourth defendant there was an entire ademption by the sale of the bequeathed farms; but if this Honourable Court should consider that as the bequest in which the plaintiff was interested there was not such entire ademption, then the said defendant contends that half of the aforesaid farm, "Palmietfontein," and not also the farm "Wilbeestvley," should be held to be referred to in the said bequest under the words "ander grond," or "other land," in the said will.

15. The second defendant agrees with the contentions of the first defendant.

16. The third defendant personally and in his capacity as the natural guardian of his minor children, contends:

a. That if there has been any ademption of the legacy of the farm "Jak-halsfontein" there has been only a partial ademption, to wit, to the extent of the difference between the value of the said farm and the value of the farm "Wilbeestvley." The third defendant contends that the said legacy is preserved to the extent of the value of the farm "Wilbeestvley," which was purchased and assigned to him upon the disposal of "Jak-halsfontein."

b. Failing this the third defendant contends that by such purchase and assignment the testator and testatrix intended to and did substitute the farm "Wilbeestvley" for the farm "Jakhalsfontein" for the purpose of and in respect of the bequest thereof under the will annexed.

c. Failing the above the third defendant supports the contentions of the first defendant.

17 (1) The fourth defendant agrees with contentions (a) and (b) of the plaintiff, but he denies the correctness of all and singular the claims advanced in the two subsequent contentions (c) and (d).

(2) He contends that he, the defendant, by entering into the arrangement with his parents referred to in paragraph 11, did not divest himself, and had no power to divest himself in his representative capacity of his rights in and to the said farms "Wilbeestvley" and "Palmietfontein," or either of them, and thereby to prejudice and defeat the just and lawful rights of his children and further descendants, under the said will, to the said property, and maintains that the arrangement in question never had any legal force or effect so far as the rights of the said children or descendants were concerned.

(3) He contends that there was no accrual of his rights in favour of the plaintiff, and that, if the plaintiff's contention (b) should be upheld, he, the defendant, is entitled, as representing his children and descendants, to an order declaring their *fidei commissary* rights under the said will to half of the said farm or farms, and that their said share should be delivered to him on their behalf.

The parties pray for judgment for their respective contentions, and pray that the costs of this action may be ordered to come out of the estate.

The original will was in Dutch, of which the following is a translation:

On this the twenty-fourth day of the month January in the Year of Our Lord One Thousand Nine Hundred and Two (1902). We, Douw Gerbrand Steyn and Elizabeth Sophia Johanna Lessing, married to each other, declare to dispose of our property left after death, doing such of our own free will without advice or persuasion of anyone and revoking therefore all testaments, codicils or other documents having the force of a last will which we might before the date hereof jointly or singly have executed and passed, wishing and desiring therefore that none of the same after the passing hereof shall be of the slightest force or effect, but on the contrary shall be looked upon as never having been passed.

Now passing on the the choice of Heirs, I, the testator declare to name constitute and appoint as my only and sole heirs:

1st. The testatrix herein.

2nd. My child born of my marriage with Geertruida Catherina Snyman.

3rd. The children already begotten of this marriage and still to be begotten.

And I, the testatrix, declare to nominate and appoint as my only and sole heirs

1st. The testator herein.

2nd. The children already begotten of this marriage and still to be begotten.

And since your son, D. G. Steyn, is deceased we therefore declare that his children shall come in as heirs in his stead, so also in case of predecease of one or more of our other heirs, then and in that case their lawful descendants in their stead, and such of all the first dyings property, actions and credits, inheritances and legacies, nothing excepted on the understanding and condition however that the survivor off us will have to remain in full possession of everything until his or her death or remarriage, it being our wish and desire that the survivor in case of remarriage shall be obliged before contracting the same to choose and appoint two good and reputable men as guardians over the kindred, which must then be passed.

It is further our wish and desire that our estate shall be settled within six months after the death of the first dying.

We declare hereby to nominate and appoint the survivor of us as executor or executrix of this our testament, administrator or administratrix of our estate and effects, so also guardian of our minor children, and such with the power of assumption and all other such powers as are allowed in law.

We declare further to make over and bequeath as follows:

1st. To our son, Willem Johannes Abraham Steyn, our farm "Jakhalsfontein," situate in the district of Colerberg, as at present possessed by us, under the following conditions and "bemarkings" price.

a. That our said son shall pay as "bemarkings" price the sum of One Thousand Six Hundred Pounds sterling to be paid into the estate of the survivor six months after his or her death.

b. In case of predecease of our said son then the bequest shall devolve on his children as hereafter mentioned.

c. That the survivor of us shall retain the full free and undisturbed life interest in the said property until his or her death.

d. That our said son will be solely a fiduciary heir, and that after his death the said property must devolve upon his two eldest children in equal shares and on the same condition, namely, that the property shall devolve on the two eldest children of their fiduciary heirs after their death up to the fourth generation, and even further if the law allows it. In case the two fiduciary heirs have only one heir who would in-

herit the aforementioned conditions, he shall inherit the whole property on the whole conditions mentioned.

2nd. To our sons Isaac Jacobus Steyn and Johannes Christian Steyn, the portions of our farms "Groen Kloof" and "Geelbeksfontein," situate in the district of Colesburg, as at present possessed by us under the following conditions and "bemakings" price.

a. It is our wish that the ground in so far as the size is concerned shall be divided equally; our son, Johannes Christian Steyn, will, however, receive his portion so that the "werf" and lands and fountain, etc., of "Groen Kloof," known as "Vlakfontein," falls within his half share.

b. The legatees will be jointly as well as singly obliged to pay six months after the death of the survivor into the estate the sum of Four Hundred Pounds sterling as "bemaking" price.

c. That conditions (b) (c) and (d) of the bequest first abovementioned shall be considered as added hereto and with regard to the transferring of the property of our two sons, the same shall devolve in such a way on their two eldest children that both branches are represented one from each side and so on as far as the law of *fidei commissum* allows. In case, however, the fiduciary heirs have only one heir who could inherit under the aforementioned conditions, he shall be entitled to inherit the whole property (d). In case the testators shall sell the said ground and buy other ground, such other ground must be looked upon as bequeathed on the same stipulations and conditions as herein mentioned. In case, however, one of the testators may come to die before such other ground shall have been purchased, then the proceeds of the ground shall be equally divided between our two said sons after deduction of £400 aforesaid.

3rd. It is further our wish and desire that the above-mentioned sum of £2,000 to be paid into our estate shall be divided as follows:

a. £1,000 (one thousand pounds) sterling among our grand-children, being the children of our deceased son, Douw Gerbrand Steyn, in equal shares.

b. And the other £1,000 (one thousand pounds sterling) in equal shares to our four daughters, namely, Geertruida Catharina, married to J. L. Venter; Elizabeth J., married to Jacobus Kruger; Hester Catharina and Johanna.

4th. We bequeath further to the survivor of us all our erven situated at Venterstad, with the buildings thereon, as his or her free property. Lastly, we declare to reserve specially to ourselves the right and power at all times (the bequest excepted) to alter this, our last disposition, as we may be advised, either by separate deed or at the foot of this testament, desiring that all such alterations which may be found in this sense,

confirmed by our signatures, shall be looked upon as if the same were inserted verbatim in this testament.

The foregoing we declare to be our testament and last will, desiring that the same shall be of force as such in every detail, notwithstanding any solemnities being neglected which we hereby consider observed, imploring the utmost benefit under the law.

Thus passed and attested at Venterstad on day and date above mentioned, in the presence of the subscribing witnesses.

Mr. McGregor, for plaintiff; Mr. Schreiner, K.C., for first and second defendants; Mr. Close, for third defendant; Mr. Burton, for fourth defendant.

Counsel having been heard in argument,

Cur. adv. vult.

Postea (September 8).

De Villiers, C.J.: The testators by their will bequeathed the farms Groenkloof and Geelbeksfontein to their sons Isaac and the plaintiff, and their farm Jakhalsfontein to their son Willem. After the date of the will, but before the death of the testatrix, the testator sold these farms together to a syndicate for £25,000, and he purchased the farm Wildebeestvlei for £7,500 and the farm Palmietfontein for £7,750. The bequests of the farms were subject to certain intricate *fidei-commissary* substitutions, but it is only necessary to refer to one condition which is attached to the bequest of the farms Groenkloof and Geelbeksfontein. It reads as follows: "In case the testators shall sell the said ground and buy other ground, such other ground must be looked upon as bequeathed on the same stipulations and conditions as herein mentioned; in case, however, one of the testators may come to die before such other ground shall have been purchased, then the proceeds of the ground shall be equally divided between our two said sons, after deduction of £400." No similar condition is attached to the bequest of the farm Jakhalsfontein. It is clear, therefore, that the legacy has been deemed by reason of the sale of that farm. There has been no revocation of the legacy by will, but the voluntary alienation of the farm amounts to a tacit revocation, or, as it is generally termed, an *ademption* of the legacy. That is the general rule, and independently of the condition to which I shall again presently refer, there are no circumstances in this case to prevent the application of the rule.

As to the farms Groenkloof and Geelbeksfontein, they also were sold after the date of the will, and unless the conditions show a different intention on the testators' part, the legacy of these farms must also be regarded as having been *adempted*. The question then arises, what effect has that condition upon the rights of the different legatees? It cannot assist Willem, for it does not apply to the

farm bequeathed to him. One of the farms subsequently bought, namely, Wildebeestvlei, was given in occupation to him, but that circumstance cannot assist him unless such giving in occupation can be brought into relation with some direction in the will that land given in occupation to any legatee shall be considered as a substitution of one bequest for another, or as the books term it, a translation of the legacy. As to the plaintiff and Isaac, the condition certainly applies to the farms bequeathed to them. It is said, however, that Isaac received the sum of £1,000 from the testators, on condition that he should not inherit any landed property, either under the said will or under any other will of his parents, the said money having been given to him for the purpose of buying ground therewith. It is by no means clear to me that this condition ought to affect the construction of the will. The testators must be regarded as having expressed their final wishes by their will, and if under that will Isaac is entitled to the rights of a *fiduciary* legatee, his renunciation of those rights before the death of either testator is not conclusive as to the rights of the parties interested. It is unnecessary, however, to decide the question, seeing that he does not claim any rights as fiduciary heir, and adheres to the renunciation which he made as such. Any such renunciation cannot, however, affect the rights of the remainder men, which stand on exactly the same footing as those of the plaintiff himself.

Coming next to the meaning of the condition, it appears to me that the plaintiff and his co-legatee are either entitled to all farms bought by the testator after the sale of the original farms, or they are entitled to nothing at all. The giving in possession of one of the farms to the plaintiff cannot assist him, because there is nothing to show that this was done in pursuance of the condition in the will. Seeing that the original legacy had been adeemed, the plaintiff can only succeed by showing that the expression "other ground" was clearly intended to apply to the farms now claimed by him. That "other ground" must be land bought in substitution for the land originally bequeathed to the plaintiff and Isaac. I cannot quite agree with the contention of the first defendant's counsel that there must be proof that the proceeds of the farms first bequeathed were actually applied to the purchase of other farms. But I do consider that there ought to be some act of the testators to connect the purchase of the latter farms with the sale of the particular farms bequeathed to the plaintiff and Isaac, in order to show that a substitution or translation was intended. The supposition that the testators intended the plaintiff and Isaac to have all farms purchased out of the proceeds

of all the farms sold was so devoid of probability that the plaintiff's counsel himself hesitated to press it. It appears to me, however, that if that is not the meaning of the condition, the plaintiff cannot succeed at all. The words "other ground," wide though they are, must be read by the light of the whole passage, and so read they can only mean ground bought in substitution for the specific farms then being dealt with—namely, Groenkloof and Geelbeksfontein. There is no evidence whatever as to which of the two purchased farms was obtained in substitution for the two original farms, and it does not appear that such evidence is procurable. The plaintiff therefore has failed to prove that the property claimed by him falls within the description of the "other ground" bequeathed to him and Isaac, and his contentions must therefore fail.

The only contention which can be supported is that of the first and second defendants to the effect that there was an entire ademption by the sale of the farms Groenkloof, Geelbeksfontein, and Jackalsfontein. The costs will be paid by the estate.

I confess that I do not regret having been driven to this conclusion. The intricate fidei commissary substitutions, if put into force, would have led to endless complications and law suits among the family, and would not have been of much benefit to any of them. The plaintiff himself would, if his father had refused to adiate, have been entitled to the life interest in one-fourth share only of the farms, whereas now if the father should adiate, as I presume he will, the plaintiff will receive his proportionate share of the inheritance free and unencumbered. As to Willem, it is impossible to avoid the supposition that the testators by giving him possession of one of the farms, intended him to have it as a legacy; but it is a supposition only, not founded on any clear provisions of the will. He also, by the finding of the Court, will come in as an heir; and as to Isaac, he, I presume, will have to bring the sum of £1,000 received by him into collation before he receives his inheritance. In the interest of all parties concerned, it seems well that the *fidei commissum* should fall to the ground.

Hopley, J., concurred.

[Plaintiff's Attorneys: Syfret, Godlonton and Low; 1st and 2nd Defendants' Attorney: Trollip; 3rd Defendants' Attorneys: Dold and Breda; 4th Defendants' Attorneys: Tredgold, McIntyre and Bisset.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

HERALD V. TYLER.

{ 1904.
Sept. 7th.

Mr. W. P. Buchanan moved, as a matter of urgency, for confession of judgment in anticipation of the return day of a certain writ of arrest. The defendant was arrested on September 2 on the suspicion that he was about to leave the country, and at the present was confined in Roeland-street Gaol. The action was in respect of a promissory note, which the defendants jointly signed along with one Frank Wynburg, in a transaction regarding mules. Myburg informed him before the arrest that he had sold certain mules grazing at Malmesbury, and the defendant had reason to believe if Myburg sold all the mules he would not account to him.

Mr. Close, who appeared for the plaintiff, said that he was in the hands of the Court in the matter.

De Villiers, C.J., said if there was any ulterior reason for the application he would not have granted it, but it seemed to be a *bona fide* one. The defendant proposed to do now what he would do five days hence. The object of the plaintiff in having him arrested was to bring him before the Court in order to get judgment.

The application would be granted, and the release of the defendant would follow in the ordinary course.

"The immovable property belonging to my estate shall continue under the administration of my executors for the benefit of my grandchildren, and the fruits, rents and interests therefrom accruing shall accumulate and remain with the immovable property under the administration of the executors until my youngest grandchild shall attain his 21st year of age, when, and no sooner, my immovable property shall be realized by public auction and my estate wound up, and the net proceeds be equally divided among my grandchildren, then alive, share and share alike."

Held, that grandchildren born after the testator's death and alive at the time of the youngest grandchild attaining his 21st year will be entitled to share in the distribution.

Held further, that the grandchildren acquire no right transmissible to their heirs until the youngest grandchild born, or still to be born, shall attain his or her 21st year: that no distribution can take place so long as any of the testator's children are capable of procreating children, and that in the meantime the dominium is in the executors who hold the property in trust for those who in due time shall be entitled to share in the distribution.

Wentzel v. Brink's Executors (9 Juta, 328) followed.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

BLACK'S HEIRS V. ESTATE { 1904.
BLACK AND ANOTHER. { Sept. 8th.
Oct. 15th.

Will—Construction—Legacy to a class—Grandchildren—Distribution—Vesting—Executors.

The testator by his will made the following disposition:

This was a special case stated for the decision of the Court.

The plaintiffs were as follows: John Maule Black; Alexander Julian Fison Black; Edith Janet Alice Black; Julia Elizabeth Mitchell (born Glin Wright), married to and duly assisted by John Frederick Mitchell; Emily Ann Catherine Ball (born Glin Wright), a widow; Laura Alice Taylor (born Glin Wright), married to and duly assisted by Frederick Kibbey Taylor; Louise Wilhelmine Weeks (born Black), married to and duly assisted by Robert Foster Jeffrey Weeks; Frances Geraldine Hugo (born Black), married to and duly assisted by Heinrich Pieter Hablutzel Hugo; Norman Alexander Noel Black; Ronald Leslie Black; Archibald

Maule Black; John Richard Black; William Runciman, in his capacity as father and natural guardian of Alexander Walter Runciman and Alice Elizabeth Anne Runciman, minor children of himself and Elizabeth Sarah Runciman (born Black); Gardner William Runciman; and the defendants—The Board of Executors of Cape Town, in its capacity as executor testamentary of the estate of the late John Richard Black, and James Fergus Black.

The plaintiffs' contention was as follows:

The first twelve plaintiffs are majors, and comprise all the living grandchildren of the late John Richard Black (hereinafter called the testator), who in his lifetime resided and was domiciled at Simon's Town, in this colony, and who died on the 6th November, 1883.

The plaintiff (numbered 13) William Runciman, sues in his capacity as father and natural guardian of Alexander Walter Runciman and Alice Elizabeth Anne Runciman, minor children of himself and his wife Elizabeth Sarah Runciman (born Black), who was a grandchild of the testator, and who died on the 17th November, 1896, aged 38 years. The plaintiff, Gardner William Runciman (numbered 14), is a major son of the abovenamed William Runciman and his late wife aforesaid.

The first-named defendant is sued in his capacity as the executor testamentary of the estate of the testator, and was duly appointed such by letters of administration, granted by the Master of this Hon. Court on the 5th December, 1883.

The second-named defendant is the youngest child of the testator. He was born on the 16th February, 1850, was married on the 15th July, 1899, and though the marriage still subsists, there has been no issue thereof. He is joined in this action for the purpose of protecting the interests (if any) of such issue as may hereafter be born to him.

The testator died at Simon's Town aforesaid on the 6th November, 1883, leaving of full force and effect a will dated 14th February, 1860, a copy of which is hereunto annexed marked "A," which the parties crave leave to have regarded as inserted herein. The testator's wife (Anne Maule) predeceased him; she died at Simon's Town on the 13th May, 1875, leaving no will. Of the testator's children mentioned in the will, Alexander Nicholas Black died on the 18th March, 1899, and was the father of the first three plaintiffs and of Elizabeth Sarah Runciman, in paragraph 2 hereof mentioned; Elizabeth Anne Black is the widow of John Glin Wright, is aged 76 years, and is mother of the plaintiffs numbered 5, and 6; Juliana Margaretha Jeffrey Black died on 17th May, 1896, leaving no issue; John Richard Black is the father of the plaintiffs numbered 7, 8, 9, 10, 11, and 12,

and is aged 60 years; Alice Black is the widow of William Runciman, sen., and is aged 58 years and has no issue; James Fergus Black is the second-named defendant, and hereinbefore mentioned. All the plaintiffs who are grandchildren of the testator were born before the date of the testator's death, and the youngest of them is John Richard Black (numbered 12), who was born on 2nd November, 1882. The plaintiff, Gardner William Runciman, was born on the 3rd October, 1882, but the two minors represented by their father William Runciman as aforesaid are now of the age of 13 and 11 years respectively. The first twelve plaintiffs, being testator's surviving grandchildren, contend: (1) That under the will the immovable property became and was vested at the death of the testator in those of the grandchildren who were then living. (2) That of such grandchildren those who died before the coming of age of the youngest grandchild, John Richard Black, on the 2nd November, 1903, have become divested of their shares, and that such shares have accrued to the aforesaid plaintiffs equally. (3) That plaintiffs aforementioned became entitled on and after the coming of age of the said John Richard Black, and are now entitled to claim a realisation of the said immovable property and a division of the proceeds among them equally. Or alternatively, (4) that as they were and are the only grandchildren of testator alive when the youngest grandchild in being, viz., John Richard Black, reached the age of majority on the 2nd November, 1903, they are entitled to claim the realisation of the immovable property and the distribution of the proceeds among them equally. The 13th plaintiff (in his capacity aforementioned) and the 14th plaintiff contend: (1) That under the will the immovable property became and was vested at the death of the testator in those of the grandchildren who were then living. (2) That of such grandchildren, those who died before the coming of age of the youngest grandchild, John Richard Black, on the 2nd November, 1903, were not divested of their rights but transmitted their rights to their children as heirs, and that, therefore, the 14th plaintiff and the minors represented by the 13th plaintiff are entitled to receive, as heirs of their mothers, the share which their mother, the late Elizabeth Sarah Runciman (born Black), was, and would, have been entitled to out of the estate as a grandchild of the testator. (3) That all the plaintiffs became entitled, on and after the coming of age of the said John Richard Black, and are now entitled to claim a realisation of the said immovable property and a division of the proceeds equally amongst the various grandchildren, the heirs of deceased grandchildren representing their deceased parents in the division as aforesaid.

The defendants' contention was as follows: Defendants contend that so long as the said second-named defendant is alive, or so long as children may be born of him, the realisation of the said immovable property and the distribution of the proceeds cannot take place.

The clause in the will relating to the plaintiffs was as follows: "The immovable property belonging to my estate shall continue under the administration of the said Board of Executors, for the benefit of my grandchildren, that the fruits, rents, and interests accruing from the said immovable property shall accumulate and remain with the said immovable property under the administration of the said Board of Executors, Cape Town, until my youngest grandchild shall attain his 21st year of age, when, and no sooner, my said immovable property shall be realised by public auction and my estate be wound up, and the net amount thereof be equally divided among my grandchildren, then alive, share and share alike."

Mr. Schreiner, K.C. (with him Mr. W. P. Buchanan) for first twelve plaintiffs; Mr. Close for thirteenth and fourteenth plaintiffs; Sir H. Juta (with him Mr. Upington) for the defendants.

Mr. Schreiner contended that as soon as the youngest grandchild reached the age of 21, the time for the distribution of the immovable property contemplated by the testator had arrived. The substantial point was that the testator contemplated when he made the will there would be a life interest intervening for his wife, who, however, predeceased him. It was not to be supposed that these unfortunate grandchildren should have now to wait, if the testator's son had a child, until it reached the age of 21.

[De Villiers, C.J.: It would be a greater hardship to such a child to get nothing at all, than it would be for the plaintiffs to wait.]

Mr. Schreiner said that it would certainly be a hardship if all these middle-aged people were to get nothing. All the present grandchildren were alive when the will was made, and after 21 years there had not been a single heir added to the estate. It would be cruel irony if all the grandchildren should have to wait another 21 years, if another grandchild should happen to be born, which was extremely improbable.

Mr. Close said that, on the question of vesting, the interest given to the wife, was obviously a usufructory interest, and then the only persons who could be treated as heirs were those coming in under the clause for the benefit of the grandchildren.

Sir H. Juta said in this case it was clear that the testator had postponed the distribution. The terms of the will were clear that the only persons to receive the distribution were those alive at the time the distribution took place. The

object of the testator was to accumulate property. The words "then alive" could not be got over; they were perfectly definite. The testator clearly contemplated that some of the grandchildren might die when he said "amongst those then alive."

Cur. Ad. Vult.

Postea (Oct. 15th).

De Villiers, C.J.: The testator, by his will, made the following disposition: "The immovable property belonging to my estate shall continue under the administration of the Board of Executors for the benefit of my grandchildren, and the fruits, rents, and interests accruing from the said immovable property shall accumulate and remain with the immovable property under the administration of the said Board until my youngest grandchild shall attain his twenty-first year of age, when, and no sooner, my said immovable property shall be realised by public auction, and my estate wound up, and the net amount thereof be equally divided among my grandchildren, then alive, share and share alike." The testator, who during his lifetime resided at Simon's Town, died in 1883, leaving several children and grandchildren. Some of the children and one of the grandchildren have since died, leaving issue. The youngest grandchild at the time of the testator's death was John Richard Black, jun., who attained the twenty-first year of his age on the 2nd of November, 1903, and no grandchild has been born since the death of the testator. It is quite possible, however, that more grandchildren may come into being, for some of the testator's children are still alive, including James Fergus Black, who is fifty-four years old, and although married, has no issue. The grandchild who has died since the date of the testator's death is Mrs. Runciman, but she has left three children, who are plaintiffs in this suit, and their contention is that, as the youngest grandchild living at the date of the testator's death has now come of age, there should be an immediate distribution, in which they must share as the heirs of their deceased mother. The remaining grandchildren of the testator are all plaintiffs, and they join in the contention that there should be an immediate distribution, but they deny the right of Mrs. Runciman's children to share in that distribution, as she was not alive at the date when the youngest grandchild became of age. The defendants in this suit are the Board of Executors and the testator's son James Fergus Black, and they contend that so long as he, James Fergus Black, is alive, or so long as children may be born of him, the realisation of the immovable property and the distribution of the proceeds cannot take place. The main question to be decided is whether the testator

intended to benefit all his grandchildren, including those to be born after his death, or whether he meant to confine the distribution to the grandchildren born before his death. The general rule laid down by Voet (28-5-13) as to the probable intention of a testator making a similar disposition would certainly support the view that all grandchildren who may still be born should share in the distribution, but that general rule was not observed by this Court in *Bresler v. Kotz's Executors* (2 Menz., 444). That case was followed in the case of *re Henning* (7 Juta, 53), where the testators had bequeathed a sum of money to the children of his daughter when they should attain a certain age, but I guarded myself against being supposed to decide that children born after the death of the testators would be excluded if they were born before one of the children reached the requisite age. In *Wentzel v. Brink's Executors* (9 Juta, 328), the Court refused to authorise the distribution of an inheritance given to the children of the testator's brothers with the condition that such brothers and their spouses should during their lifetime receive the interest. It was held that, as the brothers were still alive and might possibly procreate children, the portions accruing to the heirs were not yet ascertainable, and could not therefore be distributed. Now if, in the present case, the testator had directed that the distribution is to take place upon the eldest grandchild coming of age, there would have been no doubt that all grandchildren living at the time of such coming of age must share, even though born after the testator's death, and that grandchildren born after such coming of age must be excluded. The direction, however, is that the distribution shall take place upon the youngest grandchild attaining his twenty-first year. The plaintiff's contention is that the youngest grandchild intended by the will is John Richard Black, but if other grandchildren had been born after the testator's death and before John Richard Black attained his twenty-first year they would have been entitled to share in the distribution, which it would again have been necessary to postpone until the youngest of them should attain his twenty-first year. The fact that no grandchildren were born between the date of the testator's death and the coming of age of John Richard Black cannot in any way assist in the construction of the will. In directing the accumulation of the rents and profits and the distribution of the total proceeds on the coming of age of his youngest grandchild, the testator appears to have been influenced by the desire to enrich the surviving members of a class, rather than by personal affection for any in-

dividual members of that class. If personal affection had prompted him, he certainly would not have confined the distribution to those grandchildren who should be alive at the date fixed for the distribution. Mrs. Runciman had been born before the testator's death, but under the will her children are clearly excluded from the distribution, whether the date of such distribution be the coming of age of John Richard Black, jun., or of any possible grandchild that may yet be born. Until all the testator's children are dead or reach an age when it will be physically impossible for them to procreate any more children, it is not possible to ascertain who the youngest grandchild is, or what grandchildren are entitled to share in the distribution of the accumulated funds. The plaintiffs contend that on the death of the testator the immovable property became vested in them, and the question was asked: in whom is the *dominium*, if it is not in the grandchildren? The obvious answer is that the *dominium* is in the executors of the testator. They are the persons who will have to realise the property and pass transfer thereof, and in the meantime they hold it in trust for those grandchildren, who shall, in due time, be found to be entitled to share in the distribution of the proceeds. An interesting question is raised by Mr. McGregor in his notes to Voet 36, 1, 26, whether under similar circumstances a person shared with the administration of burthened property is a *fiduciary* or not but that question does not arise for decision in the present case. Our law clearly recognises the capacity of executors and administrators to hold such property in trust for those who, although not yet born, are indicated by a testator as the objects of his bounty. (See 1 *Hall, Cons.* 98; Voet 28, 5.12 *in fine*.) Under the terms of the will now in question, the grandchildren acquire no right, transmissible to their heirs, until the youngest of the grandchildren, born or still to be born, shall attain his or her twenty-first year. I am clearly, therefore, of opinion that the defendants are right in their contention that the realisation of the immovable property and the distribution of the proceeds must be postponed until the youngest grandchild of the testator that may still be born shall have attained the requisite age. The costs of this action will be borne by the estate.

His Lordship added that Mr. Justice Hoplev, who also sat in the case, concurred in this judgment.

[Plaintiffs' Attorneys: Plaintiffs 1 to 12, G. Trollip—13 and 14, Dold and Van Breda; Defendants' Attorneys: Van Zyl and Buissinné.]

COLONIAL GOVERNMENT V. MUNICIPALITY OF ALIWAL NORTH.

This was an action brought by the Colonial Government against the Municipality of Aliwal North. The case turned upon the question as to whether certain property of the Government at Aliwal North was ratable. One portion of the property was used as a gaol, and the second portion, which was enclosed by a wall, was used as a garden by the gaoler. The Colonial Government sued the Municipality to refund £2 ls. 4d. for rates, and it was agreed to bring the matter before the Supreme Court for a final decision as to whether the vegetable garden was a part of the gaol or not.

Mr. Evans was for the Government, and Mr. Schreiner, K.C. (with him Mr. McGregor) was for the Municipality.

Counsel having been heard in argument,

De Villiers, C.J., said the great question was whether the permanent works and improvements had been effected or not. In his opinion, permanent works and improvements had been effected. The walls would be a permanent improvement, the hedge would form part of the improvement, and the vegetable garden to some extent would be an improvement. It had been said that the vegetable garden was not an improvement, because the vegetables exhausted the ground, but he supposed that the ground would be well manured to make up for the exhaustion, and there the clause of the Act relied upon would not exempt the Government. The only question on which there might have been difficulty was whether or not the establishment was a gaol or a convict station. If the special case had been differently worded, a great deal more might have been said in favour of the plaintiff. The meaning of gaol had been clearly defined in the special case, and the tenth clause clinched that by setting out that the second portion might at any time be permanently or temporarily converted to any use for gaol purposes. Clearly there was an implied admission that the uses to which that portion was devoted was not for gaol purposes. He was of opinion that the special case should be recorded in favour of the defendant, and the Court would declare that the Government was liable to be rated for municipal purposes in respect of the second portion, the costs to abide the result.

Hopley, J., concurred.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

Ex parte FOOT. } 1904.
 } Sept. 9th.

Mr. Gutsche moved for the appointment of a commission to examine certain witnesses in an insolvent estate of which petitioner is trustee.

Order granted as prayed, Mr. Advocate Struben to act as commissioner.

Ex parte MCLEOD. } 1904.
 } Sept. 9th.
 " 12th

Articled clerk—Admission.

An articled clerk, who had served over two years and nine months to an attorney of the Supreme Court, who was practising in S. Rhodesia, was allowed to complete his period of service with an attorney at Cape Town.

Mr. Percy Jones moved for an order authorising petitioner to complete articles of clerkship in this colony.

Sir H. Juta, K.C., appeared for the Incorporated Law Society to oppose.

The petition set out that applicant, who had resided at Salisbury, Southern Rhodesia, was on the 20th November, 1901, articled to serve Mr. Alfred Henry MacLeod, an attorney of this court, practising in Southern Rhodesia. He continued his service from the said date until about the 30th June, 1904. Petitioner, being desirous to submit himself as a candidate for the law certificate examination to be held in Cape Town, and in order that he might receive coaching, left Salisbury on the 1st July, 1904. He desired to complete his service under articles in Cape Town with an attorney of this Hon. Court. Mr. A. H. MacLeod was willing to cede the articles of service. Petitioner desired cession of his articles of service to one of the attorneys of this court, in order that he might complete three years' service as required by law.

His Lordship said that he saw a note attached to the papers stating that if the cession were allowed, the Government may be deprived of £10 stamp duty.

Sir H. Juta said that the stamp duty was a subsidiary point. The principal point was that the Law Society would like to have a definite ruling from the

Court in view of the Rule of Court No. 149. The 149th Rule required, not only that a clerk must serve within the Colony, but the service must be for the whole period within the Colony. That rule had never been altered or varied, as far as he knew. Counsel called attention to cases where service in another country had been allowed to count. He was informed that there was no precedent for cession of articles. If the service were allowed to count, then fresh articles should be taken out and registered.

Mr. Jones said that the applicant came down here to improve his qualification, and he had already been articulated to an attorney of this Court, though practising in Rhodesia. Counsel relied upon the case of Crawford, where the Court allowed the last year's service to be completed in Rhodesia.

Sir H. Juta contended that there was a fundamental difference between the cases.

Cur. Adr. Vult.

Postea, Sept. 12th.

Hopkey, J., The petitioner was, on November 20, 1901, duly articulated at Salisbury, Southern Rhodesia, to Mr. Alfred Henry McLeod, an attorney of this Court, and also of the High Court of Southern Rhodesia, to serve him as a clerk in the profession of attorney-at-law and notary public, for a term of three years. The articles were duly registered, and filed in the office of the Registrar of the High Court of Southern Rhodesia, and the petitioner served under the said articles continuously until the 30th of June, 1904, when, being desirous of presenting himself for examination as a candidate for the Law Certificate of the University of the Cape of Good Hope, at the examination to be held in Cape Town in December, 1904, and being further desirous of obtaining in Cape Town tuition to fit him for the said examination, he, with the consent of Mr. Alfred McLeod, removed to Cape Town, where it is stated he has since been continuously serving as a clerk in the office of an attorney of this Court. He now applies that he should be allowed to have his articles ceded by Mr. McLeod, who is willing to do so, to an attorney of this Court in Cape Town, and that his service with Mr. McLeod in Rhodesia should be allowed to count as service in this Colony. The Incorporated Law Society appear to point out that according to the 149th Rule of Court, it is necessary that the articles should be to serve within this Colony, and that the applicant should, during the whole of three years, have continued to be actually employed in such service within this Colony. There is no doubt that the strict reading of the rule in question is against the applicant, but it should be borne in mind that the circumstances of this country have changed in very many

and important particulars, since the year 1829, when the rule was promulgated. We are here concerned with a case involving our relations in such matters with Rhodesia, a great British Dependency which was not contemplated in 1829, and which is now governed by the same system of law as obtains in this Colony, the Supreme Court of which exercises appellate jurisdiction over the Courts of that country. Moreover, the practice of the Courts and all the duties of attorneys and notaries are, as far as I am aware, identical in Rhodesia and in this Colony, so that for all practical purposes it is immaterial whether a clerk receives his instruction in the knowledge and practice of the law in that country or in this Colony. The 149th Rule of Court, while it lays down that persons who have been articulated, and who have served as therein laid down, shall be eligible to be admitted and enrolled as attorneys of this Court, does not go further and state that no other mode of service will be approved of by the Court, and that no other persons save those dealt with in that and the immediately succeeding rules shall be eligible. The Court can exercise, and has more than once exercised, its discretion, and upon good cause shown has granted relief in cases where the service under articles has not been in compliance with the strictest interpretation of the original rule. The cases cited during the argument sufficiently show this, and indicate that, while the Court is careful that no person who has not had a proper training and proper legal instruction should be admitted, it exercises an equitable jurisdiction, and does not exclude persons who have in effect complied with all the reasonable requirements of the rule. In the present case, the applicant has served an attorney of this Court. That attorney, it is true, is not carrying on his business in the Colony, but he is practising his profession in exactly the same way, and is guided by the same laws and rules and etiquette as he would have observed in this colony. I am, of course, aware that there are some local laws in Rhodesia which deal with the circumstances of that country; they do not, however, affect the matter which I am considering; but, with regard to the whole system of law in vogue in that country, this Court has an appellate jurisdiction—and, as to any attorney of this Court, though he may be practising there, this Court would have power to strike him off its own rolls for any misconduct sufficiently grave to warrant such punishment, wherever such act of misconduct may have been committed. The petitioner has come from an office of an attorney of this Court, where he has received such instruction as above indicated, directly to an office of another attorney of this Court in Cape Town, where he seeks to be allowed to serve without

suffering any loss of time by reason of his service in Rhodesia. His petition should, in a large measure, be acceded to, and it would be difficult to refuse it, after such cases as in *re Crawford* (15 S.C., 105) and in *re Rothman* (13 C.T.L.R., 276). He served Mr. McLeod until the 30th June, 1904, and the service in this colony should extend until the 30th June, 1905. The Law Society also brought to the notice of the Court the fact that by Act 27, 1883, section 14, the articles should be registered within three months with the Council of the society. It is, however, obvious that in cases such as the present it would be impossible, with any sense of fairness, to insist on such registration as a *sine qua non*. Due and proper registration of petitioner's articles was made with the Registrar of the High Court of Southern Rhodesia, which is all that was required of him in that country, and it seems to me that if he is allowed to transfer his articles or enter into new ones here under the special circumstances of his case, he should be allowed to register his articles forthwith upon payment of the necessary fee. It was also pointed out that there was no precedent for cession of articles as it is here prayed may be allowed, and my attention was drawn to the fact that upon original articles there is a stamp duty of £10, of which in this case the Government would on a mere cession be deprived. I think difficulties might arise from allowing a cession, and, on the whole, am of opinion that there should be fresh articles. The order of the Court therefore is that petitioner be allowed forthwith to enter into articles of apprenticeship with an attorney of this Court, to serve him until the 30th of June, 1905, that such articles be duly stamped and registered as required by the laws of this colony, and that his time of service with Mr. McLeod in Rhodesia be allowed to count as service in this colony. I may add that I think that the Law Society was perfectly right in appearing to point out the difficulties of the case, and I personally am of opinion that it would be wise to alter the Rules of Court dealing with such matters, so as to meet the requirements of the present time, and of the altered conditions of this colony and of the other States of South Africa.

[Applicant's Attorneys: Moore and Son.]

Ex parte CHANNER AND OTHERS.

Mr. Close moved for an order under the Companies Act of 1892, authorising the alteration of memorandum of association of a limited liability company of this name, known as the Swimming Bath Company, so as to give the company extended powers in regard to the

buying and selling of land, and so forth. The company was registered with a capital of £700 in £1 shares, and the present application had the consent of the shareholders.

Order granted as prayed.

Ex parte SEALE.

Mr. Close moved on behalf of petitioner, as representing his minor son Manning Seale, for leave to execute a mortgage bond for £200 upon certain property that petitioner had built for him, on which he had borrowed £125. It would require £50 more to complete the property, and petitioner could not afford to pay this. The Master's report was unfavourable. He stated that he was not convinced that the undertaking was really in the interests of the minor. Counsel contended that the objections raised by the Master would, if regarded as sufficient, prevent fathers from helping their sons by advances.

Order granted, Hopley, J., in giving judgment, stating that the money raised should be distributed through the Master.

Ex parte BOTHMAN.

Mr. Russell moved for authority to the Registrar of Deeds to pass transfer of certain land at Victoria West, which petitioner had purchased at public auction in an estate of which he was executor *dativo*.

Order granted as prayed.

Ex parte STABLEFORD AND CO., LTD.

Mr. McGregor (in the absence of his leader, Mr. Schreiner, K.C.) stated that the report of the liquidators had been brought before the Court and ordered to lie for inspection. That order had been complied with, and counsel now moved for confirmation of the report, and the directions of Court thereunder. It was suggested by the liquidators that a Commission should be appointed to take the evidence of Wm. Stableford (director) and W. L. Kidney, and hold an inquiry into the whole of the company's transactions. Application was made in terms of sections 154, 173, and 177, of the Companies' Act of 1892.

Hopley, J., asked if the liquidators alleged that there had been fraud.

Mr. McGregor replied that he would not say that exactly, but the liquidators urged that there were certain matters which required investigation, and especially in relation to the cession of a certain bond.

The report was confirmed, and an order granted appointing Mr. Advocate W. P. Buchanan to be commissioner to take evidence under the Companies Act; with

regard to any persons named, or matters raised, or dealt with in the report, with all the powers set out in section 177 of the said Act, the examination to be returned or reported on the 15th October, with leave to apply for an extension.

Ex parte FULLER.

Mr. Upington moved, on behalf of petitioner (who is the surviving spouse and executrix testamentary of the late John Fuller), for leave to sell two farm properties for £2,000, investing the proceeds on first mortgage of landed property. Two minors were interested in the properties, which produced £120 a year. The major heirs consented. The will left the property to the heirs, share and share alike. The Master, in his report, pointed out that the will provided for the non-alienation of the landed property. He declined to make a recommendation, but said that, in case the Court granted an order, it was desirable to see that the money was properly invested on behalf of the estate. Counsel said that he thought the Master was not quite accurate in his references to the will.

Hopley, J. (after reading over the will) said that he thought the Master was not justified in saying that the will contained an emphatic declaration against the alienation of the estate.

Ordered to stand over for further information as to proposed purchasers, whether rental of £120 is net or gross, and so forth.

Ex parte COLLISON, LIMITED.

Mr. P. Jones moved for leave to amend a certain bond granted by W. H. Courtney, of East London, in respect of a mortgage for £1,000, upon land at Cambridge. In the bond petitioners were described as H. C. Collison and Co., Ltd., instead of Henry C. Collison, Limited.

Order granted as prayed.

MZUBELO AND OTHERS V. NDABA AND OTHERS.

Mr. Upington said that he appeared for the plaintiffs to apply for leave to have the plaintiffs and their witnesses examined *de bene esse*, at Matatiele, East Griqualand. The defendants consented, subject to the extension of the commission to the defendants, and their witnesses. To this condition plaintiff consented.

Application granted, the R.M., or, failing him, the A.R.M., of Matatiele, to act as commissioner, costs to be costs in the cause.

BOTHA V. BOTHA.

Mr. Close, on behalf of the plaintiff, Mrs. Katherina Botha, applied, upon notice of motion, for an order requiring the respondent, Anthony Botha, a retired farmer, to pay the plaintiff £50 to enable her to institute an action for judicial separation by reason of his cruelty and ill-treatment, and also to pay her £15 a month by way of alimony pending such action. The petitioner stated that the defendant had frequently ill-treated her, and had threatened to shoot her. Some time ago she instituted proceedings in the Court of the R.M. of Worcester, and the defendant was then ordered to keep the peace for three months. She was married to the defendant in Cape Town in July, 1902, out of community of property. The defendant was the owner of property in several places. Deponent had two children by her former marriage.

Sir H. Juta, K.C. (for the respondent) read an affidavit, in which he (respondent) stated that the petitioner was a professional nurse, and was formerly the wife of a seafaring man. He denied the charges of ill-treatment, and said that his wife had threatened to shoot him. He questioned the legality of the proceedings before the Resident Magistrate of Worcester. The children were at liberty to come and live with him as before. He also alleged that the plaintiff had frequently been drunk, and that she had said that she had a better and a younger husband to go to. Her daughter had assaulted deponent, striking him with a whip on the head. Counsel added that the irritating cause seemed to be one Karl Bender. A further affidavit was read, in which it was stated that the applicant on one occasion went into the Alexander Hotel. She was drunk, and Karl Bender's arm was round her waist. Other deponents spoke to having seen the applicant in a state of drunkenness, one occasion being when she had fallen into the water furrow.

Mr. Close read the replying affidavit of the plaintiff, in which she denied the allegations of drunkenness. On various occasions the respondent violently ill-treated her in the presence of her daughter. The respondent was in the habit of giving her medicine which was drugged, the ingredients of which he obtained from a Malay. She denied that her daughter and herself assaulted the respondent.

Mrs. Bender deposed that, while she had seen the respondent drunk on several occasions, she had never seen the applicant under the influence of drink. Deponent cut him several times with a whip when the respondent tried to force an entrance to her house. A sergeant of police, on a complaint from the applicant, visited the respondent's

house, and testified in an affidavit that he was under the influence of drink.

[Hopley, J.: Does the respondent want this woman as his wife?]

Sir H. Juta: The so-called offer is a mere sham, my lord.

[Hopley, J.: It is quite possible she would merely get her kitchen.]

Mr. Close urged that she should get such maintenance as would be suitable to her station of life.

[Hopley, J.: She may get nothing very great. Isn't it better these parties should come to some sort of arrangement?]

Counsel having been heard in argument on the facts,

Hopley, J., said it was quite clear the parties had got to such a stage of existence as to render married life unbearable, and in all probability the whole of their matrimonial relations would have to come before the Court. It had been urged that the applicant should get no relief, because she happened to be married by ante-nuptial contract, but he thought the policy of the Court was not so much whose money it was, as the fact that the marriage relations had to be inquired into. Under the circumstances of the present case, he thought the money should be paid by the one spouse who was able to do so, in order that the whole thing might be fairly inquired into. It had been said that this woman had not made out a *prima facie* case; but while he was not prepared to say now whether her case was a good one or not, it was perfectly clear the parties had reached a stage which made it impossible for them to live together. So far as she was concerned, there was the *prima facie* fact that she had left a comfortable home for some reason or other, and had taken her two daughters away, and was apparently living on charity. He thought £30 would be a fair sum to allow her to enable her to carry on this suit. On the question of alimony, he did not want to say that in no case would he be inclined to order some sort of money, but in the present case the date at which the whole matter would be settled was so near that there was no real necessity for it. The costs of the application would abide the result.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

{ 1904.
{ Sept. 12th

Mr. W. P. Buchanan moved for the admission of Angus Somerville Fletcher as an attorney and notary.

Application granted and oath administered.

Mr. W. P. Buchanan moved for the admission of William Daniel Rainier, as an attorney and notary.

Application granted and oath administered.

Mr. Van Zyl moved for the admission of Victor Gordon as an attorney and notary.

Application granted and oath administered.

PROVISIONAL ROLL.

GLUCK V. NATHAN.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Ordered to stand over pending proof of service on the defendant.

Subsequently, an affidavit of service was put in, and an order was granted as prayed.

PEDERSEN V. MCKAY.

Bond—Interest—*Pactum de non petendo*.

Mr. Lewis moved for provisional sentence on a mortgage bond for £1,000, with interest, the bond having become due by reason of non-payment of interest.

Mr. Gardiner (for the defendant) read an affidavit, to the effect that a little before expiration of the notice it was agreed that the notice should be cancelled, and that he should give a promissory note for £300. The reason why the interest was not paid was that he intended to pay £700 balance on the bond, and had been trying to make arrangements to that end. No further demand was made before summons was issued.

Mr. Lewis read a replying affidavit by the plaintiff's attorney.

Mr. Gardiner submitted that his client was entitled to judgment, inasmuch as there had been no demand for interest before issue of summons.

[Hopley, J.: What is your excuse, Mr. Gardiner, for not paying interest for June? Were you trying to make arrangements?]

We forgot it, my lord.

Mr. Lewis submitted that the plaintiff was not required to give notice in regard to the interest. There was a specific sum due on a specific date, and there was no need to make demand. They had actually made demand on defendant for immediate payment of the bond and interest.

Hopley, J., said the plaintiff claimed judgment on a mortgage bond for £1,000, by reason of the non-payment of interest. It would appear that interest had not been paid since the 31st December last. On the 29th March there was a letter written to the defendant giving him three months' notice that he would be required to pay the bond, calling up the bond as he had, according to its terms, a perfect right to do if he chose. After that date, and some time in June of the same year, an arrangement was come to whereby the defendant gave £300 as part payment of the bond, and this notice given on the 29th March was considered to be entirely cancelled. In that state of affairs matters stood, and then the defendant said he forgot the matter of the interest, while he was trying, as he said, to raise the remaining £700 to pay off the whole of the bond. Then, all of a sudden, on the 5th September, the defendant got a letter, which the plaintiff now relies upon as being a letter of demand. In this letter he called upon the defendant for payment of the amount of the bond and interest, and stated that, unless such payment be made by ten o'clock on the Wednesday morning, summons would be issued. If that letter meant anything at all, it meant this, in spite of the arrangement in June the plaintiff was going to enforce the three months' notice, which was given on the 29th March. So matters stood, and the next thing the plaintiff did was to issue summons founded upon non-payment of interest on this bond. Well, the interest had not been paid, but certainly there had never been a demand made upon the defendant on that ground. He made next day a satisfactory tender, which plaintiff admitted to be a satisfactory tender, but he tendered no costs, and the whole matter was really reduced to this small issue, whether he ought or ought not to have tendered costs. He thought the defendant was right on the principle laid down in the cases which Van Zyl referred to. From the paragraph which he had read, it seemed to him that there ought to be in such circumstances a letter of demand by the creditor to the debtor laying before him what he wanted before he issued his summons. Provisional sentence would be granted for £700, but plaintiff must pay the costs.

PATERSON, BOYES AND CO. V. HAMP.

Mr. Russell moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MORRISON V. LANGTON.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

ESTATE LILIENTFELD V. WALDEK.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £200, together with interest at the rate of 8 per cent., and that the property specially hypothecated be declared executable.

Order granted.

HENNESSY V. ESTATE CARMICHAEL.

Mr. D. Buchanan moved for the final adjudication of the late John Carmichael's estate as insolvent. Theoretically, the estate was in the hands of the Master, who had been served with a notice.

Order granted.

THOMPSON V. JAMESON.

Mr. Russell moved for provisional sentence on a promissory note for £100, with interest and costs.

Order granted.

CORDES V. VAN WEENEN.

Mr. P. Jones moved for provisional sentence on a mortgage bond for £2,000. The bond had become due by reason of non-payment of the capital amount and interest. Counsel also applied to have the property declared executable which had already been attached.

Order granted.

CORDES V. PULVERMACHER.

Mr. P. Jones moved for provisional sentence for £1,800 on a mortgage bond, with interest and costs, and that the property attached be declared executable.

Order granted.

NETHERLANDS BANK V. RUSSELL.

Mr. Roux moved for provisional sentence on a promissory note for £150, with interest and costs of suit.

Order granted.

BOESEN V. DAY.

Mr. W. P. Buchanan was for the plaintiff, and Mr. Gardiner for the defendant. Mr. Buchanan asked for the final adjudication of the defendant's estate as insolvent. Postponements had been granted from 14th July until 11th August and 25th August, and then again until to-day, and nothing had yet been received by the plaintiff.

Mr. Gardiner said that the defendant had not yet obtained the money from the sale of her property. The delay was caused through the survey, and an affidavit to that effect was put in from Mr. Surveyor Maskew. It was anticipated that the plaintiff would get his money by the first day of next term.

The matter was ordered to stand over until October 15, on condition that the money paid by the purchasers pass through the hands of the attorneys, at all events, a sufficient portion of it, on the undertaking they will immediately pay it over to the plaintiff, the plaintiff on his side undertaking he will consent to the provisional order being withdrawn, so that transfer can be passed, costs to be arranged as in the previous order.

GOTZE V. BERGH.

Mr. W. P. Buchanan (for the plaintiff) moved for provisional judgment on two promissory notes for £150 and £100.

Mr. Gardiner appeared on behalf of the defendant, and said that pleadings had been filed in the principal case for a larger portion of the amounts of the original promissory note.

Hopley, J., said it seemed to him that the affidavits disclosed such a conflict of evidence between the parties, and there seemed to be so much complication in the business, which might be capable of simple explanation when the case came to trial, and so much renewing of documents, settling of scrip and so on, that he did not think the case came under the category of an ordinary liquid document. That view was strengthened by the fact that there was already a principal case, in which practically the same claims were made and the same defence set up. He thought the proper course would be to order the parties to go into the principal case, and the pleadings could be filed in time to allow of the consolidation of the two cases. An order would be made accordingly, costs to abide the result.

STEYN AND SERRURIER V. TAAHAR AND SOWKER.

Mr. P. S. T. Jones moved for provisional sentence on a Magistrate's

C 2

Court judgment for £60 and costs, and for an order declaring certain property executable.

Granted.

RABOLINI V. NEWMAN.

Mr. W. P. Buchanan moved for provisional sentence upon certain IOU's signed by the defendant in favour of the plaintiff for £53, with interest *a tempore morae* and costs of suit.

Mr. Gardiner appeared for defendant, and read an affidavit made by defendant, who stated that the plaintiff was in his employ, and allowed certain persons to wrongfully seize some machines belonging to him. He complained that he had sustained damages by reason of the wrongful acts of the plaintiff, and stated that he was about to institute proceedings to recover damages.

Mr. W. P. Buchanan read an affidavit made by plaintiff's attorneys, to which was attached a letter from the defendant to plaintiff, in which he appealed for time to pay.

Mr. Gardiner asked that there should be a stay of execution pending action to be brought by defendant.

Provisional sentence was granted as prayed, with costs.

FRIEDMAN BROTHERS V. MORRISON.

Mr. W. P. Buchanan moved for a final order of sequestration, defendant, it being alleged, having committed an act of insolvency, in that he had clandestinely left the Colony with intent to defeat or delay his creditors. A provisional order was granted on August 11.

Mr. Gardiner appeared for the defendant.

Affidavits were read on behalf of the applicants, stating that defendant had sold property in Cape Town, and had gone to Natal with the object, applicants believed, of defeating or delaying creditors.

Mr. Gardiner said the defendant had only gone away temporarily, and was expected back at the end of the month. He suggested that there should be a postponement until defendant's evidence could be taken.

Mr. Buchanan consented, and the case was ordered to stand over until October 1.

STEPHAN BROS. V. MYERS.

Mr. Roux moved for provisional sentence on a promissory note for £200, with interest and costs.

Granted.

ESTATE MARAIS V. BAUERMEESTER.

Mr. W. P. Buchanan moved for provisional sentence for £318 on a promissory note.

Granted.

Estate Goldschmidt v. Petronella

ESTATE GOLDSCHMIDT V. DAY.

Mr. Rainsford appeared for the plaintiff.

Mr. Gardiner (for the defendant) pointed out that a provisional order of sequestration had been granted against the defendant before date of summons.

Provisional sentence was refused, with costs, His Lordship stating that the manner of proceeding had been entirely misconceived.

WARD V. HONIKMAN.

Mr. De Waal moved for provisional sentence on a promissory note for £500, with interest from the due date and costs.

Granted.

KANTEROWITZ V. STRANACK.

Mr. W. P. Buchanan applied for provisional sentence on a mortgage bond for £200, with interest and costs, and for hypothecated property to be declared executable.

Granted.

ESTATE FINCHAM V. CHRISTIE.

Mr. P. S. T. Jones moved for provisional sentence for the sum of £1,100 on a certain promissory note, dated the 8th October, 1901, and due on the 8th October, 1902.

Mr. Rainsford appeared for the defendant.

Mr. Jones put in the promissory note, to which was attached a written statement by defendant that in case of his illness or such other event a certain draft in his favour, payable at the Standard Bank, should be paid to Magdalena Fincham, now deceased, on behalf of whose estate the present claim was made.

Mr. Rainsford read an affidavit made by the defendant, in which he stated that the money was given to him by the late Mrs. Fincham in consideration of services he had rendered on her behalf, and the promissory note was signed because Mrs. Fincham was desirous that her relatives should be kept in ignorance of the gift. The promissory note was only intended as a blind to her relatives. A corroborative affidavit was made by one Pierpont.

On behalf of the applicant, affidavits were read, to the effect that the deceased woman had stated to the depon-

ents that the sum had been advanced as a loan, and the attorneys for the plaintiff stated that defendant had offered them to pay the debt, if time were allowed him.

After hearing Mr. Rainsford in argument, the Court granted provisional sentence.

Hopley, J., said the defence was not one which commended itself to him. It was more likely that the document represented the real state of affairs, and that this was a loan by a good-natured woman to a man whom she thought she was setting on his feet. Possibly defendant might, in the principal case, be able to establish his defence, but his task would be an uphill one. Provisional sentence would be granted, with costs, unless the defendant went into the principal case forthwith, in which case costs would abide the result.

SCHWALBE V. SMITH.

Mr. Roux moved for provisional sentence for £56 15s., on a mortgage bond, with interest and costs.

Provisional sentence was granted, the specially hypothecated property being declared executable.

COWLEY V. LEWIS AND GRIFFITHS.

Mr. Roux moved for judgment against the first defendant (Lewis) for £20, on a promissory note, with interest and costs.

Granted.

VON HOLDT V. MARTIN.

Mr. J. E. R. de Villiers moved for provisional sentence on certain conditions of sale for £17.

Defendant said he owed the money, but was not able to pay it. His goods had been sold, and he was out of work.

Hopley, J., said defendant would have to see plaintiff and endeavour to make the best arrangement he could. Provisional sentence would be granted, with costs.

SMALBERGER V. KELLER. (1904. Sept. 12th.)

Provisional sentence—Renunciation of benefits by woman.

Where the Court was not satisfied that the legal effects of renunciation of benefits had been duly explained to a woman who had signed a promissory note as a co-

principal debtor, provisional sentence was refused.

Mr. McGregor moved for provisional sentence on a promissory note made by one Muller, and signed by defendant as surety and co-principal debtor for £925, with interest and costs.

Mr. W. P. Buchanan, for the defendant, read an affidavit by defendant, in which she stated that she was induced by plaintiff to sign the note. She appended her signature, and the note was an accommodation to plaintiff and Muller, in order to enable them to raise money at the bank. Subsequently, she wrote to the bank repudiating her liability, but ere that the promissory note had been taken up by the plaintiff. She referred the Court to the ante-nuptial contract between herself and her husband, by which the marital power of the latter was not wholly excluded. She was married out of community.

Plaintiff deposed on affidavit that the promissory note was given in respect of the balance of the purchase price of certain property purchased from him by Muller. The terms of the promissory note were explained to the defendant, and she was told that she would be liable for the amount if the note was not redeemed by Muller.

Hopley, J., said it seemed to him the case should not be dealt with in provisional form. The application alleged that defendant was surety and joint principal debtor for a certain promissory note for £925. One Muller, who is the present defendant's son-in-law, made a promissory note in favour of one Smalberger for the sum of £925 for a debt, due by Muller to Smalberger. Apparently, these two relations of the old lady, in order to settle this matter to their own satisfaction, got her, in the absence of her husband, to sign the document. The matter seemed to have been carefully considered by these two, and they seemed to have got a lawyer to draw up a document, which was to bind Mrs. Keller. The lawyer explained the meaning of the renunciation of the exceptions to these two gentlemen, and left it to them to explain the meaning to Mrs. Keller. It was extremely improbable that these two people would have been able to explain Mrs. Keller's position to her, and the chances were that it was only generally explained. He felt that the proper course was to refuse the provisional sentence, costs to abide the result of the principal case.

GENERAL MOTION.

HARKSON V. HARKSON.

Mr. Russell moved, as a matter of urgency, for leave to sue the defendant by

edictal citation for a decree of divorce, and for an order for the custody of certain children. The parties were married in Norway, in 1890, and there were two children of the marriage, a girl and a boy, aged 11 and 9 years respectively. Between April and August, 1904, the plaintiff had cause to remonstrate with his wife about her undue familiarity with a boarder in the house, named Fordham, and she proposed that she should go to England to reside for a term, and take the two children with her for the purpose of putting them to school. He had since learned that Fordham and his wife were living together at Hove, Brighton.

Hopley, J., said he did not see what use it would be making an order as to the custody of the children.

Mr. Russell: She might return to this colony.

Hopley, J.: Then you can move the Court again. There seems very little likelihood of her coming back. Leave will be granted to sue by edict, the process to be served personally, returnable November 3, with leave to serve intendent with notice of trial.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION.

{ 1904.
{ Sept. 13th.

Mr. W. P. Buchanan moved for the admission of Nicolaas Lambrechts Schounberg, as an attorney, notary, conveyancer, and sworn translator.

Application granted, and oath administered.

PROVISIONAL ROLL.

LINDENBERG AND DE VILLIERS V. WESNER.

Mr. Close moved for provisional sentence upon a promissory note for £36. Order granted.

DEMPERS AND VAN RYNEVELD V. STRYDOM.

Dr. Greer moved for provisional sentence upon a mortgage bond for £350, with interest and costs of suit, the bond having become due by reason of the non-

payment of interest; counsel also asked for the property specially hypothecated to be declared executable.
Order granted.

MCKAY V. MAHOMET.

Sir H. Juta, K.C., moved for provisional sentence on a lease for £160, rent due, for which lease the defendant signed as surety and co-principal debtor.

Mr. Burton (for the defendant) read an affidavit, in which the latter said that the plaintiff had failed to observe the conditions of the covenant. He had not given the lessee full, free, undisturbed use and occupation of the premises, and had not kept the said premises in good repair. The lessee had suffered damage to the amount of £500, for the recovery of which proceedings had been instituted by deponent in this court. The premises had been occupied by sub-tenants, and several of these had left on account of the want of repair of the premises. Deponent attached a report on an inspection of 172, 174, and 176, Long-street, prepared by Mr. Simkins, architect, who said that the present roof was beyond repair. The lessee had not had beneficial occupation of the premises.

Sir H. Juta read a replying affidavit by the plaintiff, who denied any neglect to repair the buildings, after notice had been given to him. He denied that he was liable in any damages for loss of tenants. He was not aware of any sub-tenant having left by reason of the condition of the premises.

Mr. Burton submitted that, in view of the circumstances, provisional sentence should not be granted at the present stage.

Buchanan, J.: One Osman was the lessee of certain premises under a deed of lease, and to this deed of lease the present defendant had joined himself as surety and co-principal debtor. The action has not been brought under this lease, judgment has been given against him, and a return of *nulla bona* has been issued. The surety now wishes to set up a claim of damages, not which he had, but which Osman had. There is no valid defence to this action. Judgment has been given for a liquidated demand, and the defence is an unliquidated claim for damages. Provisional sentence will be granted as prayed.

LATEGAN V. HOHN AND MAUSER.

Mr. Van Zyl moved for a decree of civil imprisonment upon an unsatisfied judgment for £65, and costs.

The defendant Hohn appeared, and said that he was unable to pay at present. He was prepared to offer £1 a

month. He was at present out of work.

Cross-examined: He had a lease with Mr. Lategan for ground for brick making. He could not use the clay.

Decree of civil imprisonment granted against both defendants, execution to be suspended as to Hohn on payment of £1 a month, first payment to be made on the 1st October, with leave to plaintiff to apply for an increased order.

FRIEDMAN V. SHAPIRO.

Mr. P. Jones moved for provisional sentence on a certain lease for £64, being two months rent for July and August, and also for costs.

Mr. Burton (for the defendant) said that it was desirable to hear this case in conjunction with a matter standing on the motion roll. The motion was for an order compelling Friedman to pay certain costs.

Mr. P. Jones said that he had not been retained in the other matter.

Buchanan, J., said that the matters would be heard together.

Mr. Burton read an affidavit by the defendant, who said that he had a good defence to the action. On the 4th July he paid the rent of 23 and 25, Primrose-street, to Michael Friedman, by setting off £30 due from plaintiff to himself as rent of certain property at the Paarl. He had given the plaintiff a cheque for £4 in settlement of the balance and a debt of £2. He had a set-off against the August rent claimed in the summons by way of taxed bill of costs, amounting to £16 14s. 10d., being costs of action and certain costs incurred by him in respect of a rule nisi obtained by the Churchwardens of St. Saviour's, Claremont. He verily believed that the costs would amount to more than the difference between £16 14s. 10d. and the balance of the August rent.

Mr. Jones read a replying affidavit by Michael Friedman, who denied that the defendant had any set-off, and said that the premises at the Paarl were let, not to himself, but to his reputed wife. He should oppose any action to compel him to pay costs of previous litigation. He added that he had given his power of attorney to Mr. Harry Handa, as representing the wardens of St. Saviour's Church who held a bond against Friedman.

Judgment for £64, less £16 14s. 10d., paid on account, with costs.

DEMPERS, MOORE AND CO. V. FRIEDGOOD.

Mr. Du Toit moved for provisional sentence on a mortgage bond for £800, with 6 per cent. interest, and that the property specially hypothecated be declared executable. The bond had be-

come payable on the stipulated three months' notice.

Order granted, subject to the attorney producing an affidavit that notice had been duly served.

DE WET V. DUSSEAU.

Mr. J. E. R. de Villiers moved for provisional sentence on a certain acknowledgment of debt for £100, with interest at the rate of 6 per cent. per annum from the 17th June, 1904.

Granted.

HOLDENSON AND NEILSON V. MCKENZIE AND CO.

Mr. McGregor moved for provisional judgment on a certain bill of exchange for £803 15s., with interest and costs.

Granted.

NANNELLY V. DARIA AND CO.

Mr. D. Buchanan moved for the final adjudication of the defendants' estate as insolvent.

Granted.

SKEAD V. TWINE.

Mr. P. Jones moved for provisional sentence for an amount of interest, £71 10s., due on a bond, less £20 paid on account.

Granted.

ILLIQUID ROLL.

CORONATION FREEHOLD { 1904.
ESTATE CO. V. SABER. { Sept. 13th.

Mr. Russell moved for judgment, under Rule 329d, for £75, balance due on 100 shares allotted to the defendant, the sum of £25 having been paid on account, with interest and costs.

Granted.

ST. LEGER V. ROBINSON.

Mr. Struben moved for judgment, under Rule 329d, for £150, moneys advanced from the 15th April, with interest at the rate of 8 per cent. from the 15th April, with costs.

Granted.

ABRAHAMS V. ESMAIL AND CO.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £17 1s. 1d., less £6 paid on account, the balance of an account for goods supplied, with interest and costs.

Granted.

FRIEDLANDER AND DU TOIT V. MANCHESTER.

Dr. Greer moved for judgment, under Rule 319, in default of plea, for £38 8s. 2d., for professional services, and moneys disbursed, and costs of suit.

Order granted, subject to the production of the original affidavit of service.

MCNAUGHTON V. SINELLEKAMP.

Mr. Russell moved for judgment, under Rule 319, for £59 5s., balance due for work done, with interest and costs.

Granted.

BAILEY V. BAILEY.

Mr. D. Buchanan moved for a decree of judicial separation in terms of a consent paper that had been filed.

Decree of judicial separation, *a mensu et thoro* granted.

ASKEW AND CO. V. WRIGHT.

Mr. Van Zyl moved for judgment, under Rule 319, for £55 4s. 6d., goods sold and delivered, with interest and costs of suit.

Granted.

VAN DE SANDT DE VILLIERS AND CO., V. DE WET.

Mr. Van Zyl moved for judgment, under Rule 329d, for the sum of £12 16s. 6d., on an account duly rendered, with interest and costs.

Granted.

PHILIP BROS. V. WALTER.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £196 4s. 8d., goods sold and delivered, with interest and costs.

Granted.

COLONIAL GOVERNMENT V. KIRBY.

Mr. Howel Jones moved, under Rule 329, for £215 8s. 2d., for material and labour supplied.

Granted.

GARLICK V. LURIE.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £168 4s. 6d., goods sold and delivered, with costs.

Granted.

NEW HUDSON CYCLE CO. V. STAVENS.

Mr. W. P. Buchanan moved, under Rule 329d, for £136 8s. 7d., balance due

on goods sold and delivered, with interest and costs.
Granted.

CHRISTIE V. ESTATE STRASM.

Mr. D. Buchanan moved for judgment, under Rule 329d, for the sum of £25, rent due, with costs.
Granted.

WILLIAMSON V. BERNHARDT AND STEVENS.

Mr. Roux moved for judgment, under Rule 329d, for £30 18s., balance due for professional services, with interest and costs.
Granted.

S.A. NEWSPAPER CO. V. THEUNISSEN AND DE WET.

Mr. Du Toit moved for judgment, under Rule 329d, for £32 17s. 6d., with costs. The debt was incurred through certain advertisements.
Granted.

KRIGE V. DE VILLIERS.

Mr. J. E. R. de Villiers moved for judgment, under Rule 319d, for £8 1s., for goods sold and delivered, with interest and costs.
Granted.

ESTATE BEVERN V. MYBURGH.

Mr. P. Jones moved for judgment, under Rule 329d, for £108 10s., for goods sold and delivered and work and labour done, with interest and costs.
Granted.

ROBERTSON AND CO. V. GARVIE.

Mr. D. Buchanan moved for judgment, under Rule 319d, against the defendant, in default of plea.
Granted.

WADNER AND ERICKSON V. TODD.

Mr. Joubert, for the defendant, moved for leave to sign judgment against the plaintiffs for not proceeding with their action, with costs. The plaintiffs had been duly barred.
Granted.

MURPHY V. COLONIAL GOVERNMENT.

Mr. Howel Jones moved for judgment against the plaintiff for not proceeding with his action.
Granted.

PUMKELL, YALLOP AND EVERETT V. AURET.

Mr. Close moved for judgment, under Rule 329d, for £395 19s. 8d., goods sold and delivered.
Granted.

HARRISON V. MYBURGH.

Mr. Close moved for judgment, under Rule 329d, for £10 5s., goods sold and delivered, with interest and costs.
Granted.

SEARLE AND SON V. VAN NIEKERK.

Mr. P. Jones moved for judgment, under Rule 329d, for £27 2s. 6d., balance of overdue account for goods sold and delivered, with interest and costs.
Granted.

WEINTROB AND CO. V. PHILIP AND VOEBEE.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £18 7s. 6d., goods sold and delivered, with interest and costs.
Granted.

DART V. WEINTROB AND CO.

Mr. Russell moved for judgment, under Rule 329d, for £949 18s., goods sold, including clearance charges.

Louis Salawichi, one of the partners, said that he only received the summons last Saturday, and, if his Lordship would grant a postponement, he could produce a good defence. He understood from Dart that he would not proceed with the case.

The case was ordered to stand over until to-morrow morning, when the defendants will have an opportunity of entering an appearance.

REHABILITATION.

Mr. Russell moved for the rehabilitation of Rowland Ellis Collins. The estate was sequestrated on March, 1898. The assets amounted to £2,861 13s. 3d., and the liabilities £3,660, leaving a deficiency of £798. The claims proved were £3,817 and the assets £1,818, leaving a deficiency of £2,999. There was nothing unfavourable in the trustee's report.
Granted.

GENERAL MOTIONS.

DARTER V. DARTER. { 1904.
 { Sept. 13th.

Mr. Close moved for leave to sue the respondent by edictal citation for moneys

advanced on bonds. The parties were married out of community of property, and the defendant was last heard of in London. He had deserted his wife.

Leave granted, personal service, failing which, substituted service, as before, with leave to serve the notice of trial and intendit at the same time.

STEER V. CHETTY.

Mr. Russell moved for an extension of the return day and for substituted service. The plaintiff had been informed that personal service could not be effected.

Return day extended until 15th October, and service to be substituted by a publication once in "Star" and the "Gazette."

Ex parte POUCHER.

Mr. Burton moved for leave to sell certain property belonging to certain minors. The matter had previously been ordered to stand over for notice to the parties interested. The Master's report was favourable and all the major heirs agreed to the application. Granted.

LOTTER V. BOTHA.

Mr. Van Zyl moved for an award of arbitrators to be made a rule of Court.

Respondent was not represented, but he sent a letter, in which he raised certain objections, the principal one being that his arbitrator was absent from the arbitration proceedings.

Mr. Van Zyl said that during part of the time the respondent's arbitrator was absent through illness, and the award was made by the other arbitrator and the umpire appointed by the two arbitrators.

Buchanan, J., said the award seemed to have been made by one arbitrator.

Mr. Van Zyl submitted that this was a proper proceeding under the Act, the defendant's arbitrator having had due notice of the arbitration proceedings.

Buchanan, J., said counsel had better produce authorities in support of the contention that the award was a good one in law. The matter would be ordered to stand over.

Ex parte TROSKIE AND TROSKIE.

Mr. D. Buchanan moved for leave to sell certain property in which minors were interested. All the major heirs consented, and the Master recommended that the application be granted. The petitioners were the executors in the estate.

Granted.

Ex parte VENTER AND OTHERS.

Mr. Burton moved for an order directing the transfer of certain property. The application was made by executors on behalf of three minors, to whom a bequest of the property was made by the late H. C. H. Venter. It appeared that previous to the bequest the testator had made a declaration of sale of property to five minors. Subsequently the testator instituted a successful action for divorce against his wife, who admitted that she had been guilty of adultery, and that two children of the five were children of the person with whom she had been guilty of misconduct. Thereupon the testator revoked the sale or donation, and executed a will, in which he bequeathed the property to the three minors on behalf of whom application was made to have the property transferred to them, in accordance with the directions of the will. The Registrar withheld authority to pass transfer, pending the decision of the Court on the matter. The question at issue was whether the sale could be revoked.

Buchanan, J., suggested that the better course would be to institute proceedings to set aside the sale, and to have the rights of the parties declared under the will.

Mr. Burton said he agreed that that would be the better course. Of course, the two children interested in the sale or donation were not now represented.

Buchanan, J., said the executors had better move in the matter by way of an action to have the sale declared invalid. The Court would direct the executors to bring a declaratory action joining all parties interested, and especially the two children disinherited, assisted by their mother as natural guardian and *curator ad litem*.

[Before the Hon. Mr. Justice HOPLEY.]

Ex parte DE KLERK. { 1904.
Sept. 13th.

Mr. Van Zyl moved for an order as to a certain cession of articles of clerkship. Counsel stated that the original deed of cession had been lost. It was asked that leave be given for a copy to be filed as the original.

The application was granted.

GREEN V. THERON.

Mr. Van Zyl moved for an award of arbitrators to be made a rule of Court.

There was no appearance on behalf of the respondent, and the application was granted.

Ex parte VAN DIJK.

Mr. D. Buchanan moved for an order authorising the Master to accept certain documents. The circumstances were that one Christoffel Johannes van Dijk, jun., disappeared, and was believed to have been drowned. It was stated on affidavit that C. J. van Dijk, jun., left his father's house on the 10th May, 1894. He was tracked by his spoor for a distance of twelve miles to the coast, his footprints ending near some rocks. Nothing had been heard or seen of him since, and it was believed that he was dead. It was asked that the Registrar be authorised to assume his death, and to call a meeting to appoint an executor dative in the estate.

Hopley, J.: It seems a curious thing that a farmer should walk twelve miles in circumstances like these. It may have been a case of suicide.

Mr. Buchanan: Yes, my lord, that may be so.

An order was granted, authorising the Master to assume the death of C. J. van Dijk, jun., as on the 10th May, 1894.

Ex parte AGENBERG AND OTHERS.

Mr. D. Buchanan moved, on behalf of the petitioners, the executors in the estate of Petrus Johannes Agenberg, for leave to transfer certain property in the estate to petitioners. The property had been purchased by applicants at an auction sale for £15, which was stated to be a fair value.

Granted.

Ex parte GESWINT.

Mr. Van Zyl moved for leave to effect an exchange of certain properties. Petitioner applied in his capacity as guardian of a minor, and it was stated that the exchange would be advantageous to his ward. The Master's report was favourable.

An order was granted as prayed.

Ex parte ANNEAR.

Mr. D. Buchanan moved for leave to sell certain property. The petitioner was curator to the minor heirs of the late Pieter Kruger, of Somerset East, to whom the property in question belonged. The Master's report was favourable.

The order was granted.

NANGLE V. CROUS.

Mr. W. P. Buchanan moved for an order compelling respondent to sign certain documents in connection with a life insurance policy given to plaintiff (Dr. Nangle, of East London), as security for repayment of a sum of £50 advanced on

a promissory note, for which sum judgment had been obtained against Crous. Respondent now declined to sign the necessary documents to procure the surrender value of the policy.

A rule nisi was granted, returnable on October 15.

Ex parte HODGSON.

Mr. Close moved for leave to raise certain money on mortgage.

Granted.

Ex parte VAN SCHALKWYK.

Dr. Greer moved for a release from civil imprisonment.

Granted.

INGRAM V. INGRAM.

Mr. Rowson moved for leave to serve the intendit and notice of trial in this case by edictal citation.

Granted.

Ex parte BERDIEN.

Mr. Roux moved for an order confirming the sale of certain property in which minors were interested. The Master's report was favourable.

Granted.

Ex parte DEVENISH AND ANOTHER.

Mr. P. Jones moved for the cancellation of a certain mortgage bond.

Order granted, calling on all persons concerned to show cause by the first day next term why the Registrar of Deeds should not be authorised to cancel the said mortgage bond.

Ex parte PATERSON AND ANOTHER.

Mr. D. Buchanan, on behalf of petitioners, asked for leave to raise £1,625 by mortgage bond on property in the estate of the late Henry Paterson, builder and contractor, Cape Town. Certain minor heirs were interested in the estate. The Master's report was favourable.

Granted.

Ex parte VAN DER WALT.

Mr. W. P. Schreiner moved for leave to sell a certain farm in the Middelburg district on the estate of her late husband. Certain minors' interests were involved and the Master's report was not adverse.

The order was granted.

REVIEW CASE.

Ex parte BOWERS.

Debtor—Civil imprisonment.

Hopley, J.: stated that a matter, which appeared to be of some urgency, had come before Mr. Justice Buchanan in chambers. A petition had been presented from the Paarl prison from a man named Bowers, who was imprisoned there as a civil debtor. It appeared that, subsequent to his being imprisoned, his estate was surrendered and accepted as insolvent. He was still in prison, and made this petition for an order giving him discharge from prison. The matter was of some urgency, as a meeting in his insolvent estate was to be held to-morrow, and it was desirable that he should be present. The Court would make an order for his release, and the Registrar would see that it was telegraphed down to the Paarl.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ILLIQUID ROLL.

MURRAY AND STEWART V. J 1904.
RAMAGE. 1 Sept. 14th.

Mr. W. P. Buchanan moved for judgment in terms of the declaration. The matter had been standing over for production of proof of service of the declaration, and counsel now stated that an affidavit had been filed.

Order granted.

DART V. WEINTROB AND CO.

Mr. Russell said that this was an application under Rule 329d, and was standing over for information as to whether the defendants had entered appearance.

Buchanan, J., said he was informed that the defendants had entered appearance. Plaintiff would be allowed costs of the application on account of the defendants' delay in entering appearance, but there would be no judgment.

GENERAL MOTIONS.

BHODES V. RHODES AND ANOTHER.

Mr. P. Jones moved, as a matter of urgency, for leave to sue by edictal citation for divorce. The petitioner was James Joseph George Rhodes, and he claimed a divorce from his wife, Amy Rhodes, by reason of her alleged adultery with one Henry James Bowen. It was alleged that the defendants were living as man and wife at Hobart, Tasmania, whence they had gone from this colony as Mr. and Mrs. H. J. Bowen. Petitioner was married to his wife in Graham's Town under an antenuptial contract.

Leave to sue by edictal citation granted, citation to be served personally, and to be returnable on the 15th December, with leave to serve intendent and notice of trial at the same time.

CARR AND CO. V. LEENDERS AND CO.

Mr. Gardiner moved for the appointment of a commission to take certain evidence in London, England.

Application granted.

Ex parte POOLOS.

This was an application for the release of certain shop premises in Sir Lowry-road, Cape Town, and Lower Main-road, Salt River, from an order of attachment. Mr. Burton was for the petitioner; Sir H. Juta, K.C., was for the respondent.

From the affidavits read by counsel, it appeared that one Atha Caralis had carried on business as a fruiterer at 219, Sir Lowry-road, Cape Town, and 47, Lower Main-road, Salt River. On the petition of certain creditors, his estate had been sequestered and the insolvent had disappeared. One of the grounds of the petition in insolvency was that the debtor had sold certain of the assets in the estate with a view of defeating his creditors. Mr. A. N. Foot, who was the *curator bonis* in the estate, had caused the two shops to be placed under attachment by the Messenger of the Supreme Court, and certain of the stock was being removed in consequence of one of the shops having been broken into. The petitioner Poolos said that he bought the stock from Caralis, and had been carrying on business at both shops at his own risk and profit. He denied that there had been any collusive arrangement between himself and Caralis, and said that he made the purchase in the ordinary way of trade. One of the creditors, representing Sturk and Co., declared that an injustice would be done to the creditors if the application were

granted. The object of the petitioner was to have the shops released from attachment pending an action to be brought.

After hearing Mr. Burton, on the facts,

Buchanan, J., said that in this matter there was a distinct allegation of fraud, and the circumstances were such upon which the allegation was based as to induce the Court to act with the greatest caution. In justice to all parties, he thought he should give an order setting aside the order of attachment, upon the applicant giving security to the approval of the Master in £150 on the stock and £50 for costs of action, to be brought by the trustee in the insolvent estate of Cralis, costs to be costs in the cause.

PEACOCKE AND OTHERS V. { 1904.
BAILEY ; FRIEDMAN V. { Sept. 14th.
ODENDAAL.

Jury—Act 23 of 1891—Removal of trial.

Where a trial by jury in a civil case has been demanded by either party, it is not competent for the Supreme Court to remove the case to trial on Circuit, and thus deprive litigants of their rights under Act 23 of 1891.

Mr. Schreiner, K.C. (for the applicants), said that it would probably be a convenience if both matters, which involved identical points, were heard together. The question was as to removal of trial. Sir H. Juta, K.C., was for the respondent in the first matter, the Hon. Thos. Bailey, of Queen's Town; Mr. McGregor was for the respondent in the second matter. The applications, it was stated, were brought under the Jury Act (No. 29 of 1891).

In the first matter, the petitioner sought to have the trial removed to the Circuit Court, to be held at Queen's Town shortly, the ground of the application being that all the parties resided at Queen's Town, and that it would be a convenience to all concerned if the trial were removed there. The action related to certain defamatory words alleged to have been uttered by the defendant reflecting on the integrity of the plaintiff firm.

For the respondent, an affidavit, sworn by his town attorneys, was read, objecting to the removal of the trial on the ground that he would be prejudiced in his defence if the case were heard before a jury summoned in Queen's Town. He did not admit that the plaintiffs had any right to have the

case heard before a jury in the Circuit Court.

In the second matter, the petitioner swore an affidavit to the effect that it would be more convenient for the case to be heard before the Circuit Court of Swellendam.

An answering affidavit was put in for the respondent.

Mr. Schreiner (for the defendant) contended that, as all the parties resided in the district of Swellendam, it would be very inconvenient to remove the trial from that place to Cape Town.

Sir Henry Juta argued that the Act gave them the legal right to claim a trial by jury, and the Court could not upset the trial, unless by written consent of the parties. How could the plaintiff deprive them of that right by putting in a claim for the removal of the trial? If the plaintiff wanted to avoid a jury, he should not have set the case down for hearing before a jury.

Mr. McGregor said he was inclined to adopt the argument advanced by Sir Henry Juta.

Buchanan, J., said these two actions had been instituted in the Supreme Court. The pleadings had been filed and issue had been joined. In the first case, the defendant had claimed a jury, and in the second, the plaintiff had claimed trial by jury. The plaintiffs in the first case and the defendants in the second wished to have the cases removed to circuit. No doubt the character of justice and the Rules of Court allowed cases to be removed to another court for trial. He thought from the facts placed on the affidavits that both the cases could be more conveniently heard in the Circuit Court, if it was only a question as to the place of trial, but the question was as to whether, a jury being demanded, it was competent for the Court to remove the trial of the case to a court where there could be no trial by jury. If there was an application to remove the case to a court where there could be a trial by jury, there would be no objection on the part of the Court. The Jury Act (23 of 1891) conferred a certain right on parties which could not be taken away from them. He thought it would be taking away the right of the parties if the place of trial was removed. This was a new point, and he would have liked to have referred it to the full Court, but he thought that he might lay down that, in his opinion, the Court could not remove the place of trial when issue had been joined and a jury demanded, to a court where it could not be tried by a jury. If the case could have been tried by jury at the Circuit Court, the Court would have considered the convenience of the Bar, but in the present case the application would be refused.

Sir H. Juta asked for costs.
Buchanan, J., said the costs would be costs in cause, because the question was a fair one to raise.

MAYISELA V. R.M. OF } 1904.
SOMERSET E. } Sept. 14th.

Law agent—Qualifications.

M., an ex-constable and a native, had applied to the R.M. of S. for enrolment under Act 20 of 1856 as a law agent. The applicant produced the necessary certificates as to character, but the Magistrate refused the application on the ground, inter alia, that the applicant's educational qualifications were insufficient.

Held, that a Magistrate has no power to insist on any educational or professional qualifications in any person applying to be enrolled as a law agent in his court.

Mr. Close applied on behalf of the applicant, Samuel Mayisela, for an order compelling respondent to admit applicant as an agent at law.

The plaintiff's affidavit stated he made application to the respondent to be admitted as an agent at law in his court, but his application was refused. He enclosed certificates as to his capabilities to act in such a position. A protest was lodged against the applicant being admitted by the agents at law practising in the district, in which it was stated that it would not be in keeping with the dignity of the Court to have the applicant practising in the court, and, secondly, they held that he was not competent to perform legal work.

The Magistrate's reasons for refusing the application stated that he did not consider it fair or just to overlook the protest of the legal practitioners, they being men of good sterling character, having practised for many years in his court. Secondly, he did not consider him sufficiently well educated to conduct any cases in the court, and, thirdly, he considered there were enough efficient practitioners in the district.

[Buchanan, J.: The only point the Court will have to consider is whether the applicant was competent to fill the position or not.]

Mr. Close: The fact that there was a sufficient number of agents practising in the Magistrate's Court was no reason for refusing to admit the applicant. As to his professional qualifications, he was not examined by the Court and

therefore the Court was not in a position to judge. The statute law on the subject is contained in section 36 of Act 20 of 1856 and section 8 of Act 43 of 1885. As to reported cases, see *Fan Wyk v. R.M. of Willowmore* (13 Juta, 216), *De Kock v. R.M. of Caledon* (6 C.T.R., 417). Act 21 of 1886 merely deals with the case of agents removing from one district to another. As to character the applicant has excellent testimonials and not Act makes any mention of educational qualifications. The agents who protested against applicant's admission had absolutely no *locus standi* and that is nothing to show that he was not in every respect qualified.

[Buchanan, J.: The only question is whether education can be taken into account at all?]

I submit not. All that is required is that the applicant should be of full age and of good character.

Mr. H. Jones: The Magistrate has discretion as to the educational qualifications of men he admits to practise in his Court. "Good fame and character" imply a certain amount of education and business capacity. A law agent often has very important duties to perform. The applicant was only a native constable. He is probably well known to the Magistrate and the only educational qualification he can show is that he has passed the School Elementary examination in the third class. I wish to call attention to the fact that costs have been asked against the Magistrate but I submit that he should certainly not be ordered to pay costs *de bonis propriis*.

Mr. Close was not called upon in reply.

Buchanan, J., said that this was an application on behalf of Samuel Mayisela to be admitted as an enrolled agent of the Magistrate's Court. The only qualification required by a law agent in the Magistrate's Court was that he be a man of good fame and character. He was not required to pass any examination at all. The applicant in this case had been a native constable, and had received a good discharge. The Assistant Resident Magistrate under whom he served certified that he discharged his duties in a good and proper manner. He applied to the Resident Magistrate at Somerset East to be admitted to his Court as an agent at law. The various practitioners there objected to his admission. The Magistrate heard the application, and decided that he would not enrol the applicant, because he could not overlook the protest of the other practitioners, because he did not consider he was sufficiently competent to fill the position, and because there were enough practitioners in the district. The only point the Court had to decide was whether the Magistrate's objection to the applicant on the grounds that he was not sufficiently educated was a good one.

He had no doubt but that there was a general wish to raise the status of enrolled agents. In the absence of attorneys in the district, the old law still prevailed, which allowed agents to be enrolled in the Magistrate's Court. The only qualification necessary was that the applicant shall be of good fame and character. Now, in this case the Magistrate had not had any grounds for deciding that the applicant was not a man of good name and reputation. The fact that he was not sufficiently educated could not be considered in the case. There was no legal ground stated as to why the applicant should not be placed on the roll, and, under the circumstances, he would have to order the Magistrate to enrol the applicant. He had repeatedly pointed out that, where officers act in a public capacity, and their action is questioned in a higher Court, that they should not be called upon to pay the costs of the case. In the present case, despite all the cautions, the Magistrate was called on to show cause why he should not pay the costs. The applicant would have to pay any costs incurred by the Resident Magistrate. Of course, if Mr. Jones appeared on behalf of the Attorney-General, he would not get his costs, but the applicant would have to pay all other costs incurred by the Magistrate.

LANG V. COLONIAL GOVERNMENT.

Mr. McGregor applied on behalf of the applicant James Lang, for an order compelling respondents to disclose certain documents. The motion was based on the following notice: "Take notice that application will be made on behalf of James Lang to show cause why an order should not issue from the Supreme Court compelling defendants to give to applicant the amount of water pumped by the defendants' servants from the Imvani River, which flows through the applicant's land at Lausanne, adjoining the Imvani Railway station, in the Queen's Town district, and which was consumed for railway purposes and of which records the defendants refused or delayed to make discovery.

Mr. McGregor read an affidavit made by George M. Walker, of the firm of Walker and Jacobsohn, the attorneys for the plaintiff, in which he stated that the pleadings in this case were closed on the 2nd of June, and an order was obtained directing the defendant to make discovery of all documents, papers and writings relative to matters at issue in the suit. In reply an affidavit of discovery was made by Mr. T. S. McEwen, stating that all documents had been discovered. Among the documents specified in the schedule annexed to the affidavit no mention was

made of the water records. His firm had repeatedly called upon the defendants through its attorneys to make discovery of the records, but without success.

Caleb Arthur Collins made an affidavit, in which he stated that in or about the month of August Mr. Whitaker, an engineer, and Mr. Waters, a water superintendent of the Railway Department, went to the plaintiff's farm, and on plaintiff asking how he would know the quantity of water the department took away from his farm he was told either by Whitaker or Waters that he could at all reasonable times obtain the quantity of water from records which would be kept by the department. As the department in Cape Town was disputing the correctness of the amount claimed by plaintiff, deponent obtained from the stationmaster at Queen's Town a memorandum of the water taken by the department, and was shown that 1,633,200 gallons had been taken. The plaintiff's declaration stated that he entered into an agreement with the defendant, whereby he allowed them to pump water for consumption on the C.G.R. from a stream flowing through his land at the rate of 4s. per 1,000 gallons. The Government had pumped from the stream 1,633,200 gallons, and were indebted to plaintiff in the sum of £326 12s.

George R. Whitaker's affidavit denied that he told the plaintiff that certain records of the quantity of water consumed on the railway were kept. He told him he might be able to get the desired information at East London.

Buchanan, J., said that this was an application by the plaintiff in a suit which had been instituted against the Government for an order compelling the Government to produce the records of the amount of water pumped by them from a certain river. An order had already been obtained compelling the defendants to make discovery of all documents in their possession. An affidavit of discovery had been made, but there was no mention of these figures, and the defendants denied all knowledge of them. The plaintiff stated that they must have them because a messenger of his got the figures from a servant of the Government. The Government then made searching inquiries, but could not get them. If the Court had a suspicion that any document was being suppressed it would give an order for its discovery. The Court could not presume that there was such a document in the possession of the defendant, and, therefore, it could not give an order to compel them to discover documents which they had not got. The application would be dismissed, with costs.

RIGE V. DE JAEGER'

Mr. Russell applied, on behalf of the plaintiff, to have the trial of this case removed to the Circuit Court at Swellendam. The defendant did not raise any objection.

The application was granted.

Ex parte THE MOUNTAIN VIEW STONE QUARRY COMPANY.

Mr. McGregor applied for an order authorising the amendment of the articles of association of this company.

The order was granted.

CARR AND CO. V. LENDERS AND CO.

In this case, which was heard yesterday, and which was an application for the appointment of a commission *de bene esse*, Mr. Oliver was appointed commissioner.

SHAW V. SHAW.

Mr. Close applied to have a day set down for the return of affidavits in this action, which was a claim for alimony.

The application was granted, the return day being fixed for the 1st October.

SUPREME COURT

(In Chambers.)

[Before the Hon. Sir JOHN BUCHANAN.]

DE WITT V. SKIPPON. { 1901.
 { Sept. 27th.

This was an application arising out of an action brought by the present respondent against De Witt in respect of certain bills of quantites, in which action the plaintiff (Skippon) was awarded £8, but was ordered to pay the costs. The costs had not been paid. A writ of execution was issued, and it had come to the applicant's knowledge that a sum of £130 was owing to Skippon by one Francis Wyatt Williams, for the erection of whose house Skippon was the contractor. The present application, therefore, was to attach this money.

Mr. Van Zyl moved.

Mr. Close, who appeared to oppose the application on behalf of Messrs. Small and Morgan, read an affidavit by Mr. James Boyd, manager for Messrs. Small and Morgan, stating that Mr. John Morgan, who was at present absent from the Colony, had, under an agreement with Skippon, taken over Skippon's contracts, including the contract in question, and the sum of £130 was owing to the firm.

Buchanan, J., after referring to the original case, said it was quite clear that the money belonged to Messrs. Small and Morgan, and De Witt was not able to prevent them from receiving the benefit for the work which they had done. The application would be refused, with costs.





"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

CRIMINAL SESSIONS.

[Before the Hon. Mr. Justice HOPLEY
and a Jury.]

REX V. CHARTERIS. { 1904.
Oct. 4th.

Indictment—Exceptions—Rules
of Court 63 and 64.

Where exception was taken to an indictment on the ground that it charged a prisoner with crimes of distinct species;

Held, that the indictment (as it stood) was bad, and the Crown was put to election as to which class of charges it would prosecute.

Exception having been further taken that certain persons from whom the accused was said to have received bribes were not specified;

Held, that these counts might be amended by the insertion of the necessary particulars.

David Charteris, a sergeant of police, residing in Cape Town, was arraigned on a charge of accepting bribes in a public office, contravening sections 11 and 30, of Act No. 12, of 1882, entitled the Police Regulations Act, 1882, and contravening section 4, of Act 36, of 1902, entitled the Betting Houses, Gaming Houses, and Brothel Suppression Act, 1902.

The indictment (which it is necessary to set out fully, in order that the argument on the exceptions may be clearly understood) reads as follows:

That David Charteris, a sergeant of police, at all times material to this indictment, residing at Cape Town, in the District of the Cape, is guilty of the crimes of Accepting Bribes in a public office, contravening sections 11 and 30 of Act No. 12 of 1882, entitled the "Police Regulation Act, 1882," and contravening section 4 of Act No. 36 of 1902, entitled the Betting Houses, Gaming Houses and Brothels Suppression Act, 1902, or of one or more of the said crimes: 1st—In that in or about the month of July, in the year of our Lord one thousand nine hundred and two, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from the keeper or owner of a certain brothel situate at 15 Van de Leur-street, in Cape Town aforesaid, money amounting to the sum of ten pounds sterling, the said money being offered by the said keeper or owner and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under Part IV. of Act 36 of 1902, of the said keeper or owner of the said brothel and the landlord thereof; and thus did commit the crime of accepting bribes in a public office.

Secondly.—As also, in that between the first day of June and the first day of December, in the year of our Lord one thousand nine hundred and two, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, accept for and on behalf of the keepers or owners of certain three brothels, situate in Primrose-street, in Cape Town aforesaid divers sums of

money in monthly instalments amounting to the sum of one hundred pounds sterling, or thereabouts, the said money being offered by the said Max Harris, and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No 36 of 1902, of the keepers or owners of the said brothels and the landlord thereof; and thus did commit the crime of accepting bribes in a public office.

Thirdly.—As also, in that between the said first day of December, in the said year of our Lord one thousand nine hundred and two, and the first day of March, in the year of our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully, and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keepers or owners of certain two brothels, situate at 20 and 21, Longmarket-street, in Cape Town aforesaid, divers sums of money in monthly instalments amounting to the sum of eighteen pounds sterling, or thereabouts, the said money being offered by the said Max Harris and accepted and received by the said David Charteris as a fee, gift or reward, to influence his behaviour in the said office by inclining him to forego his duty, therein taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No 36 of 1902, of the keepers or owners of the said brothels and landlords thereof; and thus did commit the crime of accepting bribes in a public office.

Fourthly.—As also, in that between the said first day of December in the said year of our Lord one thousand nine hundred and two, and the said first day of March, one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keeper or owner of a certain brothel, situate at 23, Van de Leur-street, in Cape Town aforesaid, divers sums of money in monthly instalments amounting to the sum of eighteen pounds sterling, or thereabouts, the said money being offered by the said Max Harris, and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, ac-

cording to law, under Part IV. of Act No. 36 of 1902, of the keeper or owner of the said brothel and the landlord thereof; and thus did commit the crime of accepting bribes in a public office.

Fifthly.—As, also, in that between the said first day of December in the said year of our Lord one thousand nine hundred and two, and the said first day of December in the said year of our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keeper or owner of a certain brothel, situate at 7, Sidney-street, in Cape Town aforesaid, divers sums of money in monthly instalments amounting to the sum of eighteen pounds sterling, or thereabouts, the said money being offered by the said Max Harris and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No. 36 of 1902, of the keeper or owner of the said brothel and the landlord thereof; and thus did commit the crime of accepting bribes in a public office.

Sixthly.—As, also, in that, between the first day of April and the first day of October, in the said year of our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keepers and owners of certain three brothels situate at 50, 60 and 62 Primrose-street, aforesaid, divers sums of money in monthly instalments amounting to the sum of ninety pounds sterling, or thereabouts, the said money being offered by the said Max Harris, and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No. 36 of 1902, of keepers or owners of the said brothels and of the landlords thereof; and thus did commit the crime of accepting bribes in a public office.

Seventhly.—As also, in that between the said first day of April and the said first day of October in the said year of our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a ser-

gent in the Cape police, and as such occupying a public office, did wrongfully, unlawfully, and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keepers and owners of certain two brothels, situate at 16 and 18, Canon-street, in Cape Town aforesaid, divers sums of money in monthly instalments amounting to the sum of thirty pounds sterling, or thereabouts, the said money being offered by the said Max Harris and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act 36 of 1902, of the keepers or owners of the said brothels and the landlords thereof; and thus did commit the crime of accepting bribes in a public office.

Eightily.—As also, in that, in or about the months of August and September, in the said year of Our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keepers and owners of certain brothel, situate at 27, Canterbury-street, in Cape Town aforesaid, divers sums of money in monthly instalments amounting to the sum of twenty pounds sterling, or thereabouts, the said money being offered by the said Max Harris and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No. 36 of 1902, of the keeper or owner of the said brothel; and thus did commit the crime of accepting bribes in a public office.

Ninthly.—As, also, in that, in or about the said month of October in the said year of Our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Solomon Goldstein, residing at Cape Town aforesaid, money amounting to the sum of ten pounds sterling, the said money being offered by the said Solomon Goldstein and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under

part IV. of Act No. 36 of 1902, of the owner or keeper of a certain brothel, situate at 27, Canterbury-street, in Cape Town aforesaid, and thus did commit the crime of accepting bribes in a public office.

Tenthly.—As also, in that, in or about the month of January, in the said year of Our Lord one thousand nine hundred and two, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keeper or owner of a certain brothel situate at 24, Selkirk-street, in Cape Town aforesaid, money amounting to the sum of ten pounds sterling, the said money being offered by the said Max Harris and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No. 36 of 1902, of the keeper or owner of the said brothel and of the landlord thereof; and thus did commit the crime of accepting bribes in a public office.

Eleventhly.—As also, in that, in or about the month of May, in the said year of Our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from the owner of a certain brothel, situate at 24, Selkirk-street, in Cape Town aforesaid, through the said Max Harris, money amounting to the sum of fifteen pounds sterling, the said money being offered by the said Max Harris for and on behalf of the said owner, and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No. 36 of 1902, of the keeper or owner of the said brothel, and thus did commit the crime of accepting bribes in a public office.

Twelfthly.—As also, in that, in or about the said month of January, in the said year of Our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from one Max Harris, lately a restaurant-keeper, of 40, Caledon-street, in Cape Town aforesaid, acting for and on behalf of the keeper or owner of a certain brothel, situate at 15,

Longmarket-street aforesaid, divers sums of money in monthly instalments, amounting to the sum of twenty-five pounds sterling, or thereabouts, the said money being offered by the said Max Harris and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No. 36 of 1902, of the keeper or owner of the said brothel, and of the landlord thereof; and thus did commit the crime of accepting bribes in a public office.

Thirteenthly.—As also, in that, in or about the month of April, in the year of Our Lord one thousand nine hundred and four, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from the keepers or owners of certain four brothels, situate at 28, Longmarket-street, 10, Parkin-street, 3, Tyne-street and 12 Muir-street, in Cape Town aforesaid, money amounting to the sum of eighty pounds sterling or thereabouts, the said money being offered by the said keepers or owners and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to law, under part IV. of Act No. 36 of 1902, of the said keepers or owners of the said brothels and of the landlords thereof; and thus did commit the crime of accepting bribes in a public office.

Fourteenthly.—As also, in that, in or about the months of August, September, and October, in the said year of Our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a sergeant in the Cape police, and as such occupying a public office, did wrongfully, unlawfully and corruptly accept and receive from the said Max Harris divers sums of money, the precise amount of which is to the prosecutor unknown, the said money being offered by the said Max Harris and accepted and received by the said David Charteris as a fee, gift or reward to influence his behaviour in the said office by inclining him to forego his duty therein of taking or causing to be taken steps for the due prosecution, according to the law of Fanny Rosenbloem, Fanny Fishbien, and others whose names are to the prosecutor unknown, residing at Cape Town aforesaid, for contravening sub-section 29 of section 5 of Act No. 27 of 1882, entitled the "Police Offences Act, 1882," and thus did commit the crime of accepting bribes in a public office.

Fifteenthly.—As also, in that, between

the nineteenth day of January and the twenty-first day of April in the said year of Our Lord one thousand nine hundred and four, and at Cape Town aforesaid, the said David Charteris being a member of the Cape police force, enrolled at Cape Town aforesaid, on the twenty-seventh day of December, in the year of Our Lord one thousand nine hundred, under the provisions of the Act No. 12 of 1882, did wrongfully, unlawfully and wilfully neglect to execute a certain warrant dated the said nineteenth day of January, signed by Joachim Wilhelm Heyneman Russouw, Esquire, a Justice of the Peace for the district of the Cape aforesaid, for the arrest of one David Rogers or Davis charged with the crime of contravening section 133 of the said Act No. 36 of 1902, and said warrant being directed to be by him, the said David Charteris, executed as in section 12 of the said Act No. 12 of 1882 provided, and thus did contravene section 30 of the said Act No. 12 of 1882.

Sixteenthly.—As also, in that, between the twenty-fifth day of the said month of January, and the eighteenth day of the said month of April, in the said year of Our Lord one thousand nine hundred and four, and at Cape Town aforesaid, the said David Charteris being a member of the said Cape police force, enrolled as aforesaid, did wrongfully, unlawfully and wilfully neglect his duty by not serving a certain brothel notice on one George Hyman, the landlord of a certain brothel, situate at 12, Muir-street in Cape Town aforesaid, and thus did contravene section 11 of the said Act No. 12 of 1882.

Seventeenthly.—As also, in that, between the eighteenth day of February and the seventeenth day of April, in the said year of Our Lord one thousand nine hundred and four, and at Cape Town aforesaid, the said David Charteris being a member of the said Cape police force, enrolled as aforesaid, did wrongfully, unlawfully and wilfully neglect his duty by not serving a certain brothel notice on one Joe Lis alias Joe Silver, the landlord of certain brothels situate at 9 Sydney-street and 28 Longmarket-street, in Cape Town aforesaid, and thus did contravene section 11 of the said Act No. 12 of 1882.

Eighteenthly.—As also, in that, between the said eighteenth day of February and the said seventeenth day of April, in the said year of Our Lord one thousand nine hundred and four, and at Cape Town aforesaid, the said David Charteris, being a member of the said Cape police force, enrolled as aforesaid, was guilty of an act of misconduct against the discipline of the said force, by wrongfully and unlawfully becoming a partner and acquiring a financial interest in the profits of a certain gaming house situated at 7, Caledon-street, in Cape Town aforesaid, conducted by the said Max Harris and others, in contra-

vention of the provisions of the said Act No. 36 of 1902, and thus did contravene section 30 of the said Act No. 12 of 1882.

Nineteenthly.—As also, in that, between the said eighteenth day of February and the said seventeenth day of April, in the year of Our Lord one thousand nine hundred and four, and at Cape Town aforesaid, the said David Charteris did wrongfully and unlawfully keep and own a certain gaming house situated at 7, Caledon-street, in Cape Town aforesaid, and thus did commit the crime of contravening section 4 of the said Act No. 36 of 1902.

Twentiethly.—As also, in that, between the first day of May and the first day of August, in the said year of Our Lord one thousand nine hundred and three, and at Cape Town aforesaid, the said David Charteris, being a member of the said Cape police force, enrolled as aforesaid, was guilty of an act of misconduct against the discipline of the said force, by wrongfully and unlawfully acquiring a financial interest in the profits of the illicit sale of liquor at 100, Hout-street, in Cape Town aforesaid, by one David Rogers alias Davis, in contravention of section 75 of Act No. 28 of 1883, and thus did contravene section 30 of the said Act No. 12 of 1882.

Mr. Nightingale conducted the prosecution, and Mr. Van Zyl appeared for the accused.

Before the prisoner was called upon to plead, Mr. Van Zyl excepted to the indictment, on the ground that contrary to Rule of Court 63 it contained counts of more than one crime of a different species, and arising out of separate and unconnected facts. The first fourteen counts were based on charges of bribery, and the others of contravening the Police Regulations and the Brothels Act. In all fairness to prisoner, it would not be right to hear all the charges together. The offence of bribery with which he is charged in the first fourteen counts is a crime of an absolutely different nature from the offences against the Police Regulations and against gambling with which he is charged in the remaining counts. Nor is there any such connected series of Acts as required by Rule of Court 64. In support hereof was cited *R. v. Klaus Bele* (2 E.D., p. 401).

Mr. Nightingale, replying on Rule of Court 64, contended that it was correct to try the prisoner on all counts in one indictment, because they were all the result of the system he had adopted as a public official of making money out of his position.

Hopley, J., said he thought it would have been advisable for the Crown to have brought in three different indictments.

Mr. Nightingale said if that had been done, it would have wasted the time of the Court, as it would have necessitated

calling the same witnesses over and over again.

Hopley, J., said the Court had had a case before it during the present session in which a number of men were charged on different indictments with the same crime.

Mr. Nightingale said that in the case referred to by his Lordship, there were a number of men and only a few facts. In the present case there was only one man and a number of facts.

If the Court put him to his election he would, in order to prove the bribery counts, have to call in corroboration the very evidence that would support most of the charges of infringing the Police Regulations Act 12, of 1882.

Hopley, J., said that on looking through the indictment it was seen that crimes of different species were charged in this indictment, and it must be admitted that the crimes arose out of separate and unconnected facts. This must be admitted, because Mr. Nightingale had not been able to give any definite answer as to whether the evidence he was going to lead showed how the first 14 counts were connected with the others. The first 14 counts were under common law, and charged the prisoner with bribery. Under the 64th Rule of Court it was competent to indict a man on the same indictment for two or more offences arising out of the same cases, or connected by acts committed by him. But because a man had committed half a dozen crimes they could not charge him with all the crimes on the same indictment. He did not think any of the arguments advanced by the Crown in answer to Mr. Van Zyl were sound. He did not see anything in the rules of the Court which made it possible for the Crown to take the same indictment for all charges, simply because one man had been carrying out, as it was alleged, a system of crimes. It seemed to him in the present case that the Crown should make its election, and he asked Mr. Nightingale which of the various counts he was ready to proceed on.

Mr. Nightingale said he was ready to proceed with the first 14 bribery counts, and also with count 16.

Mr. Van Zyl then took exception to counts 1 to 8 and 10, 11, 12, and 13, on the grounds that the prisoner was charged with wrongfully and unlawfully receiving from the keepers or owners of certain brothels certain sums of money without the names of such owners or keepers being given. He contended that the indictment was too vague, and did not give the accused a fair opportunity of properly preparing his defence. He quoted the case of *R. v. Salting and others* (4, Searle 79), tried on appeal in the Civil Court. The case he referred to was dismissed because the amount of money and the name of the owner were not specified.

Hopley, J., said he could not understand what the High Court was doing if they dismissed a case on those grounds. He wished to know if he formed one of the bench.

Mr. Van Zyl: Yes, your lordship was one of the bench.

Hopley, J., said he recollected that case. There was a good deal in it. The accused was charged with stealing a certain sum of money from some person unknown. It was known that a certain sum of money was stolen from the district where the accused lived. The prisoners were found there under suspicious circumstances in possession of a considerable quantity of money, yet the indictment was considered by the Court to be too vague.

Mr. Nightingale said the Crown was unfortunately in the position of not being able to give the names, as many of the people concerned had left the country.

Mr. Van Zyl contended that, without knowing the names of the persons who owned the brothels the accused found it exceedingly difficult to arrange his defence.

Mr. Nightingale said that, with the permission of the Court, he would have the numbers of the street in which the brothels were situated inserted in the counts of the indictment in which the numbers had been omitted.

Hopley, J.: As to the bribes taken by Harris on behalf of accused, cannot you get the names of the persons who paid them from Harris?

Mr. Nightingale said that did not affect the case, as the indictment charged that the accused actually took the bribes from Harris, who was the agent for the brothel keepers, and not that the accused received money from the brothel keepers direct.

Hopley, J., said exception had been taken to certain of the first fourteen counts in the indictment. He certainly thought there was a certain amount of vagueness about it. In the cases in which it was possible to find out the names of the owners or keepers of the house concerned, the numbers had been given. There was one count in which accused was charged with receiving money from three brothels in Primrose-street, the numbers of which were not given, but he understood the Crown was prepared to fill them in. If so, he thought that the indictment should be allowed to stand, and the case go to the jury. He did not feel at that stage of the case inclined to throw the case out of court. If there was any uncertainty about the case, it would go to a Higher Court.

[Prisoner's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. 1901.
(Oct. 15th.)

Mr. Van Zyl moved for the admission of Etto Gerhardus van Bonde as an attorney and notary.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Walter Kenna Dose as an attorney and notary, and conveyancer.

Application granted and oaths administered.

Mr. Sutton moved for the admission of Hugh Gordon Nourse as an attorney and notary.

Application granted and oaths administered.

Mr. Van Zyl moved for the admission of Louis Johannes Bredell as an attorney and notary.

Application granted, oaths to be taken before the Resident Magistrate of Oudtshoorn.

Mr. M. de Villiers moved for the admission of George Frederick Bate as a conveyancer.

Application granted, oaths to be taken before the Resident Magistrate of East London.

PROVISIONAL ROLL.

FRIEDMAN BROS. V. MORRISON.

Sequestration—Provisional order—Discharge.

This was an application for the compulsory sequestration of the respondent's estate.

The affidavit of the applicants stated that the respondent, who owed them £326, had left the Colony without acquainting them, and in doing so, had committed an act of insolvency. Mr. Justice Hopley had already granted an order for provisional sequestration.

The answering affidavit of the respondent admitted leaving the Colony, but it was only on a visit to Natal to bring back his wife, who had preceded him there on a visit. He was prepared to pay the applicants the amount due to them when they rendered him a correct and detailed account.

Other affidavits as to the respondent's solvency were read by counsel.

The replying affidavit on behalf of the plaintiffs stated that the respondent had never, prior to leaving Cape Colony,

questioned the accuracy of the account. They believed that Morrison had left the Colony with the intention of not returning, because he had sold his property and movables in the district, and that his going away had been of a secret nature, going overland, when the easiest mode would have been by sea. When they called on him the day prior to his departure, he said he was indisposed, and could not see them. The next day he left for Natal under an assumed name, accompanied by his daughter, whom he left at Mossel Bay. They considered he had not received the full value for some land he sold his son-in-law, the amount received being only £900, whereas a few weeks before he told plaintiffs he had been offered £1,240 for it.

Mr. Gardiner, for defendant, said there was no evidence before the Court that the defendant was unable to pay his debts, and consequently the plaintiff's action was a high-handed one.

[De Villiers, C.J.: What is the defendant's reply to the allegation that he left the Colony under an assumed name?]

That is only hearsay.

[Buchanan, J.: But the circuitous route he took is somewhat suspicious.]

He went to see a daughter on the way to Natal. A most important point is the fact that the defendant has returned to Heidelberg.

Mr. Buchanan (for plaintiff): The respondent never disputed our claim, but promised to pay. We originally claimed £377, which has been reduced by £100. We offered to accept £200, and agreed that costs should be costs in the cause. Defendant objected to the costs, and that is the whole question.

Mr. Gardiner: The applicants are unreasonable in asking for costs. The allegation as to the respondent going to Mossel Bay under an assumed name rests on hearsay evidence. The creditors had no right to attempt to sequester respondent's estate. As to his going to Natal overland instead of by boat, he wished to see his daughter at Oudtshoorn. He left his promissory note with Du Preez, and has returned to meet it. That is quite sufficient to show that he was not running away from his creditors.

[De Villiers, C.J.: But he has sold all his property.]

He denies that he has not assets sufficient to meet the claims against him.

De Villiers, C.J., said the Court would order that the order of sequestration should be discharged, if within ten days from date the sum of £277 was lodged with the Registrar of the Court. The question of costs would be allowed to stand over.

STEER V. ROELKE.

Mr. P. Jones applied for provisional sentence on a mortgage bond for £3,000, with interest and costs.

The application was granted.

CREAGHE V. ZINKENDORF.

Mr. W. P. Buchanan applied for provisional sentence on a mortgage bond for £500. Also that the property specially hypothecated be declared executable.

The application was granted.

CLOETE V. EDWARDS AND SCHOEBUSH.

Mr. Close, who appeared for the defendants, asked to have his case adjourned, pending the decision of the Court in an application to have the estate of the defendants sequestrated.

Mr. McGregor opposed the application, and said that the case before the Court did not concern the partnership at all. He was applying for judgment on three promissory notes, in respect of which Edwards was principal and Schoebusch was surety. These notes did not concern the partnership at all. The case came before the Court on a removal order from the Magistrate's Court at Lady Grey. The application was for provisional sentence on three promissory notes, the first of which was for £177 7s., less £124 12s. 6d. paid on account, leaving £52 14s. 6d., with interest at 25 per cent. and costs of suit; also on two promissory notes for £200 each, with interest.

The Court granted the application.

LOMNITZ V. STEENSMA.

Mr. Le Roux applied for provisional sentence on a mortgage bond for £4,500, with interest at 6 per cent. from the 1st January, and also that the property specially hypothecated be declared executable.

The application was granted.

GORDON MITCHELL AND CO. AND OTHERS V. BAKST.

Mr. Gutsche moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WARNER AND CO. V. BANSO.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

TREDIDGA V. MELLMAN AND SEGAL.

Mr. Gutsche moved for provisional sentence for £1,750 on a mortgage bond, with interest, the bond having become due by reason of the non-payment of interest; also for the property specially hypothecated to be declared executable.

Order granted.

VAN DEUSEN AND ANOTHER V. BOOYSEN.

Mr. De Waal moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

LAWRENCE AND CO. AND OTHERS V. LURIE.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SCHULTZ V. ROSSOUW.

Mr. W. P. Buchanan moved for provisional sentence for £3,200 on a mortgage bond, with interest, the bond having become due by reason of the non-payment of interest.

Order granted.

S.A. BREWERIES LTD. V. HARDING.

Mr. Gardiner moved for the final adjudication of the defendant's estate as insolvent. He also applied for an amendment of the defendant's name in the summons to "Wm. Robert Harding."

Ordered to stand over pending further information in regard to suggested amendment of summons.

HIGHMAN AND OTHERS V. FRASEWISKY AND VAN WYK.

Mr. Upington moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SMITH AND CO. V. TUPNACH.

Mr. Roux moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WESSNER V. POGGENTPOEL.

Mr. Sutton moved for provisional sentence for £40 on certain conditions of sale, with interest.

Order granted.

CAPE TOWN GAS CO. AND OTHERS V. NYMAN.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

COLONIAL ORPHAN CHAMBER V. WAHL.

Mr. Percy Jones moved for provisional sentence for £1,850, balance of a mortgage bond, with interest, and also for £8 16s., insurance, and for the property specially hypothecated to be declared executable.

Order granted.

BAILEY V. McDONALD.

Mr. Percy Jones moved for provisional sentence for £3,000 on a mortgage bond, together with interest, the bond having become due by reason of the non-payment of the interest. Counsel also asked for the property specially hypothecated to be declared executable.

Order granted.

SWEMMER V. CALITZ.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

TRUSTEES REINER V. BOYCE.

Mr. Percy Jones moved for provisional sentence on a mortgage bond for £4,000, with interest, and for £6 insurance premiums, the bond having become due by reason of the non-payment of interest. Counsel also asked for the property hypothecated to be declared executable.

Order granted.

NOACH V. RAUBENHEIMER.

Mr. De Waal moved for provisional sentence for £73 on a promissory note, with interest and costs.

Order granted.

HENDRICK V. DE BEER AND MAIDMENT.

Mr. D. Buchanan moved for provisional sentence on a promissory note for £33, with interest and costs.

Order granted.

DUBIS V. HYMAN (alias DACHEAIX).

Mr. Burton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

MCLEOD V. BARNARD.

Mr. M. de Villiers moved for provisional sentence for £120 on a mortgage bond on land in the division of Willowmore, the bond having become due by reason of notice having been given. Counsel also asked for the property specially hypothecated to be declared executable.

Order granted.

SHEPPARD V. MCINTOSH AND STEER.

Mr. Van Zyl moved for provisional sentence for two sums of £1,800 and £509 on two mortgage bonds, with interest, the bonds having become due by reason of the non-payment of interest. Counsel also asked for the property hypothecated to be declared executable.

Order granted.

LEVE V. KOENIG.

Mr. Struben moved for provisional sentence on a lease for arrears of rent, and also asked that the provisional order granted on the 21st September be made final.

Order granted as prayed.

MCLEOD V. MAKE.

Mr. M. de Villiers moved for provisional sentence for £75 on a mortgage bond, together with interest, the bond having become due by reason of notice having been given. Counsel also asked that the property specially hypothecated be declared executable.

Order granted.

MCLEOD V. WELCOME.

Mr. M. de Villiers moved for provisional sentence for £50 on a mortgage bond, the bond having become due by reason of notice having been given. Counsel also asked for the property specially hypothecated to be declared executable.

Order granted.

MCLEOD V. STRYDOM.

Mr. M. de Villiers moved for provisional sentence for £75 on a mortgage bond, together with interest, the bond having become due by reason of notice; and for the property hypothecated to be declared executable.

Order granted.

CAPE OF GOOD HOPE SAVINGS BANK V. HARRISON.

Mr. De Waal moved for provisional sentence for £1,000 on a mortgage bond,

with interest, the bond having become due by reason of the non-payment of interest. Counsel also asked for the property hypothecated to be declared executable.

Defendant opposed the application, and said that he had been unable to sell the property.

Mr. De Waal, replying to the Court, said that the plaintiff could not consent to a stay of execution.

De Villiers, C.J., said that there were special circumstances in the case, and that the execution would be stayed for three months, with leave to the plaintiff to apply in the mean time for an order for an interdict.

WICHT V. HOMEWOOD.

Mr. De Waal moved for provisional sentence for £1,100 on a mortgage bond, together with interest, the bond having become due by reason of the non-payment of interest. Counsel also asked for the property hypothecated to be declared executable.

Application granted.

LYONS V. GREENLAND.

Mr. Close applied for a decree of civil imprisonment against the defendant, in default of his paying a judgment debt of £68 15s.

The defendant appeared, and said he was unable to pay the amount due. He had to support his wife and mother out of a salary of £15 a month. The plaintiff, he alleged, had ruined him. He could not pay more than 10s. a month.

Mr. Close: You see you owe about £100, and if you can only pay 10s. a month, it will take about 200 years to pay it off.

The Court refused to grant any order.

VON HOLDT V. BUHR.

Mr. J. E. R. de Villiers applied for judgment on certain conditions of sale. The application was granted.

TERNAN V. TUCKER.

Mr. Sutton applied for provisional sentence on a mortgage bond for £100, with interest from the 1st January.

The application was granted.

BENNETT AND BAKER V. BARRY.

Mr. Alexander applied for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Court for £127 10s. 9d.

The defendant appeared, and opposed the application, on the grounds that she

was unable to pay the debt. She kept a boarding-house at Rondebosch, the furniture of which was hired. She had to pay £40 a month rent. Her income was £96 a month, and after she had paid her debts, she had nothing left. She would be able to pay £1 a month at present.

An order for civil imprisonment was granted, to be suspended pending the payment of £1 a month. Plaintiffs would be entitled at a later date to make application for increased payments.

VERSFELD V. ALLIE.

Mr. Benjamin applied for provisional sentence on a mortgage bond for £53. The application was granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

FRIEDMAN V. BELMAN. { 1904.
Oct. 17th.

Civil imprisonment—Application for release.

This was a motion for an order discharging applicant from prison. Applicant's affidavit stated that he had, by an order of the Court, been committed to gaol in April last because he was unable to satisfy a judgment of the Court against him for £550. An order was then made that he should pay £7 10s. per month, which he had been unable to do. Since being committed to prison, he had been unable to do anything to pay the debt off.

The answering affidavit of Charles Kramer, articulated clerk to Messrs. Syfret, Godlonton and Low, stated that he had applied to the respondent for the instalment due, but that he had not got it. He believed the business alleged to be the property of the respondent's wife was really the respondent's, and that he was able to pay the amount of the claim against him.

The replying affidavit of the respondent's wife, stated that she owned the property in question, and that the respondent was her traveller, who received sufficient salary to live upon and travelling expenses.

Mr. Alexander, for applicant; Mr. W. P. Buchanan for respondent.

[De Villiers, C.J., enquired if the offer to pay £7 10s. per month was made by the applicant.

Mr. Alexander said he understood he had made no offer. The case of *Hall and Co. v. Esterhuysen* (2 C.T.R., 133), shows that the Court will not grant civil imprisonment to coerce any relatives: not even a wife. Here if the defendant had means he would not remain in prison.

De Villiers, C.J.: The Court has made an order that the present applicant be imprisoned, but that the decree be suspended pending the payment by him of £7 10s. per month. The Court, when making that order, must have been aware of all the circumstances. Now the applicant applies to be liberated. He brings forward no new facts to satisfy the Court that he should be released. In the absence of such evidence the Court would not be justified in departing from its previous order, and therefore the application must be refused.

PARKIN V. SPIES. { 1904.
Oct. 17th.

Bond—Capital and interest—Payment of interest.

A mortgage bond passed by the defendant in favour of the plaintiff contained a proviso that the capital should not be called up for five years, provided that the interest be duly paid as it falls due. After the passing of the bond, an arrangement was entered into between the parties that the interest should be paid at the office of H., who was the legal adviser of both. The first instalments of interest were duly paid at such office and received by the plaintiff, but on a further instalment falling due, the defendant failed to pay the actual sum at the office, but he had made an arrangement with the attorney for the payment of the amount on his behalf on demand by the plaintiff. The plaintiff, however, did not apply at the office of H. for payment, and sued the defendant for capital and interest, on the ground of failure to pay interest when due.

Held, that the plaintiff was not entitled to claim payment of the capital.

This was an application for provisional sentence on a certain mortgage bond for

£1,000. The bond was executed on March 10, 1903, and had become due and payable by reason of non-payment of interest. It was also prayed that the property specially hypothecated be declared executable.

Sir H. Juta, K.C. (for defendant): Our defence is that the interest on the bond was payable at the office of Schweitzer and Burger. The interest was paid there, and yet the plaintiff called up the bond. Subsequently the interest was tendered, and was refused.

[De Villiers, C.J.: Mr. Schreiner, some very important questions seem to be raised in this case; can they be determined on affidavit?]

Mr. Schreiner (for plaintiff): I think so. It is said that payment was to be made, not by the attorney, but at the office of the attorney. The interest was due on June 13, but no interest was tendered to the plaintiff till July. Plaintiff showed every consideration for defendant, and took a second bond when defendant would not meet the first. It was agreed that defendant should insure his property, but he has failed to do so, and yet it is most important to a second bond holder that the property should be kept up.

[De Villiers, C.J.: The bond does not bind the defendant to insure. Should he not do so the mortgagee can insure.]

We are not calling up the bond on the ground of failure to insure. I cite the fact of the non-insurance merely as an illustration of the spirit in which the defendant has acted, and in order to account for the line we are taking in standing on our legal rights. Even assuming that the office of the attorneys was the place where the interest was to be paid, it is quite clear that no interest was paid there by June 13.

[De Villiers, C.J.: If the plaintiff had called on the defendant on the 13th he would have received his money.]

That is not at all clear. There was no payment up to July 5. Had the plaintiff died before that date we could not have sued the attorneys for the money.

If the defendant made an arrangement that payment of the interest should be made by the attorneys that was no payment by them. No matter what defendant may have deposited with them, there was no money ear-marked for us, and there was no security that the attorneys would pay.

[De Villiers, C.J.: Is not an arrangement made for payment the same thing as payment?]

No. Even if such arrangement were made the defendant would be still responsible if his attorney did not carry it out. It is clear that no money was paid up to July 8th. The plaintiff is not bound by any arrangement made by defendant with his attorney. The bond is in our favour, and the most important allegations made by the defendant are

made in replying affidavits which we are not allowed to answer. Even if the attorney did promise the defendant to provide the money that was not a *solutio*, and the plaintiff could not be bound by any such arrangement if he did not accept it.

Sir H. Juta was not called upon in reply.

De Villiers, C.J.: In this action the plaintiff sues for principal and interest under a mortgage bond. In regard to the principal, there is a proviso that the principal cannot be called up for a period of five years, provided the interest was paid. After the expiration of five years, the capital was to become payable. The plaintiff now seeks to recover the principal and interest on the ground that on the date it was due the defendant did not pay the instalment. The evidence given is to the effect that a certain arrangement was arrived at between the parties that the interest, for the convenience of all parties, should be paid at the office of a certain attorney, who was legal adviser to both plaintiff and defendant. Now, this allegation receives confirmation by the fact that all the payments made since the bond was passed were made at this attorney's office. The defendant stated that he made arrangements with the attorney to pay the instalment due to the 30th June. Therefore, had plaintiff applied at the office on the 30th June, he would have got the instalment; but he did not do so. It did not suit his plan, for he seemed exceedingly anxious to secure the forfeiture of the bond. It would certainly be a great hardship on the defendant if he had been prepared to pay his instalment that he should have to pay in the amount of the bond. The Court will give provisional sentence for the amount of interest due only.

The plaintiff was ordered to go into the principal case on the capital sum.

[Plaintiff's Attorneys: Van der Byl and De Villiers; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

ESTATE LOCHNER V. PIENAAR.

This was an application for provisional sentence on a promissory note for £447 10s., less £283 paid on account.

The affidavit of the defendant denied the liability. He stated that the note was purely an accommodation note. He was charged by applicant to sell mules on commission for him, and he was charged with the price of them, when, in reality, the sales took place between the plaintiff and the third party through respondent. He tendered applicant £29, the amount due.

The applicant's answering affidavit stated that the defendant owed him

£447 10s., less £283. He denied that the respondent sold mules on commission for him, but said that he purchased them at £17 10s. each. He also supplied him with six mules at £40 each, for which he said he had a purchaser; but as he could not sell them, applicant took them back and credited him with their full value. The promissory note was not an accommodation note; it was a note given for full value received.

Mr. Close, for the defendant, in argument, said it seemed very peculiar, if Pienaar had purchased the mules outright, that he should write and ask applicant's permission to sell the mules at a lower price than he was allotted to have purchased them at. He asked his lordship to refuse the order, as the circumstances were all in favour of the respondent.

Mr. P. Jones, for the plaintiff, said the whole question was as to whether the note was an accommodation note or not. If they took the defendant's financial position at that time, they would see that he was only a poor struggling man.

Provisional sentence, with costs, in terms of the summons, was granted.

CAPE OF GOOD HOPE SAVINGS BANK V.
GOW AND OTHERS.

Mr. De Waal applied for provisional sentence on a mortgage bond for £29 and costs.

The application was granted.

GARAGE CONFIDENTIAL CO. V. VAN RIET.

Mr. Struben applied for a decree of civil imprisonment against the defendant on an unsatisfied decree of the Court for £286 and £91 costs.

The defendant appeared, and said he had no money to pay the claim. He had no furniture of his own. He was married. He was a builder by trade, but had no contracts on hand now. Out of the last contract, he had no money left.

Mr. Struben said he understood defendant had erected a building at Elsie's River, for which £66 was due.

Defendant (in examination) said the amount realised from the buildings had been mortgaged for bricks. He used to drive a motor-car called the Comfortable, which Messrs. I. and J. Herman lent him to visit his works.

Mr. Struben: That car was attached by us, and we have received part payment.

Defendant (continuing) said plaintiffs had purchased the car he was decreed for back for £250. A decree was given against him for £500. Witness was not in a position to pay any monthly instalment at present.

The Court refused the application, but reserved permission to the plaintiffs to apply again when they had proof of the defendant's ability to pay.

ORLANDINI V. COLLINS.

Mr. P. Jones applied for provisional sentence on a mortgage bond for £950 and interest, and also that the property specially hypothecated be declared executable.

The application was granted.

DORMEHL V. SCHOLTZ

Mr. Russell, who appeared for the plaintiff, said leave had been given to sue by edictal citation in this case, but since then the defendant had died, so he asked permission to amend the summons to sue the executors.

The application was granted.

BOESEN V. DAY.

Mr. W. P. Buchanan, who appeared for the applicant, said that this case had been before the Court a considerable number of times. It was an application for the final order for the sequestration of the defendant's estate. The case had originally come before the Court on the 14th July, and had been postponed on divers occasions, pending some arrangement being arrived at. He understood the defendant wanted a further postponement, and he was directed to oppose it.

Mr. Gardiner, for the respondent, said he was asking for something more than the postponement of the case. He was asking for the discharge of the order. Mrs. Day (the respondent) had sold certain property, and she averred that if the transfer was allowed to go through, she would be in a solvent position, and would be able to pay the claim made by the plaintiffs.

The case was allowed to stand over until Thursday next, pending arrangements between the parties being arrived at.

ILLIQUID ROLL.

GARLICK V. ZACKON. { 1904.
Oct. 17th.

Sir H. Juta, K.C., moved for judgment, in default of plea, for £40 against defendant, as surety for goods sold and delivered.

Granted.

LESLIE V. PARKINS

Mr. Sutton moved for judgment, under Rule 329d, for \$50.

Granted.

**VAN DE SANDT DE VILLIERS AND CO
V. LOUW.**

Mr. Van Zyl moved, under Rule 329d, for judgment for the sum of £10 18s., for goods supplied.
Granted.

BOWERS V. HOOPER.

Mr. Upton moved for judgment, under Rule 329d, for £24, rent due.
Granted.

MALLAH AND CO. V. ALLIE.

Mr. Upton applied for judgment, under Rule 329d, for £325, money received by the defendant on the plaintiffs' behalf.
Granted.

**FRIEDLANDER AND DU TOIT V.
HATSCHER.**

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £23 14s. 11d., for professional services and moneys disbursed for the defendant.
Granted.

OWIE AND CO. V. ISRAELSON BROS.

In this case, the Chief Justice intimated that defendants' estate had been sequestrated, so that provisional sentence could not be given.

SCOTT V. KIRBY.

Mr. Lewis moved for judgment, under Rule 329d, for £50, for work and labour done.
Granted.

**FLETCHER'S WHOLESALE V. LEVIN
AND SONS.**

Mr. Struben moved for judgment for costs, the principal having been paid since issue of summons.
Granted.

DE LEEUW V. LOUW.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £77 0s. 4d., for goods sold and delivered and moneys disbursed.
Granted.

COOK AND CO. V. YOUNG.

Mr. D. Buchanan moved for judgment, under Rule 329d, for £305 7s. 6d., for goods sold and delivered.
Granted.

SA. BREWERIES, LTD. V. WOBBE.

Mr. P. S. T. Jones moved, under Rule 329d, for judgment for the sums of £300 17s. 11d., £602 10s., and £183, for rates, rent, and goods respectively.
Granted.

**WOOLFF, HEINAMANN AND CO. V.
VAN VUUREN.**

Mr. D. Buchanan moved for judgment for £43 8s. 3d., goods sold and delivered, less £20 6s. 8d., paid on account.
Granted.

SCOTT V. DAWSON.

Mr. Bisset moved for judgment, under Rule 329d, for £56 1s. 2d., for goods sold and delivered.
Granted.

COLONIAL GOVERNMENT V. BLAAUW.

Mr. Struben moved, under Rule 329d, for the sums of £119 10s. 6d. and £114 6s. 6d., quitrent due on certain two farms.
Granted.

WESTERN WINE CO. V. ERK.

Mr. W. P. Buchanan moved, under Rule 329d, for judgment for £183 5s. 10d., for goods sold and delivered.
Granted.

JONES AND CO. V. BLAKE.

Mr. De Waal applied under the same rule for judgment for £181 4s., due on certain accounts.
Granted.

NEGRINI V. FROST.

Mr. P. S. T. Jones moved, under Rule 329d, for judgment for £1,000, due as balance of the purchase price of certain property.
Granted.

**SPILHAUS AND CO. V. ROMAIN AND
ANOTHER.**

Mr. Pyemont moved for judgment, under Rule 329d, against Samuel Romain for £55 14s. 10d., for goods sold and delivered. He asked for a postponement *sine die* in the case of the other defendant.
Granted.

SPILHAUS AND CO. V. NEWMAN.

Mr. Pyemont moved, under Rule 329d, for judgment for £34 13s. 4d., for goods sold and delivered.
Granted.

HOVEY V. HINE.

Mr. Russell moved, under Rule 329d, for judgment for £16 10s., wages due. Granted.

SPIILHAUS AND CO. V. ENGEL.

Mr. Pyemont moved, under Rule 329d, for judgment for £149 4s. 11d., balance of account for goods sold and delivered. Granted.

ERTATE OF VAN DER RIET V. SKIPPON.

Mr. Pyemont moved, under Rule 329d, for judgment for £46, rent due. Granted.

ATKINSON V. EDWARDS.

Mr. M. de Villiers moved for judgment, under Rule 329d, for £10, due on a certain acknowledgment of debt. Granted.

MOLL V. AREND.

Mr. M. de Villiers moved for judgment, under Rule 319, for £175, the purchase price of certain land. Granted.

VASSIS V. YAXOGLONG.

Mr. Benjamin moved, under Rule 330, for leave to sign judgment against defendant, who had been barred. Granted.

CLAREMONT COUNCIL V. BLAKE.

Mr. Pyemont moved for judgment, under Rule 329 (d), for £76 0s. 10d., municipal rates due. Granted.

ZEEDERBERG AND DUNCAN V. VAN BIENE.

Mr. D. Buchanan moved for judgment, under Rule 329 (d), for £72 11s. 10d., for goods sold and delivered. Granted.

OLIVER AND CO. V. GOUWS.

Dr. Greer applied for an order declaring respondent to be of unsound mind, and for the appointment of a *curator bonis*. A *curator ad litem* had already been appointed. Counsel read affidavits to show that the respondent was insane.

Order granted as prayed.

REHABILITATIONS. (1904.
{ Oct. 17th.

Mr. De Waal moved for the release of the estate of Harris Howitz from sequestration.

Granted.

Mr. P. Jones applied for the discharge of Carel Johannes Coetzee, under the sixth section of the Insolvent Ordinance.

Granted.

GENERAL MOTIONS.**MARSHALL V. MARSHALL.**

Mr. P. S. T. Jones applied for a decree of divorce, defendant not having returned as ordered by the Court.

Granted.

MARTENS V. MARTENS.

Dr. Greer moved for a decree of divorce, defendant not having complied with the order of the Court to return.

Granted.

SUTHERLAND V. SUTHERLAND.

Mr. Gardiner applied for a decree of divorce. Defendant was ordered to return by December 15, but had not done so.

Granted.

GIDDINGS V. GIDDINGS.

Mr. W. P. Buchanan said that an order was granted calling upon defendant to return by September 15. The order had not been complied with, and he (counsel) now asked for a decree of divorce.

Granted.

NIVEN AND YOUATT V. REDFERN AND BENSLEY.

Mr. Burton moved for postponement of trial until next term.

Sir H. Juta, K.C., appeared to oppose.

On behalf of the applicants (the defendants in the action), it was stated that they were absent in Europe, and wished the case postponed until their return.

Affidavits were read on behalf of the respondents to the effect that the action had already been postponed to suit defendants' convenience, and respondents now objected to the case being postponed until next term.

The case was ordered to be set down for trial on the 16th November.

FREEMANTLE V. MILLS.

Sir Henry Juta, K.C., moved, on behalf of the respondent, for removal of trial to the Eastern Districts Court at Graham's Town. The action was one upon petition by Mr. Freemantle, the unsuccessful candidate at the recent Uitenhage election, to have the election declared null and void. It was stated on affidavit that a number of witnesses whom the respondent wished to call would have to be present at the Criminal Court at Graham's Town on the 10th November, to give evidence in regard to certain charges of impersonation. Counsel said the trial had been provisionally set down for hearing at the Supreme Court on the 11th November, but as the hearing of the impersonation cases, involving the presence of many witnesses required to give evidence in this case, was fixed to take place at Graham's Town on the preceding day, it would be necessary either to remove the trial to Graham's Town or to alter the date fixed by the Supreme Court.

Mr. Burton, who (with Mr. Van Zyl) appeared for Mr. Freemantle, read an affidavit made by the latter, in which he expressed the desire that the petition should be tried before the Supreme Court, inasmuch as there would not be a full complement of judges at Graham's Town, and as there was no power of appeal to the Supreme Court against the decision of the Eastern Districts Court relative to election petitions.

De Villiers, C.J., said it was clear that the Court had no power to refer the trial to the Eastern Districts Court. Power was given to remove such trials to a Circuit Court, but there was great objection to this course, as it was desirable that election petitions should be decided by more than one judge, unless the parties elected otherwise. The date of trial would, however, be altered to the 21st November. As the Act was clear that it was not competent for the Court to order the removal to the Eastern Districts Court, the cost of the application for removal would have to be borne by the respondents. Costs of the application for postponement would stand over.

Ex parte **THE DORDRECHT D.B. CHURCH.**

Mr. J. E. R. de Villiers moved to make absolute a rule *nisi* under the Derelict Lands Act.

De Villiers, C.J., pointed out that there was a defect in the publication. The application was refused.

Ex parte **DENNIS AND ANOTHER.**

Mr. D. Buchanan moved for a rule

nisi under the Derelict Lands Act to be made absolute.

Granted.

Ex parte **STEVENSON.**

Mr. Struben moved for a similar order, which was granted.

SKLAAR V. INSOLVENT ESTATE OF WEINTROB,

Mr. W. P. Buchanan moved for an order for the delivery of a certain bond to enable the applicant to pass transfer of property. Applicant stated that the bond was given to respondent as security to him for the performance of certain obligations, which applicant had duly performed. Application had been made to the trustee for the document, but the latter stated that it was in the insolvent's possession, and that he (the trustee) had no power to compel Weintrob to deliver it up.

Without hearing Mr. McGregor in argument, the Court refused the application, with costs.

De Villiers, C.J.: This application seems a most extraordinary one. The applicant asks for an order on the trustee to hand over to the applicant a certain mortgage bond. The trustee says he has no mortgage bond; that he has never had it; that if the insolvent has it, the applicant can sue him. The trustee goes further, and says: "I lay no claim to the document, if you wish to sue him, you may do so." And he goes still further, and says: "If you will guarantee costs, I will assist you to sue him." Clearly, the position taken up by the trustee is right. The trustee would have no right to squander money which he held on behalf of creditors for the benefit of the plaintiff. It is a matter for the plaintiff and the insolvent, who improperly withheld a document to which he had no right. The application will be refused, with costs.

Costs of an affidavit filed on behalf of the respondent were refused.

ELLIS V. KEMP.

Mr. Schreiner, K.C., moved for the appointment of a joint commission to take evidence at King William's Town.

Granted, the Resident Magistrate at King William's Town being appointed commissioner, costs to be costs in the cause.

JAMES V. FREDERICKSON.

Mr. Gardiner applied for an order interdicting the defendant, the administrator of the estate of the late Thomas

Robinson James, from selling certain land in West Pondoland. In his affidavit, the petitioner said that the selling of the land would deprive him of his only home. Petitioner believed that in the present depression, property would realise very little.

Mr. W. P. Buchanan, for the respondent, read answering affidavits by the defendant, who said that if the property was not realised there would be no funds for the education of the minor children, and the sale was entirely for the benefit of the heirs.

Mr. Gardiner said they were prepared to pay all the liabilities of the estate.

De Villiers, C.J., said it seemed unreasonable to sell the property now, against the wishes of the heirs, who were prepared to pay the debts.

Mr. Buchanan pointed out that defendant was also guardian of the minor child.

De Villiers, C.J., said there seemed no necessity for charging defendant with ulterior motives, but he thought in the present circumstances that it would be better not to sell the property. The Court would direct respondent not to sell the land, provided that within twenty-one days petitioner placed sufficient money in the hands of the respondent to pay the debts of the estate and the cost of administration, the costs of this application to come out of the estate.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

WELLS V. WHITE. { 1904.
Oct 18th.

Mr. W. P. Buchanan (for the plaintiff) applied for judgment, in terms of consent paper, i.e., for prayer (b), an interdict restraining defendant from trespassing on the land of the plaintiff, and (d) costs of suit. The plaintiff had waived his claim for damages.

Judgment was entered accordingly.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Jury.]

SOOYE V. LAWRENCE AND CO. { 1904.
AND OTHERS. { Oct. 18th.
FOR V. LAWRENCE AND CO. { Nov. 15th.
AND OTHERS.

Fraudulent insolvency—Sale by insolvent—*Bona fides*—Consideration—Illegal seizure.

Y., a general dealer, sold his shop, fittings, good-will, &c., to one S. At the time of the sale Y. was insolvent. The creditors of Y. thereupon attached his premises and such goods as they found. Thereupon S. claimed possession of the shop, restoration of the goods and damages. A jury found that the sale was not bona fide, and returned a verdict for the defendants.

In the second case, on the plaintiff's default, the Court granted absolution from the instance with costs.

This was an action brought by one Hew Sooye, of Wynberg, against (1) B. Lawrence and Co. (2) Wiener and Co., and (3) A. L. Foot.

The action against the 3rd defendant was for the possession of a certain shop and certain goods therein attached. Against all defendants (the one paying, the others to be absolved), defendant claimed (a) £400 as and for damages, alternative relief and costs.

Plaintiff's declaration was as follows:—

1 The plaintiff (Hew Sooye) resides at Wynberg, Cape Division, where he carries on business as a general dealer.

The first two defendants (B. Lawrence and Co., Ltd., and Wiener and Co., Ltd.) are companies, registered with limited liability under Act 25 of 1892, and carry on business separately as merchants in Cape Town.

The third defendant (Alfred Newton Foot) is sued herein as the duly appointed trustee of the insolvent estate of Ah Young.

2. Previous to and in the month of March, 1904, the said Ah Young was carrying on business as a general dealer in a certain shop in Ottery-road, Wynberg, which he hired from one Carl Carles.

3. On or about the 21st March, 1904, by an agreement in writing, the plaintiff purchased, and the said Ah Young sold all his interests and goodwill in the ten-

ancy of the said shop, and the stock-in-trade, goods, fittings, and effects in and upon the premises for the sum of £50, payable as to £14 in cash, as to £11 by a promissory note due on the 26th of March, and as to £25 by a promissory note due on the 21st May, 1904. It was also agreed that possession of the shop and delivery of the stock, fixtures, etc., should be given and taken forthwith. The said sale and purchase was a *bona fide* one for just and valuable consideration.

4. The plaintiff accordingly, on the same day, took possession of the premises and delivery of the stock, fixtures, etc., and he on that day also made an agreement with the owner of the premises by which he hired them from that date at a monthly rental of £5, and in further consideration of his paying half the water and the tenant's rates as the same fell due. Plaintiff duly paid the £14 cash, and signed the promissory notes as stipulated. He has furthermore duly paid the promissory note for £11 at maturity. He has not paid the promissory note for £25 by reason of the facts hereinafter set forth, but has at all times been willing, and has offered to pay, and is still willing to pay the said sum on the release of his shop and goods from the attachment hereinafter referred to.

5. Thereafter and until the 23rd day of April, 1904, the plaintiff carried on the business of a general dealer in the said shop, with the said goods so purchased, and with other goods to the value of about £100 purchased by him from other and independent dealers. On the 23rd of April there were goods to the value of about £95 *ls. 8d.* in the shop.

6. On or about the 15th of April, 1904, the two first-named defendants, acting in concert as creditors of the said Ah Young, petitioned this Honourable Court, and obtained a provisional order for the sequestration of the estate of the said Ah Young as insolvent. In their joint petition they wrongfully, unlawfully, maliciously, and recklessly stated that the sale hereinbefore referred to was made fraudulently and collusively with intent to defeat or delay them in obtaining payment of their debts.

7. On the 23rd of April, 1904, the Messenger of the Master of this Hon. Court proceeded to the shop aforesaid, for the purpose of entering and laying an attachment on the estate of the said Ah Young, in terms of sections 13 and 14 of Ordinance 6 of 1845, and was for that purpose, and in accordance with the said sections, accompanied by the duly authorised and empowered representatives of the first two defendants.

8. By and in consequence of the instigation, procurement, and direction of the said representatives, who were clothed with full powers thereto by their principals, the said Messenger in pretended or intended execution of

his duty as aforesaid, wrongfully and unlawfully entered and laid attachment upon all the goods in the said shop belonging to plaintiff, and further wrongfully and unlawfully ejected the plaintiff from the shop and sealed and closed up the same notwithstanding that the plaintiff protested against their wrongful and unlawful conduct, and notified the Messenger and the said representatives of the facts alleged in paragraphs 3, 4, and 5 hereof.

9. Thereafter the plaintiff gave due notice to the Master and to the petitioning creditors of the facts hereinbefore set forth, protested to them against the aforesaid acts of their representatives, and claimed possession of his shop and the release of his goods, but notwithstanding this, the petitioning creditors and the Master, by their instigation and procurement, adopted and ratified what their several representatives had done, and wrongfully and unlawfully continued the said retention of the shop and goods.

10. Thereafter, on 25th of May, 1904, the petitioning creditors obtained the final adjudication of the estate of Ah Young as insolvent, and the third defendant was subsequently duly confirmed as trustee of the said estate. The above-stated facts were duly notified to him, and the abovementioned claim was then made to him, but, despite this, he has wrongfully and unlawfully, and by the instigation and procurement of the other defendants retained possession of the shop and goods, and refused to hand them over to plaintiff.

11. By reason of the premises, the plaintiff has been debarred from carrying on business in the shop, has suffered damage in his credit and reputation, has lost the use and profit of his goods, and has thereby and otherwise sustained damage in the sum of £400.

Wherefore plaintiff claims: (1) As against the third defendant: (a) The restoration of the possession of the shop from which he was illegally ejected; (b) the restoration of the goods attached in the shop, or the payment of £95 *ls. 8d.* their value. (2) As against all the defendants: (c) The sum of £400 as and for damages as aforesaid; (d) alternative relief; (e) costs of suit.

Defendants, in their plea, stated that the alleged sale or alienation by Ah Young was a fraud upon the creditors, and null and void, and was made at a time when his liabilities exceeded his assets. They admitted that the goods in the shop were attached, but denied that the plaintiff claimed or pointed out any particular goods as being goods purchased by him after the alleged sale. Defendants prayed that the plaintiff's claim be dismissed, with costs; that the said sale be declared null and void; alternative relief; and costs of suit.

Mr. W. P. Buchanan, with him Mr. J. E. R. de Villiers, was for the plaintiff; Sir H. Juta, K.C., with him Mr. Rainsford, was for the defendants.

Mr. Buchanan said that this case and that of *For v. Lawrence and Co. and Others* were practically on the same lines, with certain exceptions. On Monday they found that the plaintiff, in one of the cases, Shene For, was at Port Elizabeth, and that he had not come to town. Counsel was informed that he had written a letter saying that he could not get a permit to come there, and also that his father was ill.

[De Villiers, C.J.: Which is the real reason?]

Mr. Buchanan: I am only telling your lordship what I have been told myself. Counsel added that he did not intend to proceed with that case at present, as he had not yet seen the plaintiff. He would suggest that the case should be postponed. He was at present only prepared to go on with the case of *Hew Sooye*.

De Villiers, C.J. said that he would consider the position of affairs in connection with the case of *Shene For*, when he had heard the other case.

Mr. Buchanan said that the question for the jury to determine was whether the sale was *bona fide*, and whether a just and reasonable value was given for the goods by the plaintiff.

Hew Sooye (the plaintiff) said that he came out to this country about ten years ago, and had been living and trading in Kimberley. He removed to the Cape in December last, bringing with him £120. He wanted a shop, and ultimately he entered into negotiations with Ah Young in March for the purchase of the shop. Young told him that he could not get goods from the merchants to carry on the business. Witness saw Mr. Brady, and then arranged with certain of his friends to go down and take stock. The items were written in a stock-book (produced). The amount of the stock was £50 1s. 4d. Witness offered to pay half down and the rest afterwards. Young agreed, and told him to pay Mr. Brady. He paid in March, and was to have paid another instalment in May, but the shop was closed by the creditors before this second note matured, and, as a consequence, he had not paid the balance of £25. Witness produced the agreement of lease of the shop and his trader's licence. He obtained, he said, further goods for the shop from Messrs. Lensvelt, Thornton, Fergusson, Watts, and Johnson. He produced a cash-book showing his sales up to the 23rd April, when his place was closed. He also produced a book showing his purchases of goods for the shop. Proceeding, he said that on the 23rd April, about 10

a.m., the Messenger of the Court and another gentleman he believed Mr. Woods called at the shop, and the former told him that he must go out. Witness asked them why, and said he had bought the shop. They told him that he could take out things for his own use. Witness went out, and the shop was locked up. He saw Mr. Brady, and correspondence followed. In consequence of the closing of the shop, he had sustained damage by reason of losing the profits of trading. He only got the goods for the shop on the 29th June. The premises had now been let to someone else. He could not say whether the stand was a particularly good one, because he had only been in the shop about a month before he was ejected. The value of the goods in the shop at that time was about £100. He did not know what the goods were worth at present; he believed that they had gone bad. He had not been able to obtain another shop. During the four weeks he was at the shop, his takings were £41. When he was at Kimberley, he could make £35 profit on £100 takings.

Cross-examined by Sir H. Juta: When he was ordered out of the shop, he filled a box with clothing and books, including the sales' books. He did not mention in his affidavit that a stock-book was prepared, because he was not asked about it by Mr. Brady.

Sir H. Juta said that it was of great importance that this stock-book should have been produced before, because the point of the case was that it was alleged that goods of the value of over £100 had been sold to plaintiff for £50.

Witness (further cross-examined) said that he entered the sales in his book each day. After Ah Young sold the shop to him, Ah Young used to come and smoke opium with him. When he took the shop from Ah Young, he did not inquire what Ah Young's position was. He was not told that there were judgements against Ah Young. Ah Young did not tell him that he owed £425. When the Messenger came, he told him that Ah Young was not in the house. Ah Young was at the back of the premises, lying drunk with opium. Witness had not tried elsewhere to obtain a shop.

Arthur Edward Coomer said he remembered selling goods to Sooye on 13th April, to the value of nearly £6.

Lee Johnson, general dealer, of Claremont, stated that he had sold goods to plaintiff.

Carl Carlse stated that Young rented a shop from witness in Ottery-road, Wynberg, for five years. On March 21 of this year he let the shop to Sooye. Sooye promised to pay him the rent, but, owing to the shop being closed up, he was unable to pay.

Elizabeth Carlse stated that she had drawn up the agreement (produced) between her father, the previous witness, and Sooye, and had signed it as a witness.

John Fong, carrying on business at Wynberg as Ah Shene and Co., stated that he was present in Young's store when the sale took place to Sooye. Witness, with the help of others, took stock. They valued the goods at the price for which they could obtain them from the merchants. Witness had sold goods to Sooye to the extent of £4 7s. 9d.

Cross-examined by Sir H. Juta: He knew nothing about the judgment against Young.

Mr. Burfort, Messenger to the Master of the Supreme Court, said that Sooye was not allowed to take anything out of the shop. Witness closed and sealed the shop at Wood's request.

By the Court: The name of Ah Young was on a sign outside the door about a month afterwards.

Cross-examined by Sir H. Juta: He did not find any books on the premises. He found Ah Young at the back of the shop, lying down on a mattress. He was in a stupid condition.

Sing Ah, general dealer, of Sussex-road, Wynberg, said he had been a grocer for five years. On the 20th March he assisted in the stock-taking at Ah Young's shop, and made the entries in the book. Three other Chinamen put down the prices, entering the cost price in each case. The total was £50 1s. 4d.

Cross-examined by Sir H. Juta: Witness had not been working since he came to the Cape from East London about a year ago. He had not been employed by Sooye.

The witness Burfort (recalled) said that Sing Ah was looking after the shop when he went there to close the place. Sing Ah told them that Ah Young had gone to Cape Town, and that the business did not belong to him.

Sing Ah was cross-examined at some length in reference to the entries in the stock-book, which were written in Chinese characters.

The witness Burfort (recalled by the Court) said that he did not tell Sooye that he could take his own things. He considered that all the goods in the shop belonged to Ah Young.

Louis Julien Ah Lien, grocer, Diep River, who said that he was a Creole from Mauritius, also gave evidence as to the stock-taking, when Sooye went into the shop. He said that the profits of a business of this kind fluctuated from 10 per cent. to 50 per cent.

Cross-examined by Sir H. Juta: He admitted that in an affidavit he used the expression that he had made "a careful inspection" of the stock. He did not say in the affidavit that he took

part in the stock-taking, but he told Mr. Brady (the attorney) that he did. He took stock in a book similar to the sales' book.

Leopold Lobascher, auctioneer and valuer, Wynberg, said he went with the Messenger of the Court to value the goods in the shop on the 11th May last. He put down their worth at £95. At a forced sale he should think the goods would make their market value within 5 per cent. Groceries, as a rule, fetched at auction pretty well up to their market value. Witness was accompanied by Mr. Owens, grocer, Church-street, and they went over every line together.

Thomas Edwin Owens, grocer, late of Wynberg, gave corroborative evidence as to the stock-taking he made in company with Mr. Lobascher. The stock, valued at cost price, worked out at £95. At a forced sale, the goods would not make anything like so much—perhaps £50.

Mr. Buchanan closed his case.

Sir H. Juta, for the defendants, put in records of proceedings in the insolvency of Ah Young, and of judgments obtained against Ah Young. He said it was admitted that the defendants were creditors of Ah Young at the beginning of March to the amount of £425.

Alfred Newton Foot, trustee in the insolvent estate of Ah Young, stated the provisional order was granted on the 15th April. The insolvent handed over no property, but certain attachments were made by the Messenger of the Court. There were no books. The shop was alleged to be sold to Hew Sooye for £50. On the 30th June, he removed the goods, and handed the shops back to the respective landlords. Last week he inspected the books of Hew Sooye, and he thought the books had not been in use very long.

Cross-examined by Mr. Buchanan: Before moving the goods, he ascertained what position would be taken up. His object in moving the goods was to save the creditors the rent. He would value the goods at about £100 on a forced sale. The insolvent said that his assistant had taken the books away.

William Wood stated that last December, and up to March, he was in the employ of Messrs. Lawrence and Co. In December last year he was their traveller, and he knew Ah Young's shops very well. In December he inspected Ah Young's stock, with a view to giving him further credit. The value of the stock in Hew Sooye's shop was about £250, and the value of the stock in the other shop about £400. About the 22nd March Hew Sooye told him he bought the shop from Ah Young. On that date the value of the stock was not less than £100. In consequence of what he saw, the proceedings in the insolvency action were taken. After seeing the stock in December, he gave credit to Ah Young.

When he went to the shop with the Messenger, Hew Sooye told him again that Ah Young was in town, but again they found him in the back room. When he visited the shop on that occasion, nothing had been removed.

Cross-examined by Mr. Buchanan: He noticed a depletion of the stock in his visits to the shop—a depletion that was not gradual, but sudden. There was sufficient depletion to make him suspicious. The considerable depletion was about the end of February or the beginning of March. Previous to that, it was gradual. When he went with the Messenger of the Court to the premises, he estimated the value of the goods and fixtures at £100; there was about the same as on March 23. He allowed about £5 for fixtures.

Frederick K. Wiener, managing director of Wiener and Co., said that he went out to the shop, which purported to have been sold to Hew Sooye, who showed him a receipt for the purchase of the business for £50. He had a glance round at the shop, and, from his view, he should say that the stock was worth about £100. On leaving, he communicated with the other creditors. He had seen the shop about two months previously, and, upon comparison, he found that the stock was considerably less on the second occasion. After the shop had been closed, the stock was removed, in order to save the rent, to Wiener's store. The stock was considerably less at that time than it seemed to be when he saw it in the shop. Sooye seemed to him to be drunk, when witness called. He could not say whether the man had been smoking opium.

Cross-examined by Mr. Buchanan: Certain goods were sent out to Ah Young in March, but, owing to a dispute, a certain proportion, valued at about £7, was returned.

Bruce Fleming (13), of Ottery-road, Wynberg, said that he knew the shops where Ah Young's name was. He saw the shop sealed by the Messenger of the Master. In the evening he saw a Chinaman coming out of the premises; he did not know his name.

Cross-examined by Mr. Buchanan: He saw the door afterwards. The tape had been broken. The Chinaman came from the side, not from the shop entrance.

B. Jaffe, produce dealer, Wynberg, said that he had obtained a judgment against Ah Young about the 28th March. He saw a man in the shop, who told him to come on Friday morning, and who promised to pay him £2 a week. The amount was paid the first week, but not afterwards. He estimated the value of the stock, when he last saw it, at about £200; this would be about a week after he got his judgment. He was not told that the shop had been sold to Hew Sooye.

Cross-examined by Mr. Buchanan:

The sum of £2 was paid to witness's lawyers. In April witness delivered goods to the shop; he gave receipts in Hew Sooye's name.

Louis Vickar, shopkeeper, and baker, Constantia, said that he used to supply Ah Young with bread for several months. Ah Young did not pay the money he owed him, and witness put the matter in the hands of an agent. Ah Young made an offer, but failed to carry it out, and witness afterwards saw Ah Young's attorney, Mr. Brady, who told him that Sooye had bought the shop for £50. He valued the stock at that time at about £200.

Geo. Arthur Jopp, a director of Lawrence and Co., produced a copy of the account of Ah Young with his firm, who were the second largest creditors. He had seen vouchers of purchases by Hew Sooye from other people. The value of the purchases from Jensen was about £54. In January, February, and March, Jensen bought from his firm goods to the value of £128 11s. 8d.

Cross-examined by Mr. Buchanan: They stopped delivering to Ah Young in December last. He did not remember whether he told the Messenger, that they wanted to make a test case of this matter. He did not take the trouble to satisfy himself as to the purchases by Hew Sooye from Lensvelt, Jensen, and others. He took up the broad position that the sale was a fraudulent one; he thought the information they had was quite sufficient.

Gus. Marlowe, an employee of Wiener and Co., produced the accounts of Jensen and Ah Young, with his firm.

Percy Stanley, an employee of Bennett and Baker, retail grocers, spoke to having made a valuation of the stock in the shop on the 9th May. The amount arrived at was £109 7s. 9d.

Cross-examined by Mr. Buchanan: He should say that the goods at a forced sale would make £100. He had never been at a forced sale. Some of the goods would since have deteriorated, but not the tinned goods.

Sir H. Juta closed his case.

Mr. Buchanan submitted that it had been clearly shown that Hew Sooye had made purchases from independent sources between the 21st March, when he took over the place, and the 23rd April, when the business was attached. He submitted that it was perfectly clear that Sooye had bought goods from the merchants of the value of £90, and that these had been wrongfully attached. The plaintiff had been deprived of the use of the shop directly by the defendants until the end of June, when the shop was let to someone else. There could be no question of restoration of possession, but there was a question of damages. He contended that the sale by Ah Young to Hew Sooye of the business was *bona fide*, and for a just and valuable consideration. He com-

nounced on the absence of motive on the part of Ah Young or Hew Sooye; he contended that if there had been any intention of conspiracy Ah Young and Sooye would not have called in five or six other Chinese to assist in the stock-taking; the whole theory of a conspiracy was, he urged, very improbable indeed. The Chinese witnesses, although they had all been ordered out of court, had given a perfectly consistent story, even despite the skill in cross-examination of his learned friend. In regard to the Chinese stock-book used when Hew Sooye took over the business, counsel contended that the fact that Mr. Foot did not get this in his possession under the notice of avail was not an element against the plaintiff. Mr. Foot did not take with him a Chinese interpreter when he went to see the books; hence he did not understand the importance of this stock-book. This book, counsel submitted, supported the sale as a *bona fide* transaction between Ah Young and Hew Sooye. Whatever Ah Young's position financially may have been, Hew Sooye knew nothing at all about it; Ah Young had not attempted to defraud his creditors but, as a matter of fact, had acted in the interests of his creditors in selling the business to Sooye for £50. Sooye had told a consistent story throughout, but the creditors refused to believe it and had said all along, "No, we will make a test case of this." The creditors seemed to have been determined to close their eyes to everything except this supposed fraudulent sale. He urged that the jury should award substantial damages, and thus mark their sense of the callous and heartless conduct of the defendants. After all, a Chinaman had his feelings, and he had a reputation to uphold as a trader.

[De Villiers, (C.J.): There is no allegation of fraud in the documents which have been put in.]

Mr. Buchanan explained that he had been under the impression that documents embodying such a charge had been put in. Proceeding, he said that if fraud was not alleged, it was alleged that Ah Young acted *malu fide*. There was no necessity, he contended, to eject Hew Sooye from the shop; he could have been left in the shop and allowed to sell his goods.

Sir H. Juta said the main question was as regarded the sale by Ah Young to Hew Sooye. On the 21st March Ah Young was hopelessly insolvent, and his liabilities were over £400. The jury were asked to believe that when the transaction took place on the Sunday, there was no mention of the two summonses against Ah Young. The next question was, what was the value of the goods in the shop of Hew Sooye at the time of the alleged sale, and that was the point that instigated the

proceedings. If the sale had been a *bona fide* one for just and valuable consideration, the gentlemen who saw the stock would never have troubled about any proceedings; they would have been very glad to have had the £50 from Hew Sooye. It was highly improbable that Wiener's representative had said that £50 was a fair value for the stock, when he immediately went to see the other creditors. There had been a deal made of Hew Sooye's consistency in writing letters, but he did nothing else. Why did he not take immediate action for possession of the shop? Could they believe, if the Chinaman had brought the book containing the entries of the stock to the attorney, that he would not have mentioned it in the affidavits? It was not too much to say that it was a most extraordinary business, and there was something else which made it look funny. How did those books come here? It was unlikely that the Messenger and Mr. Wood would allow the bland Hew Sooye to take a big box out when they closed the shop. They could imagine a merchant who had suspicion about the dealings of a shop allowing Hew Sooye to take out the books. Supposing that the attorney had forgotten the main point of the case, it was his duty to come forward and state that he had overlooked it. With the exception of Hew Sooye, all the other Chinamen merely kept invoices of their purchases, but Hew Sooye had gone one better, and produced a couple of nice clean books. Looking at the sales, it was rather remarkable that in that neighbourhood the humble copper was unknown. No, they only dealt in shillings there. Out of ten days' sales, seven amounted to 20s., a couple 15s., and one 28s., while on Saturday it ran into pounds. They would notice that the humble copper, the humble tickety, the humble sixpence, and the humble ninepence did not count there, and they would also notice the different handwriting in the book. £50 or £60 was not much to firms like Wiener or Lawrence, and it was difficult to see why they should take action if they thought it was a *bona fide* sale. There was no evidence to show what portion of the goods belonged to the plaintiff at the time of the attachment.

Mr. Buchanan (in reply) pointed out that the Messenger of the Court had no right to attach Hew Sooye's books. It was quite a reasonable assumption that the coppers were left in the till, and nothing but the shillings taken out at the end of each day. The defendants did not know at the time what had become of the £50, otherwise there might have been no action taken in the first instance. It was quite clear, counsel urged, that in regard to £50 at least, there had been illegal attachment, and it was impossible for the defendants to get out of it.

De Villiers, C.J. put it to Sir H. Juta, whether, if the sale were declared null and void, the £25 paid by Sooye should not be paid back to him.

Sir H. Juta said that the defendants had not got the money. It was in the hands of Mr. Brady, the attorney. He should not object to the money being refunded to Sooye.

De Villiers, C.J.: As to the first part of the claim, the trustee cannot restore possession of the shop to Sooye. As to the next item, restoration of goods, or payment of value, £92, the decision of that question will mainly depend on the view the jury take of another question, viz., whether the sale was bona fide, and whether it was made at a time when Ah Young's liabilities exceeded his assets, and whether it was for just and valuable consideration. In regard to the goods, the jury will have to decide what was the value of the goods at the time when Sooye took over the shop. For the plaintiff, it is said that the goods were of the value of £50, and for the defendants, £100. That would be a sufficient difference to make the sale not be for just and valuable consideration. It is clear that Ah Young was hopelessly insolvent when the sale to Sooye was made; not only that, but there were judgments being taken out against him. There was a judgment to be issued on the day following the sale, and when the Messenger went to the shop, he was told that the business had been sold. Something has been said about the abuse of the plaintiff's attorney. It is a case in which I must express some surprise at the assistance given by the attorney to the parties under the special circumstances of the case, because, according to the record in the Magistrate's Office, the attorney who drew up the agreement of sale was the agent appearing for Ah Young in the Magistrate's Court. He, therefore, was fully cognizant of the fact that there were certain summonses to be heard in the Magistrate's Court against Ah Young, and, with that full knowledge, he drew up, apparently, the agreement of sale; or, at all events, if he did not draw it up, he appeared as one of the witnesses to that agreement. I wish to say one word more upon that point, that it is to be regretted that the attorney himself was not called as a witness, in order to elucidate a great many points which in my opinion required elucidation. I am satisfied that the attorney might, if he had been called, have thrown some light upon other somewhat obscure points, more especially in regard to the stock book. The witnesses for the plaintiff were Chinamen, and I need hardly tell the jury that, although Chinamen, they must speak the truth. I will give the jury this general warning—that they should

not allow any prejudice that they might have against the plaintiff, owing to his race, to influence their minds in the present case. Hew Sooye was a Chinaman, no doubt; but he is entitled to as much justice at the hands of the jury as any other person who comes here. On the other hand, the plaintiff is not entitled to more than justice. If the jury find for the plaintiff on the alleged sale of goods to him by Jansen and others, and also on the sale by Ah Young, they will find for the plaintiff for at least £98. If they find for the plaintiff on the sales by Jansen only, then they will find for £48. In regard to the general claim for damages, that will be a matter for the jury to decide. If they come to the conclusion that the sale was a bona fide one from Ah Young to Hew Sooye, I confess that the plaintiff would be entitled to some damages. The question of assessing general damages will, I recognise, be complicated by the fact that the plaintiff's books have been entered up in a language which, to say the least, was unintelligible.

The jury retired at 3.15 p.m. to consider their verdict, and returned into Court at 4.17, having found that the sale was not a bona fide one, and with a verdict for the defendants on the claim in convention, and also on the claim in reconvention.

Judgment was entered accordingly, with costs.

In the other action, arising out of the insolvency of Ah Young, instituted by Shene For, Mr. Buchanan, for the plaintiff, applied for a postponement.

Sir H. Juta, K.C., for the defendants, objected, pointing out that the case was set down for the 12th September.

Mr. Buchanan said the postponement would give the plaintiff a chance of not incurring further expense.

De Villiers, C.J., ordered the case to stand over until the 15th November, provided that in the meantime the defendants' costs of that day to be paid by the plaintiff.

Postea (Nov. 15th).

The case of Sheen For v. Lawrence and Co. and others was heard by De Villiers, C.J., without a jury.

Sir H. Juta, K.C., appeared for the defendants. There was no appearance of the plaintiff. Counsel stated that his lordship would recollect that this case and another, brought by Ah Young, had been joined together for hearing, and on the day when the case was called, a postponement in this particular instance was applied for and granted until to-day. He could quite understand, in view of the result of the other case, that there was no appearance to-day. He moved for judgment for the defendants on the claim in convention, and for the defendants (now plaintiffs) in the claim in reconvention. He took it that this was a liquid claim for dam-

ages. The claim in reconvention was that an alleged sale may be declared an undue preference, in terms of section 64 of the Insolvency Ordinance, and also for forfeiture.

De Villiers, C. J., said he was by no means sure that this was a liquid claim, and it seemed to him that the Court should have some evidence of insolvency, and so forth. He knew that the Court had treated ejectment as a liquid demand, but undue preference seemed to him to be on a different footing.

Sir H. Juta having been heard further in support of the procedure under which he was moving the Court,

De Villiers, C.J., said that he could not help feeling that the plaintiff might not have considered this matter of the claim in reconvention. He thought the matter had perhaps better stand over *sine die*.

Sir H. Juta said his clients were not prepared to incur further expense, and he would be prepared to consent to absolution from the instance.

De Villiers, C.J., said that there would be absolution from the instance on the claim in convention, and on the claim in reconvention, plaintiff to pay costs.

[Plaintiff's Attorney: C. Brady. Defendants' Attorneys: Moore and Son.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

STANSFIELD V. STANSFIELD. } 1904.
Oct. 18th.

In this action the plaintiff, Alfred Thos. Jones Stansfield, of Lower Main-road, Observatory, sought a decree of divorce against his wife Weselina Magdalene Stansfield, because of her desertion.

Mr. Rainsford appeared for the applicant.

Mr. Birch, of the Colonial Secretary's Office, proved the marriage.

Alfred Thos. Jones Stansfield stated he was plaintiff in the action, and resided at Lower Main-road, Observatory. He was married to respondent in 1899 at Griquatown. They lived on good terms for some time, after which some unpleasantness occurred, owing to her intimacy with some male friends. In November last, when he returned from business, he found the following letter awaiting him:

"I am going away never to return again. You, whom I trusted once, has driven me to all this. I will go before you disgrace me, as you told me yesterday. You must not think that I am a dog. I am not going to be insulted by you any longer. You call me names which you could never prove. You told

me to take the child and go; so I will. You need not seek me, for I shall never come back. I hope you will keep your house clean, for I am too bad to do so. I tried you for a long time to see if you would not be kinder to me, but all in vain. You treated me worse than a dog. I hate you, and I hate all men. I will never trust a man again. Pay the grocer. That is all. I am going up-country. Good-bye for ever,

"WESSELINA.

"P.S.—I hope you will save a lot of money now. I do not want it."

To the Court: Witness called her no names. He quarrelled with her over money matters. He complained of her extravagance, and her being out late at night.

In examination-in-chief, witness (continuing) stated he had repeatedly asked his wife to return to him, but she refused. She was at present living in Roger-street, Cape Town. There were two children issue of the marriage, one of whom was dead. The other was living with witness.

To the Court: Witness was at present living in lodgings, and had the child there with him. The defendant had no parents living.

The Court ordered the defendant to return to plaintiff on or before November 1, failing which, a decree of divorce would be granted.

Postea (Nov. 14). Rule absolute. Plaintiff to have custody of child, defendant to forfeit all benefits.

LLOYD V. LLOYD.

In this action, John Edward Lloyd, of Cape Town, claimed a decree of restitution of conjugal rights, and failing compliance therewith, divorce from his wife, on the grounds of malicious desertion.

Mr. Bisset appeared for plaintiff.

The plaintiff's declaration stated that he was married to the defendant on the 6th August, 1902, in community of property. On the 15th January last she deserted him.

Mr. Birch, of the Colonial Secretary's Office, proved the marriage.

The plaintiff stated he was married to the defendant on the 16th August, 1902. There was no issue of the marriage. They lived together until January, 1904, when some disagreement rose between them, and she left him. His wife was very fond of the stage, and wanted to go on it. He objected to this, so she left him and went to England. He had repeatedly asked her to return, but she refused to do so. He was willing to receive her back, if she consented.

To the Court: He knew she was going to England. She had £400 of her own. Witness gave it to her as pre-

sents from time to time. She first informed him in June, 1903, that she intended leaving him. She had previous to his marrying her been on the stage in Cape Town.

The defendant was ordered to return to plaintiff on or before the 15th January, failing which a decree of divorce would be granted.

VAN EADEN V. VAN EADEN.

In this action the plaintiff, Johanna van Eaden, sued the defendant, Benjamin Jacobus van Eaden, for judicial separation. There was a claim in reconvention by the husband for restitution of conjugal rights. The parties reside at Van Rhynsdorp.

Mr Gardiner appeared for the applicant, and Mr. Upington appeared for the defendant.

The plaintiff's declaration stated that they were married at Van Rhynsdorp, on the 30th December, 1902. At various times since, her husband had cruelly ill-treated her, and was habitually intemperate.

The defendant's plea denied these statements, and added that his wife had deserted him on the 4th December, 1903, and would not return to him.

In reply to an inquiry from the Court as to whether there was any chance of an amicable agreement being come to between the parties, counsel consulted with their clients.

Mr. Upington said his client was prepared to consent to an order being given for the judicial separation, and the division of the joint estate, if the Court ordered each party to pay their own costs. A point that would, however, require argument by counsel was the question of the costs of a motion for the payment of alimony made by the present plaintiff. He (Mr. Upington) submitted that although his client was unsuccessful in opposing the motion, yet he should not be asked to be out of pocket to that extent.

Mr. Gardiner contended that owing to the obstinacy of the defendants they were compelled to bring the case into court, so he thought they should not be asked to pay the costs now.

Buchanan, J., said he thought the parties had acted very wisely in consenting to an order, as it saved dragging private matters into court. An order would be made for the judicial separation of the parties, and the division of the joint estate. The joint estate was to be valued, and the defendant was to pay out one-half to the plaintiff. Each party to pay their own costs. The amount paid to plaintiff as alimony to be detained by the plaintiff.

HEHIR V. TABLE BAY HARBOUR BOARD Loss of goods—Liability of bailee.

In this action John Hehir, of Cape Town, sued the Table Bay Harbour Board for £155 damages, sustained by plaintiff, through the non-delivery of a case containing wearing apparel entrusted to their care for delivery.

The plaintiff's declaration stated that he was a butcher by trade, and the defendants were the Table Bay Harbour Board. By virtue of the powers conferred on them the defendants landed, cleared, and delivered goods from vessels to consignees. The defendants received from the S.S. Sophocles certain goods, the property of the plaintiff, and it became their duty to deliver them to plaintiff, which they had failed to do. The value of the goods contained in the case was £155 2s. Plaintiff had always been ready and willing to pay the charges for landing and delivery of goods when they were handed over to him.

The defendants' plea admitted the receipt of the goods, and also admitted that it was their duty to deliver the goods. The defendants delivered the case to the Imperial military authorities, at Cape Town, together with other military baggage. They contended that they were in no case liable for value exceeding £100, unless double rates had been paid. The defendants tendered plaintiff £30, which he refused to accept.

Mr. Gardiner appeared for the plaintiff, and Mr. W. P. Schreiner (with him Mr. McGregor) for the defendant.

The plaintiff stated he was at present working for the Cape Town City Council. In 1901 he came to South Africa with one of the Australian contingents. Prior to leaving, he placed the case in a store-room in Sydney. He made a list of the things he packed. He returned to Australia in April, 1902. He lost the original list of goods in the box, but before that he copied the original into a notebook. That was in December, 1902.

Mr. Schreiner objected to the list being put into court, as the box had been lost at that time.

Witness (continuing) said he would swear that the list put in was a correct list of what was in the box. On arriving in South Africa, he directed the agents at Sydney to forward his box, but he never received it. The baggage was not labelled "Military."

Cross-examined by Mr. Schreiner: The case came out in November, 1901, and it was not until November, 1903, that he heard it had been lost. He had communicated with Messrs. Hutton and Co. through his agents at Sydney, and had endeavoured to see them personally before sailing for Australia, but was unable to do so, as the ship sailed somewhat hurriedly. Witness packed three dress suits, for which he claimed £10

each. Witness reduced the amount of his claim by £47, from what it originally was. Witness did not know the case was lost when he copied the list of contents. His case measured 3 by 3 by 5. He denied that it was less.

Heming John Pinock stated he was a member of the firm of Messrs. Hutton and Co., shipping agents. He received a bill of lading for a certain case, but in moving their office it had become mislaid. In claiming against the Harbour Board for the case he claimed £20. He was not sure how that amount was arrived at. It might have been on the way bill, or might have been in accordance with an average, they struck for such cases. He had no authority from plaintiff to make the valuation. He marked it "pro forma." Witness received a list of the goods contained in the case, from plaintiff's attorneys, which he forwarded to the Harbour Board.

Cross-examined by Mr. Schreiner: Witness was inclined to think that the valuation on the way bill was £15. Witness knew that the case contained wearing apparel. Witness would not make representations to the Customs unless they were verified by the way bill. Witness applied to the Customs to admit free of duty "used wearing apparel of no commercial value." The plaintiff's address was given to witness as "Trooper Hehir, 3 M.R." At the time the case arrived, the Docks were in a state of chaos, and witness had two clerks engaged searching out cases. A case that accompanied plaintiffs was found in the following August.

A clerk in the employment of the Customs stated that if a case such as that under dispute went past the gates on a military wagon, it would not be charged on. If a number of new suits were in the case, they would not be allowed in duty free.

Mr. Gardiner closed his case.

For the defence, Joseph Gray Day, manager for Messrs. H. W. Markham and Co., stated he had tried packing clothes for the present case. The trunk (produced) was 4.4 cubic feet. It would be impossible to get what the plaintiff said he had in his box with the box produced. It would require a trunk a little over double the size of the one produced to get all the goods in. Witness valued the goods claimed for by the plaintiff at £145. That was for new goods, and was a very high rate. The quality of the goods claimed for by the plaintiff must have been better than he had ever seen stocked. He had not seen collars at 30s. a dozen, nor shirts at £5 10s. per half dozen.

David McLeod stated he was foreman at the Docks, and in 1901 and 1902 he was stationed at the Loch Jetty Store. A tin trunk, addressed to "Trooper Hehir," arrived in November, 1901, and in the following February was handed

over to the military. He remembered the case, and to the best of his belief, it was not larger than that produced. He entered it as a quarter-ton case, and would not have done so had it been a case 3 x 3 x 5.

Alexander Forsyth Girdwood, Chief Claims Clerk to the Harbour Board, stated he had the inquiry with regard to the case in question in hand. It was placed in the Loch Jetty Store, and remained there until August 11, when it was removed to the "Dump." The first inquiry about the case was in July, 1903. The military authorities claimed all the baggage addressed to them. The correspondence, with regard to this, had been put into Court. Mr. Pinock sent in a claim for £20. The claim for charges and dock dues was three-eighth per cent. of the *ad valorem* value, and 1s. 2d. was paid for the box. He had seen Mr. Day packing the articles into the case produced, and agreed with his evidence. If the case had been 3 x 3 x 5, it would have ranked as a ton and a quarter, whereas it was only tabulated as quarter of a ton.

Counsel then argued on the facts.

Buchanan, J.: The plaintiff in this case enrolled himself as a trooper in one of the Australian contingents, and left Australia for this Colony in 1901. Before leaving Sydney, plaintiff himself packed his wearing apparel in a case, which he locked, and delivered to Messrs. Heaton and Co., forwarding agents, for the purpose of being sent to Cape Town. The plaintiff came to South Africa, and as he was engaged in the field the whole time he did not need his clothes then. On his way home with his detachment while in Cape Town he endeavoured to see Messrs. Hutton and Co., to whom the goods had been consigned by Heaton and Co., but being under military orders, and being here only a few hours, he failed to discover their whereabouts. On returning to Australia, his agents wrote to Messrs. Hutton and Co., asking them to send back the box, but the plaintiff shortly afterwards countermanded that order. The plaintiff then left Sydney, and arrived in Natal. He was then for the first time informed by Hutton and Co. that his box was mislaid. Hutton and Co. said that, although they had paid the dock dues, and had searched for the box, they were unable to find it. The Harbour Board admitted the receipt of the box, and that it was their duty to hand it over to the plaintiff, but they state that they handed it over to the military authorities. They said this to show what had become of the goods, and did not to set it up as a defence. They offered the plaintiff £30 as compensation for his loss, which he estimated at £155, or thereabouts, though he has now reduced his valuation to a little over

£130. The question the Court has to decide is the value of the goods. Mr. Day has given valuable evidence on this point. In the first place he has gone over the list, and states that if the goods were new and of the best quality, they would be worth £143. Hutton and Co., without authority from plaintiff, and not knowing the contents of the box, declared the value originally at £15. Looking at all the evidence in the case, and the want of authority from the plaintiff to Hutton and Co., I do not think that precluded plaintiff from claiming the full value of the goods. It is true Hutton and Co. paid dock dues on their valuation, but the under payment of dock charges does not affect the admitted duty on the defendants duly to deliver the box. The plaintiff says the size of the box in which he packed the goods was 3 x 3 x 5, and a box of that size would measure more than a ton, whereas the plaintiff's box is entered on the ship's papers as measuring 9 cubic feet. But here again Mr. Day's evidence is most useful. He says that he found that by actual experiment a box of less than 9 cubic feet would hold all the goods enumerated in plaintiff's list. From my experience of such cases I am not inclined to put too great faith in the value which a person estimates his possessions at when lost under such circumstances. But Mr. Day has said that the goods could be replaced new at £143, and I think that in awarding the plaintiff one-third of that sum, I will be giving a fair compensation for the loss of his second-hand clothing. I paid careful attention to the way in which plaintiff gave his evidence, and I see no reason to discredit the evidence given by him. There will be judgment for plaintiff for £50, and costs.

[Plaintiff's Attorneys: Fairbridge, Ardenne and Lawton. Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Ex parte CREDITORS of J. 1904.
GORDON AND CO. 1 Oct. 19th.

Mr. W. P. Buchanan moved as a matter of urgency for the appointment of a provisional trustee in the insolvent

estate of A. Gordon and Co., Cape Town.

The petition of the creditors set out that the estate of the said insolvent principally consisted of: (1) general merchandise, and more particularly cycling requisites, portions of which were of a perishable nature, and must be disposed of or attended to at once; and (2) outstanding debts of a considerable amount, which it would be to the interest of creditors to collect at once. The petitioners prayed that Mr. Alfred Newton Foot be appointed provisional trustee, with power to carry on the business and collect outstandings.

Order granted as prayed.

PARRY V. WRIGHT.

This was an action for refund of payments made, Mr. W. P. Buchanan being for the plaintiff and Mr. Russell for the defendant.

Mr. Russell read an affidavit by the defendant's town attorneys, stating that they had been unable to bring the witnesses to town up to the present and that they were wholly unprepared to go on with the case under the circumstances. Counsel accordingly applied for a postponement.

Mr. Buchanan opposed the application, and submitted that the affidavit disclosed no sufficient ground for a postponement.

[De Villiers, C.J.: There is no ground that I can see for a postponement. You had better go on with the case.]

The declaration set out that the plaintiff was a broker, carrying on business in Cape Town, and the defendant was a hotel proprietor, carrying on business at the Colesberg Hotel, Colesberg. In November, 1903, defendant engaged plaintiff to act for him in taking over the licence and goodwill of the hotel and financing purchase, so as to enable the defendant to become proprietor of the said hotel as a going concern. The defendant became proprietor through the negotiations and instrumentality of the plaintiff. Plaintiff had made sundry payments for and on behalf of the said defendant, and the financing of the hotel, and had received certain payments for and on behalf of the defendant. He annexed an account showing that the defendant was indebted to him in the sum of £271 17s. 11d., which amount he claimed.

The defendant, in his plea, said that the plaintiff entered into partnership with him in the taking over of the Colesberg Hotel, to the extent of £250. He disputed an item of £3, and made tender of the balance of £18 17s. 11d. in full settlement of the plaintiff's claim.

The plaintiff, in replication, denied that he was indebted to the defendant in £250, or any other sum.

Mr. Russell explained that he was only briefed for the application for postponement.

De Villiers, C.J., said he took it, then, that the case was going by default.

Mr. Russell then withdrew from the case.

Evidence was called by Mr. Buchanan.

Edwin Parry, broker, carrying on business in Cape Town, said that the defendant engaged him in November to take over the hotel and finance it for him. He made complete arrangements for the defendant to go into the hotel. He had sent the defendant an account for £271 18s. 11d. The defendant objected to an item of £3 which witness had had to pay by way of costs as surety for the defendant. Witness denied that he owed the defendant a penny. The vendor of the hotel owed witness £250; Mr. Wright was short of that amount. Instead of taking that sum from the vendor, he let Mr. Wright have it, as his share of the partnership. Lippett, the outgoing tenant, gave Wright a credit of £250 in witness's favour. Witness, in consideration, got a quarter-share in the hotel from the defendant. If the defendant had had sufficient money to go into the hotel, witness would have received cash, instead of allowing it to go in reduction of the purchase price. The purchase price of the hotel was £1,900; Lippett was paid £450, and the balance of £1,200 was paid to Liebermann, Belstead and Co., with whom Lippett had a bond. He was willing to waive his claim as to the disputed item of £3.

Frederick B. Andrews, attorney, Cape Town, gave evidence as to the sale of the hotel and the deed of partnership between plaintiff and defendant. Witness was Lippett's attorney in the transaction.

De Villiers, C.J., gave judgment for the plaintiff for £263 17s. 11d., with costs, on payment of which sum the defendant to be entitled to obtain possession of the certificate of 500 shares from J. D. Logan and Co., Ltd., with absolution from the instance on the defendant's claim in reconvention, the defendant to pay the costs.

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

GENERAL MOTIONS.

KROON V. KROON. { 1904
{ Oct. 19th.

Mr. Bisset applied on behalf of Johanna Christina Kroon for a decree of restitution of conjugal rights, and failing compliance divorce against her

husband, on the ground of malicious desertion.

The plaintiff stated she was married to the defendant at Graaff-Reinet, on the 6th August, 1894. They lived together until January, 1901, when defendant left her. He was at present residing at Graaff-Reinet. They had not lived happily together since 1898, because defendant was of intemperate habits. In January, 1901, he joined the D.M.T. She had seen him since, but had not lived with him. He had refused to return to her. When they separated they were living at Graaff-Reinet, and he left her on the pretence of looking for work. There was one child issue of the marriage. Witness was married by ante-nuptial contract. The only property she had was the furniture. Witness at present resided at the Paarl.

Buchanan, J., granted a decree of restitution. Defendant to return on or before January 1, failing which a rule nisi would be issued, calling on defendant to show cause why a decree of divorce should not be granted.

H LILIE V. HILLIER.

In this action the plaintiff, Amelia Sarah Jane Hillier, sought a decree of restitution of conjugal rights, and failing compliance divorce against her husband, William H. J. Hillier, an ex-seaman, on the grounds of wilful desertion.

Mr. Van Zyl appeared for the applicant.

Mr. Birch produced the marriage register.

The plaintiff stated that she was married to defendant at Simon's Town, on the 29th April, 1903. Defendant was a sailor, and returned to his ship the same evening. His ship remained in Simon's Bay until May 9. He then went on a cruise, and returned in March, 1904. In the meantime, he wrote to her. She replied, but did not hear from him again. She wrote to him when he returned to Simon's Town, and asked him to meet her. They met, and he told her he was not going to return to her again, and that she might return to England and marry whom she pleased. She had not seen him since, but she knew he went to Pretoria. There were no children of the marriage. Defendant told her he had a large house in England, but she did not want any share of that. All she wanted was the costs of the case.

To the Court: When witness married, the defendant was on board ship, and witness was in service. They remained so. Defendant had left the Navy, and was a prison warder in Johannesburg now.

A decree of restitution was granted, the defendant to return to plaintiff on or before January 1.

Postea, February 16, 1905.

The decree was made absolute.

SCHREIBER V. SCHREIBER.

In this action, Hermina Gertrude Schreiber, of Claremont, sought a decree of restitution of conjugal rights, and in default of compliance of divorce against her husband, Fritz R. Schreiber, on the grounds of malicious desertion.

Mr. Russell, who appeared for plaintiff, said the defendant was sued by edictal citation.

Mr. Birch produced the marriage register, and proved the marriage.

The plaintiff stated she was married to defendant on the 21st September, 1901, in the German Lutheran Church. Witness was born in the Colony, and the defendant came out from Germany in 1899. He was a brewer at Ohlsson's Brewery. He declared his intention of settling down, and purchased some property with that intention. About nine months after they were married defendant suddenly left her. He wrote to her on the 28th July, 1903, complaining that he had not received a reply to previous letters. She had not received any before that. He told her in the letter to sell certain property, and follow him to St. Louis, U.S.A. She did not do so. In May, 1904, he wrote informing her that he had received a divorce in America from her, and enclosed a cutting from a newspaper containing the report. She received no notification of the proceedings.

Mr. Russell: The witness says she received no notice of these proceedings. It seems an easy thing to get a divorce in St. Louis.

Witness (continuing), said there was about £200 worth of property on the Flats belonging to defendant. Witness's father had paid the balance of the amount due, and he would pay the transfer fees if she could get her share of it. Witness was willing to go back to her husband if he would receive her.

To the Court: Witness disagreed with defendant from the start. He was very funny sometimes. He had a violent temper.

A decree of restitution was granted, the defendant to return to plaintiff on or before March 1.

HEYDENRYCH V. DUNMAN.

This was an action to recover the amount of £270, due on a promissory note.

Mr. W. P. Schreiner, K.C. (with him Mr. Van Zyl), appeared for plaintiff, and Mr. M. de Villiers for defendant.

Mr. De Villiers said that prior to proceeding with the case, he wished to mention a matter that would materially affect his case. A very important witness for the defence, Mr. Stephan, could not be found. A summons had been issued on the 30th September, but had not yet been served. He would suggest that the Court proceed to hear all the

other witnesses in the case, and if it was deemed necessary to take Mr. Stephan's evidence, that the case should be adjourned until it was possible to procure him. Mr. Stephan would have to undergo his trial at the next Criminal Sessions, and therefore in all probability they would be able to find him.

Mr. Schreiner said the action was one in which the plaintiff was suing provisionally, on a promissory note, the defendant, who resided at Muizenberg. The note was for £270, payable in a month, and was dated December 13, 1902. The defence that was raised to the action when the case was last before the Court was two-fold. The first was that the money had been paid at the office of Mr. Stephan, who was plaintiff's agent, and the other, which was not very consistent, was that the money had been paid to Stephan, and that the plaintiff had agreed to loan it to him. Under those circumstances, one would have anticipated that both those defences would be raised on the plea in the present action; but the sole defence raised was that the money was paid to the agent of Heydenrych—Mr. Stephan. That defence would certainly require the evidence of Stephan to support it. The making of the note was admitted, and the onus, as was usual in such cases, rested on the defendant to prove that the money had been paid. Therefore, if the defendant liked to go on with the case in the absence of Stephan, she might do so; but if she failed in her defence, and wanted the case heard piecemeal, he would have to oppose the application for an adjournment at that stage.

Buchanan, J. inquired when Mr. Stephan was likely to be forthcoming.

Mr. De Villiers said he could not answer that question. They had done their best to find him, but had failed.

Buchanan, J., said he thought it would be as well to postpone the case to enable Stephan to be present.

Mr. Schreiner said it seemed remarkably strange that Stephan, who at the last hearing of the case was in hospital, undergoing an operation which deprived him of one leg, should now have so mysteriously disappeared that it was impossible to find him.

Buchanan, J. suggested that the trial be set down for November 8, which was a few days before the Criminal Sessions at which it would be necessary for Stephan to be present.

Mr. Schreiner asked for the costs of the day.

Buchanan, J. said that if the defence was a good one, and won the case, then the plaintiffs should pay the costs; and if it was not, plaintiff would receive an order for all costs.

Mr. Schreiner said that point had been raised again and again, and quoted instances to prove that costs had always

been awarded to parties in actions who had opposed the adjournment.

Buchanan, J. granted the costs, and set the case down for hearing on the 8th November.

NORTON V. BOSMAN, POWIS AND CO.

Mr. Schreiner said he had only just been engaged with Sir Henry Juta to appear in this case, which was an action for the declaration of rights, and as he had not had time to peruse his brief, he would like to have the case adjourned until November 9, to enable him to do so.

Mr. Roux, who appeared on the other side with Mr. Burton, consented, but asked for costs.

Buchanan, J., said it was not usual to grant costs when a case was adjourned for the convenience of counsel.

The case was accordingly set down for November 9.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PROVISIONAL ROLL.

BORSEN V. DAY. { 1901,
Oct. 20th.

Mr. W. P. Buchanan said that the parties had not yet come to an arrangement. The matter had been standing over pending certain transfer going through. A provisional order against the defendant had now been standing over for three and a half months. The whole matter could be simplified if the company who had purchased the property from the defendant would pay a sufficient sum to Silberbauer, Wahl and Fuller to cover defendant's indebtedness to the plaintiff.

Mr. Gardiner (who had previously appeared for the plaintiff) said that he had not been briefed to appear that day. He suggested that the matter should stand over until two o'clock.

[De Villiers, C.J.: Very well, that is the last adjournment. The defendant's attorneys ought to have been ready, because this is the fifth time the case has been before the Court.]

The matter was again mentioned after the adjournment, when it appeared that the defendant had no proposal to make.

The provisional order was, therefore, made final.

At a still later stage.

Mr. Gardiner said that he was now prepared to produce affidavits containing an offer by the defendant, and explaining why no appearance was entered at 2 o'clock.

[De Villiers, C.J.: I think this is really trifling with the Court.]

Mr. Gardiner said that he had affidavits which would explain the position of affairs.

De Villiers, C.J., consented to hear the affidavit in explanation of the defendant's non-appearance at 2 o'clock.

Mr. Gardiner read an affidavit made by defendant's attorney, in which he stated that no time had been lost in bringing the case before the Court during the morning, but he arrived three minutes too late to brief the case.

Mr. Buchanan said he had instructions not to consent to the reopening of the case.

De Villiers, C.J., said every consideration had been shown to the defendant, and she had not availed herself thereof. During the morning, when the case came before the Court, there appeared nobody for the defendant. After a time, defendant's attorney rushed into court and said a few words to counsel, and it was decided to hear the case at 2 o'clock. But at that time there was no appearance. An order had been made by the Court for final sequestration, and if Mr. Buchanan raised objections to the present application, he did not see how they could admit it. The order would stand.

VAN DER BYL AND OTHERS V. ABEL.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

VANNER V. BRIDGES.

Mr. Van Zyl moved for provisional sentence, on certain conditions of sale, for £228, with interest, less £74 10s., paid on account.

Order granted.

LIPSCHITZ V. FOURIE, SEN. AND JUN. AND OTHERS.

Mr. Close moved for provisional sentence for £391 2s. 6d., upon a promissory note.

Order granted.

WEGE V. LATEGAN

Mr. Percy Jones moved for provisional sentence for £60 on a promissory note, together with interest and costs.

Order granted.

ROOS V. SAACHS AND HOFFMANN.

Mr. Van Zyl moved for provisional sentence for £500 on a mortgage bond, less £20 paid on account, with interest and costs of suit.
Order granted.

S.A. BREWERIES LTD V. HARDING.

Mr. Gardiner said that in this matter he had previously asked that the summons should be amended, but the matter was ordered to stand over pending an affidavit being sworn to the effect that the defendant's correct name was William Robert Harding and not Robert William Harding, as stated in the summons. He now presented an affidavit and moved for the final adjudication of the estate of William Robert Harding.
Order granted accordingly.

PEDERSEN V. HEMPEL.

Mr. Lewis moved for provisional sentence for £1,200 on a mortgage bond, together with interest, the bond having become due by reason of the non-payment of interest; also for the property specially hypothecated to be declared executable.
Order granted.

SILBERBAUER AND WILKIE V. JONES.

Mr. Percy Jones moved for provisional sentence for £3,000 on a mortgage bond, with interest, the bond having become due by reason of the non-payment of interest; also for the property specially hypothecated to the declared executable.
Order granted.

PHILPOTT V. BRIDGES.

Mr. Percy Jones moved for provisional sentence on a mortgage bond for £700, together with interest, the bond having become due by reason of the non-payment of interest; also for the property specially hypothecated to be declared executable.
Order granted.

FRIEDMAN BROS. V. MORRISON.

Mr. Gardiner said that this matter was standing over. The defendant had now deposited the sum of £277 with the Registrar, and he asked for discharge of provisional order of sequestration. He also asked for costs.
Mr. W. P. Buchanan opposed the application for costs.
Provisional order was discharged, question of costs to stand over,

Counsel having been heard further on the question of costs.

De Villiers, C.J., said the plaintiff was entitled to costs.

ILLIQUID ROLL.**GINSBURG V. HOFFMAN AND (1904.
SAACKS. (Oct. 29th.**

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £100, being amount paid for and on behalf of defendants, with interest *a tempore morae* and costs.
Order granted.

PURCELL AND CO. V. HARCK.

Mr. Percy Jones moved for judgment, under Rule 329d, for £85 16s. 5d., goods sold and delivered, and work and labour done.
Order granted.

MOTRODEN V. HASSEIM.

Mr. Roux moved for judgment for £31 cash lent, and £11 cash paid.
Order granted.

**HOLTENHOFF V. GINSBERG AND
HOFFMANN.**

Dr. Greer moved for judgment, under Rule 329d, for £115 19s. 6d., balance of purchase price of certain ground, with interest *a tempore morae* and costs.
Order granted.

GENERAL MOTIONS.**COHOON V. COHOON. { 1904.
{ Oct. 29th.**

Judicial separation—Divorce—
Postponement—Practice.

Plaintiff had instituted an action for judicial separation, and now asked that the case should be postponed, in order to enable her to apply for divorce.

Held, that plaintiff must either apply for an amendment of the original rule nisi, calling upon defendant to show cause or else commence a new action ab initio.

Mr. McGregor (for the plaintiff) applied for an adjournment of this case

for a fortnight. He stated that a *rule nisi* had been granted, calling upon George Cohoon to return to his wife, failing which to show cause why a judicial separation should not be granted, and he be ordered to pay £5 a month towards his wife's support. Since the trial for desertion the plaintiff wished that instead of a judicial separation there should be a decree of divorce, and Mr. McGregor asked the indulgence of the Court to postpone the case for a fortnight in order to communicate with Mrs. Cohoon, who resides in East London.

[De Villiers, C.J.: Would you not have to proceed afresh?]

Mr. McGregor said that in a fortnight's time they would be in a position to ask the Court for an order calling upon the defendant to show cause why a decree of divorce should not be granted.

[De Villiers, C.J.: Why not apply now for an amendment of the rule at once?]

We would rather that the matter stand over for a fortnight.

[De Villiers, C.J.: Very well, then you will have to start afresh.]

Well, my lord, perhaps we had better have an amendment of the order now.

The Court then granted an amendment of the order calling upon the defendant to show cause why a decree of divorce should not be granted, rule to be published in the same manner as previously.

Ex parte THE CONSISTORY OF THE DORDRECHT DUTCH REFORMED CHURCH.

Notices in English and Dutch papers.

Where the Court orders a notice to be published in an English and a Dutch newspaper, it must in each case be published in the respective languages of those papers.

Mr. J. E. R. de Villiers moved for a rule *nisi* under the Derelict Lands Act to be made absolute. He said he found that publication had been given in two bilingual newspapers, but in each instance the order had appeared in the English language. The order of the Court was that the rule should be published in an English and Dutch newspaper, and the question was whether the publication which had been given was a sufficient compliance with the directions of the Court.

De Villiers, C.J., said he understood that when publication was ordered in a Dutch newspaper, the notice would be printed in Dutch.

Mr. De Villiers said his attorney informed him that it was usual for notices

to appear in the English language, and that there was not the necessary machinery for the publication of the notices in Dutch.

[D Villiers, C.J.: Do you mean that the press cannot print in Dutch?]

There is no machinery for the authentic translation of the notice when it leaves the Registrar.

[De Villiers, C.J.: Oh, I see; that machinery. I should think that the interpreter of the Supreme Court could be utilised for that purpose.]

Mr. De Villiers said that he was told by the Registrar, and the Assistant Registrar, that very frequently orders of the Court were published in "Ons Land," and other Dutch newspapers in the English language.

[De Villiers, C.J.: That may be, but the point is, are they never published in Dutch?]

In some cases, where the attorney makes his own translation.

De Villiers, C.J., said that in a small place like Dordrecht it was probable that the notice, though in English, would have come to the knowledge of all concerned, and the application would in this instance be granted. It should be understood for the future, however, that if a notice were ordered to be published in a Dutch newspaper it was to appear in the language of the paper.

McKILLOP V. McKILLOP.

Mr. Van Zyl moved, as a matter of urgency, for an order declaring the respondent (James Henry McKillop, of Wynberg), a prodigal, placing him under curatorship, and appointing Arthur Kilwardine Wolff as curator of his person. Mrs. McKillop, in her petition, said that she was married to the respondent in community of property in Cape Town, in 1893. There had been one child of the marriage, and petitioner also had children by her former marriage. She brought certain property to the marriage, which had been transferred to the respondent's name. For about four years they lived happily together, but afterwards respondent gave way to intemperate habits, and he had now reached such a stage that he was continually in a state of intoxication, going to public-houses, and being invariably carried home late at night hopelessly drunk. The property had been mortgaged, respondent spent the rents upon drink, and his mind was becoming deranged. It was extremely difficult for petitioner to make ends meet. She had reason to believe that he intended to sell the property unless restrained by the Court.

De Villiers, C.J., said that the Court would not grant an order at present, but a rule would be issued calling upon the respondent to show cause on Thurs-

day next why an order should not be made as prayed, and why Mr. Wolff should not be appointed curator, the rule to operate as an interdict in the meantime restraining the respondent from alienating any portion of the joint property.

Postea. February 11.

Buchanan, J. (in chambers) ordered notice to be given to the curator.

Ex parte THE ZUID AFRIKAANSCH
WEESHUIS.

Mr. Burton moved for a rule *nisi*, under the Derelict Lands Act, to be made absolute.

Order granted.

Ex parte DURAND.

Mr. Van Zyl moved for an order authorising the transfer of certain land in the district of Elliot, sold by public auction, to the petitioner, who was executor in the estate.

Order granted.

Ex parte FOURIE AND OTHERS.

Mr. Russell moved for an order authorising the transfer of certain property in the division of Victoria West.

Order granted.

HARTZ V. GARLICK.

Mr. Gardiner moved for an order compelling the plaintiff to give security for costs and charges that may be incurred by the defendant (John Garlick), in an action instituted against him by respondent, the ground of the application being that the respondent was no longer domiciled in this colony.

Mr. Close appeared for the respondent, who said that her domicile was in the division of Carnarvon, and that she and her husband only went to Johannesburg temporarily on account of the drought.

De Villiers, C.J.: It is quite clear that the respondent is not domiciled in this country. An order must be made requiring the plaintiff to give security to the satisfaction of the Registrar of the Supreme Court before being allowed to take any further steps in the action, the plaintiff to pay costs of this application.

Ex parte COTTERELL.

Mr. Gardiner moved for the appointment of a trustee in the insolvent estate of James and Martin Kennedy, of the district of Elliot. Petitioner was a creditor in the insolvent estate, and asked that Mr. Johannes Harling, an

attorney of this Court, be appointed permanent trustee.

De Villiers, C.J., said he had no power to appoint a permanent trustee, but he could appoint a provisional trustee, with power to administer. The permanent trustee could only be elected by the creditors. An order would be granted, appointing Mr. Harling as provisional trustee, with power to administer and liquidate the estate, costs to come out of the estate.

SHAW V. SHAW.

Mr. Upington moved for an order calling upon W. B. Shaw, jun., to pay to the applicant, his wife, a sum of money to enable her to defend an action for divorce, which the plaintiff was bringing against her on the ground of adultery, at Somerset Strand, and also to pay her a certain sum as alimony. The parties were married at the Metropolitan Church, Cape Town, in 1897. Applicant said she denied the charge of adultery, and had a complete answer.

Mr. Rainsford read replying affidavits by the respondent and his father. The respondent said he was absolutely without funds.

Mr. Upington read an answering affidavit by the applicant, who said that the plaintiff had lost his situation as Town Clerk at Somerset Strand through his own fault. She denied that she had insisted on living at an hotel, when it would have been cheaper to live in a private house. She denied that her husband was without funds.

De Villiers, C.J., said that there would be no order on plaintiff undertaking to proceed to trial this term, with leave to the defendant, with the consent of the plaintiff, to defend the action *in forma pauperis*.

Ex parte FULLER.

Mr. Upington moved for an order authorising the sale of certain property. He said this matter had been before the Court on a previous occasion. It was an application to sell a certain farm. The matter had been allowed to stand over to ascertain the rents derived from the farms, and also as to whether the sons were willing to purchase them.

De Villiers, C.J., suggested that, as Mr. Justice Hopley had heard the former application, he should also hear this.

This course was agreed to.

DAVIDS V. ESTATE DAVIDS.

Mr. Roux applied for leave to sue *in forma pauperis*.

The application was granted, Mr. Roux consenting to act as counsel.

NANGLE V. CROUS.

Mr. W. P. Buchanan moved for an order compelling respondent to sign certain documents. He said that at the previous hearing of this action an order was made that a rule *nisi* issue, calling upon the respondent and the Mutual Life Assurance Co., of New York, to show cause why the surrender value of a certain policy of assurance, issued by the company on the life of the respondent, should not be declared executable, in satisfaction of a certain judgment obtained by applicant against respondent in the court of Resident Magistrate for Komgha, on the 15th July last, and further, why the applicant, as holder and concessionary of the policy, should not be authorised to sign the necessary document for procuring the surrender value from the assurance company, and to account to respondent for any surplus after deducting the amount of the judgment, with interest and costs. The present application was to move that the rule *nisi* be made absolute.

The application was granted.

Ex parte **CERTAIN SHAREHOLDERS IN THE BUFFALO SUPPLY CO.**

Mr. Burton moved for the appointment of an official liquidator. He said the gentleman who had previously been appointed by the Court refused to act, as the remuneration was too small. Mr. John Powell was suggested as a suitable person. A Mr. Fleming, who was a large creditor, also wished to be appointed.

The application was granted.

Ex parte **SAFIEDIEN.**

Mr. Gutsche moved for leave to raise money on mortgage.

The order was granted in terms of the Master's report.

Ex parte **VAN DER MERWE.**

Mr. Roux moved for an order confirming the sale of certain property. He said that when the case was previously before the Court, it was stated that the property concerned had not realised its full value. He now submitted affidavits stating that the amount given was the full value.

The application was granted.

ESTATE BLACK V. ALLIE AND OTHERS.

Mr. W. P. Buchanan (with him Mr. D. Buchanan) applied for an order authorising the execution of a certain judgment.

Mr. Gardiner (with him Mr. Roux) opposed the motion.

Mr. Buchanan read an affidavit made by the plaintiff's attorney, in which he stated that on the 1st September, judgment was obtained against defendant by plaintiff for the sum of £62 and costs. On the 14th September they gave notice of appeal, and they were required to provide security by the 15th September. On the 19th September deponent met defendant's attorney, who told him that the defendants were unable to find the security required.

An affidavit made by Sheik Allie, one of the respondents, stated they had property valued at £1,500, but on which they could not realise immediately, and if the rule was now granted, they would not be able to meet the claims of their other creditors.

The rule was made absolute.

WALLWORK V. ORANGE RIVER IRRIGATION CO.

Mr. Sutton applied for an order winding up the said company. The company was formed in Cape Town, and petitioner was secretary to it, but it had ceased work for some time now. The company was unable to pay its debts. He asked to have Mr. G. W. Steytler appointed liquidator, with full powers.

The application was granted.

Ex parte **WILSON.**

Mr. Sutton applied for leave to mortgage certain property. The application was to raise a certain sum of money on property in which a minor was interested. The Master reported favourably, but suggested that not more than £500 be raised.

The application was granted, in terms of the Master's report.

MZUBELO AND OTHERS V. NDABA AND ANOTHER.

Mr. Upington moved for the amendment of a certain record. He said this was an application for the substitution in pleadings of the name of Mzubelo, trustee to one of the heirs, in a forthcoming action.

The application was granted.

Ex parte **ALBERTYN.**

Mr. Upington moved for the amendment of a certain transfer.

The petitioner's affidavit stated that she was the executrix testamentary in the estate of her late husband, Hendrik

Albertyn. On the 4th February, 1873, one Andries Phillipus Joane transferred one-half undivided part or share of and in a certain piece of freehold, and a piece of perpetual quitrent land with the buildings thereon, called Beckers Kraal, since named La Bagatelle, and now named Loch Erin, situate in the Cape Division in the Downs to the eastward of the Sea Cow Valley, as also another piece of perpetual quitrent land situate as above, being part of the perpetual quitrent granted to William Dickson on the 1st September, 1834; measuring four morgen of freehold and 471 morgen 316 square roods of perpetual quitrent land in undivided shares to Christiaan Lodewyk, Hendrik Andries Geldenhuys, Willem John Murray Kirsten, and the late Albertyn, each obtaining one eighth undivided share in the farm. On the 4th February, 1873, the estate of the widow of the late George Higgs transferred the other half undivided part or share of, and in the property in undivided shares to Christiaan Lodewyk, Hendrik Andries Geldenhuys, Christian Andries Bruyns, and Hendrik Albertyn. On the 4th February, 1873, Christiaan Andries Bruyns transferred his one-eighth undivided in the property to Willem John Murray Kirsten. On the 14th April, 1874, Willem John Murray sold to Christiaan Lodewyk, Hendrik Geldenhuys, and the late Hendrik Albertyn, his one-fourth undivided part or share in the property. A deed of transfer was passed on the 27th February, 1875, by Willem John Murray Kirsten, whereby one one-eighth part or share was transferred. Christiaan Lodewyk, Hendrik A. Geldenhuys, and Hendrik Albertyn received one-twenty-fourth share in the farm, instead of one-twelfth. Owing to the error, Christiaan Lodewyk, Hendrik A. Geldenhuys, and Hendrik Albertyn each only obtained seven twenty-fourths share, thus leaving Willem John Murray Kirsten in possession of one-eighth share in the farm. On the 9th August, 1886, Christiaan Lodewyk, and Hendrik A. Geldenhuys each transferred one-third share to the late Hendrik Albertyn. The petitioner asked the Court to authorise the Registrar of Deeds to amend the deed of transfer of the 27th February, 1875, so as to read one-fourth part or share in the farm Loch.

The Court made an order, calling upon all concerned to show cause on this day fortnight why the transfer of two twenty-fourths share transferred by two transfers of the 9th August, shall not be declared invalid, and the estate of Kirsten to show cause why transfer of the one-eighth share still registered in the name of Kirsten shall not be passed to petitioner.

Postea (November 14th). The Rule was made absolute.

Ex parte VAN DER MERWE.

Mr. P. Jones moved for leave to raise money on mortgage. The application was before the Court on a previous occasion, when, owing to the Master's report not being favourable, the matter was postponed. The Master now reported favourably.

The application was granted.

Ex parte ENGELBRECHT.

Dr. Greer moved for an order calling a special meeting in a certain insolvent estate. The petitioner had been appointed executrix testamentary to the estate of her late husband. By an order of the Supreme Court on the 14th March, 1899, the surviving trustee of the insolvent estate of Jacques Jean Henri Smuts was ordered to pass transfer to petitioner, and to certain other persons of certain nine fifty-sixths part in the farms Paleisheuvel and Ratelrug, situate in Clanwilliam. Such transfer had not been passed. Emile Henri van Noorden, who, at the date of the order, was surviving trustee, had since died. Petitioner was desirous that a new trustee should be appointed for the purpose of effecting transfer in terms of the order of Court, wherefore she prayed that the Court order the Master to call a special meeting of creditors of Jacques Jean Henri Smuts for the purpose of electing a trustee to the estate.

The application was granted.

Ex parte LE ROUX.

Mr. W. P. Buchanan moved for leave to mortgage certain property in the division of Robertson belonging to the joint estate of the deceased wife of applicant and himself. The petitioner had filed a liquidation account, but had failed to bring up debts of the joint estate amounting to £1,651. The total amount of the liability was stated to be £2,305. It appeared that the Master reported in favour of granting the application up to a certain amount (£972), but counsel said that this was insufficient, though he waived certain small items. It seemed that there was already a bond on the property to the amount of £450. The Master reported in favour of an order being given in terms of prayer (c), enabling the petitioner to mortgage one-half of the property, but limiting the amount to £972.

Order granted in terms of Master's report, adding, however, £250 for engine and pump, to be part of the farm fixtures.

Ex parte FALKNER.

Mr. Howel Jones moved for an order authorising the Master to pay certain money for the maintenance and education of a minor.

Order granted.

Ex parte MAKRAI.

Mr. Gutsche moved, on behalf of the petitioner, a Hungarian subject, for an amendment of certain transfer, altering his name from Theophilus Makrai to Teofil Makrai, and also for the amendment of the register in the Debt Registry.

Order granted as prayed, subject to production of consent papers of the executors of the Hon. C. T. Smith.

Ex parte VAN EEDEN.

Mr. Close moved for leave to sell certain property.

Order granted.

Ex parte BOYD AND WIFE.

Mr. W. P. Buchanan moved for leave to execute an ante-nuptial contract which had not been reduced to writing previous to the marriage.

De Villiers, C.J., said that an order would be given similar to those in the Purchase case and Woodman case.

Ex parte DOUGLASS.

Mr. W. P. Buchanan moved for an order authorising the registration of the grosse of a certain ante-nuptial contract.

Order granted.

LOTTER V. BOTHA.

Mr. Van Zyl moved for a certain award of the arbitrator to be made a rule of Court.

[De Villiers, C.J.: Was the arbitration under the Act of 1898?]

Yes, my lord.

[De Villiers, C.J.: I don't see that Act mentioned in the papers.]

I think it would fall as a matter of course under that Act. Mr. Van Zyl, in reply to his lordship, said that the only point was whether the appointment by the plaintiff of Mr. Hobson as sole arbitrator was valid, in default of the appearance of the arbitrator appointed by the respondent. He understood that that was the point taken by the respondent in the letter that he had sent to the Court.

Order granted.

Ex parte WRIGHT AND ANOTHER.

Mr. Van Zyl moved, on behalf of the executors testamentary in the estate of the late William Wright for an order authorising transfer of certain property.

Order granted.

VAN DRIEL V. VENTER AND NIEBERG.

This was an application for leave to sue in *forma pauperis*. There was no appearance by counsel for respondent.

De Villiers, C.J., asked Mr. Advocate D. Buchanan, who appeared for the applicant, whether he would be prepared to take the reference?

Mr. Advocate Buchanan acquiesced.

Order granted accordingly.

Ex parte SMITH AND ANOTHER.

Mr. Van Zyl moved, on behalf of petitioners, who are attorneys of this court, practising at Indwe, for the appointment of trustees in an insolvent estate in the division of Elliott. They suggested the appointment of themselves as trustees, or, in the alternative, the appointment of a provisional trustee.

Order granted, appointing Mr. Philipson as provisional trustee with power to administer and liquidate, costs to come out of the estate.

Ex parte GOLDSCHMIDT.

Mr. W. P. Buchanan moved, on behalf of the petitioner, who resides at Queen's Town, for the removal of one Nicholas Jegels from executorship of a certain estate. The whereabouts of Jegels were unknown, and it was necessary to pass transfer of the property.

Order granted as prayed.

Ex parte SCHOLTZ.

Mr. Sutton moved for an order appointing petitioner trustee in a certain insolvent estate.

De Villiers, C.J., said there seemed to be some likelihood of the creditors coming to an election. The proper course would be to order another meeting to be called for election of trustees.

Order granted, directing that a further meeting of creditors be called for the purpose of electing a trustee.

MAXEY V. MAXEY.

Payment by husband to enable wife to bring action for surgical expenses—Alimony.

Mr. Gardiner moved, on behalf of Henrietta Alexandra Maxey, for an order

requiring the respondent to pay a certain sum of money, at the discretion of the Court, to enable applicant to bring an action for expenses of an operation and alimony. In her petition she said that in 1899 the respondent maliciously deserted her, and that she had had to undergo two surgical operations, and had had to go to England to consult a specialist. Defendant had not contributed to her maintenance. The defendant had also filed a certain document called defendant's plea, which contained many slanderous and false statements. The defendant was in the service of the Government. He had not provided for deponent during the last two years.

An affidavit by the respondent (who did not appear) was read denying that he had maliciously deserted the plaintiff. He had been to England for treatment, and did not return for some time. He swore that his salary was disbursed month by month as he received it. He was, therefore, incapable of contributing to the expenses incurred by the applicant.

An answering affidavit by the applicant denying the allegations of the defendant was read.

De Villiers, C.J., said it seemed to him to be a most unusual application seeing that this was not a matrimonial suit.

Mr. Gardiner contended that, all the same, such an action was maintainable without the plaintiff going to the more drastic remedy of a judicial separation or divorce.

De Villiers, C.J., said that there seemed to be merely a money question between the parties at present, and if the action were brought there would be small chance of the parties becoming reconciled.

Mr. Gardiner submitted that because the plaintiff elected to take the smaller remedy she should not be denied relief.

De Villiers, C.J., said he was not prepared to grant an order without proof that the replying affidavit of the applicant had been served upon the respondent. Leave would be given to the applicant to again move the Court.

Ex parte SNYMAN.

Mr. Benjamin moved for leave to sell certain property on behalf of a minor. The Master had reported favourably.

Order granted.

Ex parte THE MINORS DE VILLIERS.

Mr. Van Zyl moved for an order for the payment of certain money for the maintenance and education of the minors.

Order granted.

Ex parte STONE AND ANOTHER.

Mr. Van Zyl moved for leave to sell certain property in which minors were interested.

Order granted.

Ex parte PRETORIUS.

Mr. Van Zyl moved for an order releasing applicant from tutorship.

Order granted.

Ex parte CLIGHORN.

Mr. Schreiner, K.C., moved for an order authorising the Master to accept a certain account.

Order granted.

Ex parte KERR.

Mr. Rainsford moved for an order authorising the High Sheriff to pass transfer of certain property. The property was mortgaged, but the mortgagees were willing to allow the mortgages to remain.

Order granted.

Ex parte PIETERSEN.

Mr. D. Buchanan moved for leave to hypothecate certain property in which minors were interested.

Order granted.

Ex parte STANDER.

Mr. D. Buchanan moved for an order authorising the registration of certain property.

De Villiers, C.J., said this matter should have been brought before a judge in Chambers. No order would be made.

WALSH AND WALSH V. SADLER.

Mr. Gardiner moved for an extension of the return day of a certain citation. He said leave had been granted by the Court to sue the respondent by edictal citation, but, although every effort possible had been made to find him, he had not yet been discovered.

The return day was extended to November 14.

GOETHUYS V. DEGRAAFF.

Mr. Roux moved to have a rule nisi made absolute.

Order granted.

***In Re* THE APPLICATION FOR THE APPOINTMENT OF A COMMISSION IN THE MATTER BETWEEN GOTZE AND BERGL.**

This was an application for an order to take evidence on commission.

Mr. Gardiner supported the application, and Mr. W. P. Buchanan opposed.

Mr. Gardiner said his client (the respondent) was at present in London, where he was engaged on business, and did not know when he would be able to return. If the case could not be postponed, he asked to have a commission appointed to take his evidence.

Mr. Buchanan read a replying affidavit, in which it was stated that the applicant, although he knew there were actions pending against him, had left for England.

His Lordship granted the appointment of a commission.

***Ex parte* THE EXECUTORS IN THE ESTATE BLACK.**

Mr. Gutsche moved for leave to mortgage property.

Order granted.

***Ex parte* SHUTLER.**

Mr. Uppington moved for leave to sue *in forma pauperis*.

Order granted.

***Ex parte* THE EXECUTORS ESTATE CROSS.**

Mr. D. Buchanan moved for leave to pass transfer of property sold to an executor.

Order granted.

***Ex parte* THE ESTATE ABEL.**

This was an application for the appointment of a provisional trustee to the above estate.

Mr. Gutsche moved and suggested Mr. J. de Villiers, Paarl.

Order granted.

LACAY V. JACOBS.

Mr. W. P. Buchanan, on behalf of the plaintiff, applied for an order against the defendant for contempt of Court, for not complying with an order of the Court directing her to hand over to plaintiff her illegitimate child.

The order sought was granted.

***Ex parte* WIBES.**

Mr. P. Jones moved to have transfer passed.

Order granted.

***Ex parte* KLEYN**

Sir H. Juta, K.C., moved for leave to sell certain property.

His Lordship said he would peruse the documents handed in, and then give judgment.

Postea (Oct. 21st).

De Villiers, C.J., mentioned this matter, which came before the Court on Thursday, the petitioner asking for leave to sell certain property. He said he found that the inheritance was to go to the children in case the father died before the mother. He would like to know, if the property was sold by Mrs. Kleyn, how the proceeds were to be secured so that the children would receive their rights under the will.

Sir H. Juta, K.C. (for the petitioner) said that he would communicate with the petitioner in regard to the point mentioned by his lordship.

Postea (October 28th).

Order granted as prayed.

***Ex parte* EDWARDS.**

Mr. Pyemont moved for an order authorising the Master to file the will, etc., in the estate of Morgan Edwards. The deceased was one of the crew of the S.S. Penguin, which left Durban on a voyage of discovery, and was wrecked, the crew being drowned. The master was unwilling to accept the death notice without the order of the Court. The deceased's name appeared in the "Gazette," and also on the ship's log.

The order was granted.

***Ex parte* WINKELMANN AND OTHERS.**

This was an application for an order authorising the sale of certain property in which certain minors were interested. From applicant's petition it appeared that the property in question was not producing any rent, and that a good offer had been received for it. All the heirs (including certain minors) consented to the sale, and in view of the fact that it was proposed to invest the purchase price of the said property on first mortgage of landed property or other security, the Master saw no objection to the application being granted.

On the motion of Mr. W. P. Buchanan an order was granted as prayed.

***Ex parte* KRUGER.**

This was an application for an order authorising the sale of certain minors' shares in certain property.

The Master's report was as follows: "I have been credibly informed that the farm Allemansfontein (the property in question) is so overrun with prickly pear that it would cost a sum of money altogether beyond the means of the minors to eradicate it.

"The minors, I understand, are not properly cared for, and their education is sadly neglected, and it would, therefore, be in their interest that the properties be sold at the same time as the shares of the major heirs, so as to enable the Curator Nominatus to devote the interest of the proceeds towards their maintenance and education."

On the motion of Mr. Van Zyl an order was granted as prayed.

Ex parte TITKERTON.

This was an application for leave to sell certain property in which two minors were interested, on condition that the applicant should pay their respective shares of the proceeds into the Guardians' Fund.

The Master did not oppose.

On the motion of Mr. Close the Court granted an order as prayed.

Ex parte VAN ZYL AND OTHERS.

This was an application authorising the sale of certain property.

The facts sufficiently appear from the Master's report, which reads as follows:

"The property to which this petition relates is directed to be sold by public auction with other properties described in the will signed by petitioner and her late husband.

"It is a portion of the farm bequeathed to the two sons, and six major children have signified their consent to petitioner taking over the property, and she is willing to take it over at a sworn appraiser's valuation. I think the application may be granted."

On the motion of Mr. Pyemont the Court granted an order as prayed.

Ex parte APPEL.

This was an application for leave to execute a certain mortgage bond.

The property in question had been bequeathed to Conrad E. Appel, a minor, on condition that he should pay £600 to the testators' daughter within 12 months of the death of the survivor of the testators. In case he should be unable or unwilling to do so, the petitioner was to have the right to let half the ground bequeathed until the said sum of £600 should have been paid. The beneficiary had not paid the £600, and petitioner had consequently let the land

for 5 years at £77 per annum, and had handed over the remaining half to the beneficiary. The petitioner had paid £214 10s. 11d. to the testator's daughters, leaving a balance of £385 9s. 1d. still due to them. He had been sued for Divisional Council rates in respect of the said property. These he had paid out of the rents of the said property, but there is still a deficiency. The estate of the aforesaid Conrad E. Appel had been compulsorily sequestrated, and there appeared little hope that he would within any reasonable time be in a position to pay the outstanding balance to testator's daughters. Wherefore petitioner asked for leave to raise £385 9s. 1d., £31 15s. 9d., together with necessary legal expenses, and also for leave to let the half share of the bequeathed property in order to pay off the loan and interest due on the bond aforesaid.

The Master recommended that the prayer of the petitioner be granted.

On the motion of Mr. Van Zyl the Court granted an order as prayed.

Ex parte BECKER.

This was an application on behalf of Harry Mortimer Stone and Harriet E. Becker, as executors and tutors testamentary in the estate of the late Henry E. Becker, for leave (1) To sell certain immovable property for a sum of not less than £5,500, for the benefit of the estate (2) To invest the balance of such money after paying off the mortgages on the said property.

Or in the alternative:—

(1) To raise a sum not exceeding £2,500, for the purpose of paying off the present mortgage on the said property, amounting to £900.

(2) Erecting certain buildings thereon at a cost not to exceed the balance of the £2,500.

The second petitioner was the usufructuary under the will, and there were seven children, heirs under the will of whom four were minors. The major heirs consented to the proposed arrangements.

The Master recommended that the first prayer of the petition should be granted if the property could be sold for £5,500, failing this that the alternate prayer be granted.

On the motion of Mr. Van Zyl the Court granted an order in terms of the Master's report.

Ex parte JORDAAN AND WIFE.

This was an application for leave to register an ante-nuptial contract, which owing to a misapprehension had not been reduced to writing previous to the marriage.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

GENERAL MOTIONS.

Ex parte ELLIOTT. } 1904.
Oct. 21st.

Mr. Upington moved, as a matter of urgency, for authority, in the event of petitioner being appointed *curator bonis* of the late Charles George Elliott, to carry on the business of Innes and Elliott, attorneys, Port Elizabeth. Mr. C. G. Elliott, who, it was stated, was the sole partner in the firm, died at Wynberg on the 15th inst. The petitioner (deceased's brother) had for some time past managed his business. Under his will, Mr. Elliott bequeathed to petitioner the business, with books, furniture, etc., provided he took over the business liabilities. Petitioner accepted the legacy. The executor was at present in England, and it was desirable, in the meantime, that arrangements should be made for the continuance of the business.

De Villiers, C.J., said that an order would be granted giving petitioner, in the event of his being appointed *curator bonis*, the power applied for. He added an expression of opinion that the Master would be quite justified, under these circumstances, in appointing the petitioner as *curator bonis*.

SCOTT V. THIEME. } 1904.
Oct. 21st.
" 24th.

Consideration — Offer — Acceptance—Revocation of offer—Option—Contract.

The declaration alleged that the defendant signed a document covenanting to give to the plaintiff the option to purchase certain property at a definite price within a limited time, and that within the time so limited the plaintiff notified to the defendant that he elected to avail himself of the option and was prepared to pay the price. The plea averred that there was no consideration for the giving of the option by the defendant.

Held, that, even assuming that

there was no consideration and assuming that the so-called "covenant" should be regarded as a mere offer, the acceptance of such unrevoked offer within the specified time created the requisite consideration and gave rise to a binding contract between the parties.

This was an argument on exceptions taken by the plaintiff to the defendant's plea.

From the pleadings, it appeared that the plaintiff was a merchant tailor, residing at Kenilworth; the defendant was a farmer, residing at Claremont Flats. The defendant had held a licence for a certain Erf No. 8, Cape Flats, in the Field-cornetcy of Downs, under the provisions of the Agricultural Lands Act of 1882. On the 22nd May, 1897, the defendant's father, acting for and on behalf of the defendant, entered into a certain agreement with the plaintiff to let him have the option of purchase of the tenure of the said land on payment of £425, to be increased to £500 in case the licence was converted into a perpetual quitrent. Plaintiff said that on the 24th July, 1897, and within the limit of time, he notified the defendant to avail himself of his rights of purchase. Plaintiff had tendered the sum of £425 sterling, but the defendant had failed to give him transfer of the land.

The defendant, in his plea, said that it was provided by the Act that no interest in a licence could be assigned except under certain conditions and terms set out in the Act, which conditions and terms the defendant had not complied with. The licence expired and terminated on the 30th June, 1897. On the 28th December, 1898, a further licence in regard to the erf was granted to the defendant, and on the 31st March, 1904, the said licence was converted into a title of perpetual quitrent. He denied that he gave the plaintiff any rights over the licence of December, 1898. No consideration was given by the plaintiff. In reference to a certain letter sent by the defendant to the plaintiff, he said that it was written under a misapprehension, because he thought a legal contract was existing between the parties.

To this plea, the plaintiff excepted upon a number of grounds, and said that it was insufficient and bad in law.

Mr. M. de Villiers appeared for the plaintiff and excipient; Sir H. Juta, K.C., was for the defendant.

Mr. De Villiers said that, although he had prepared a number of exceptions, it was not because he was particularly enamoured of exceptions; but in so many respects the plea appeared to him to contain matters which, as far as they raised

points of law, were simply futile, and of no materiality whatever; and he thought that these points ought first to be removed, before they entered into the matters really at issue between the parties. There were several points in reference to which these exceptions were raised. There was the point that, according to English law and our law, want of consideration could not be pleaded in a case like this. There was further the plea of impossibility, as to which he should contend that, what was impossible having become possible, both by our law and English law, the defendant was obliged to give transfer. There was the further point of mistake and misapprehension. That was of very great consequence, but he would maintain that the defendant had distinctly to set forth in what respects the mistake and misapprehension existed, and there was the further question as to the interpretation of the Act 37 of 1882, which seemed to him perfectly clear, and to have bearing on the present case. In regard to the plea of impossibility, there was an important principle that he would seek to establish—that was, that the effect of the agreement of the 22nd May, 1897, was to establish an immediate and irrevocable contractual relation between the parties of such a nature that, upon the plaintiff notifying his election to accept transfer on the terms agreed upon, the defendant was bound to give delivery. Counsel proceeded to quote from *Hollandische Consultation*, 20. 158, p. 322; *Neostadius, Decis. Cur. Supr. Holl.* 45, p. 192.

The contract in the case referred to in the last authority was exactly similar to the present. An option was given for the purchase of a certain piece of ground at eight pounds per "gemet," at which price some other ground also had been previously sold, and it was undisputed that the seller could not revoke. Counsel also cited in support of his view *Moyle, Translation of Justinian's Institutes*, 3-23-4, p. 148; *Moyle on Sales in Civil Law*, pp. 47, 77, 80 and 174. The present case was the stronger, as under the agreement the plaintiff acquired an immediate right to take steps to effect a re-sale. On the question of consideration, he submitted that the plea of want of consideration was bad, inasmuch as there was no allegation of revocation on the part of the defendant. Counsel quoted in support of this contention, "*Lundell's Cases of Contracts*" (vol. 2, p. 1,091). He urged that the prospect held out by the defendant to the plaintiff of selling the property for the sum agreed upon in a certain case was a sufficient cause of consideration. In support, he referred to the practice of Continental waiters, who entered into a contract of service without receiving a penny of wages, as forming an analogy, the only consideration in that case being the prospect held out that they had of receiving so many

fees that they would be repaid. Mr. De Villiers quoted "*Story on Sales*" (par 127), and cited the cases of *Tembu v. Webster*, recently heard in this Court, *Tradesmen's Benefit Society v. Du Preez* (5, Supreme Court Reports, p. 278), *Smith v. Lumberg* (12, Supreme Court Reports, p. 302). On the point of notification of choice, he submitted that there was a contradiction in the plea, inasmuch as in the one paragraph it was said that the plaintiff had not availed himself of his option, and in the sixth paragraph notification was implied. Counsel next dealt with the point of the plea that section 14 of the Act 37 of 1882 provided that no interest in licences granted by the Government was assignable, except under certain terms and conditions there laid down, and that defendant had not complied with those terms and conditions. He contended that, though there may be extinction of a thing nevertheless the obligation of the debtor was continued. The rule of law was that if an ensuing impossibility of performance has been brought about by the act or default of the person who is bound to such performance, the other party may wait till the impossibility ceases or otherwise immediately claim damages. He was proceeding to quote *Pothier on Obligations* (par. 613, 614, 620, 624, 626, and 627 note a.); *Digest* 32 79 sections 2, 3; 46-3-98, section 8; 45-1-82, section 5; 19-1-55.

De Villiers, C.J., pointed out that the defence raised was not impossibility, but illegality.

Mr. De Villiers said, he was dealing with section 3 of the Defendant's plea, and that legal impossibility stood on exactly the same footing as physical impossibility. He pointed out that the defendant said that the contract ceased by the licence having expired, and that the agreement did not refer to the subsequent grant. The defendant alleged that through his own default he was unable to carry out the obligation embodied in the agreement. He said: "Such terms and conditions were not complied with by the licensee." He still submitted that the question of impossibility did materially arise in this case. He quoted *Fry of Specific Performance*, sections 994-997, *Digest of English Law* (vol. 6, p. 491), *Parsons on Contracts* (vol. 2, p. 647), and other authorities. With regard to the alleged mistake, he contended that it was incumbent upon the defendant to state whether he meant a mistake in law or in fact, and, if in fact, what the facts were as to which the mistake existed otherwise he was hampered in his defence.

Sir H. Juta said that the licence in this case was a licence under the Agricultural Act, and his lordship would see, from the provisions of the Act, that the intention of the Legislature was that the

person who applied for a holding had to apply for himself, and the licence could not be taken in execution, it could not be mortgaged, and it could not be assigned, the object of the Legislature, of course, being that in regard to any of these holdings, it should be for the benefit of the person who applied, and should not be the subject of commercial barter. The licence was to last five years, and during its currency the interest in the land could not be assigned, except under conditions set out in the Act. The defendant had not complied with those conditions, and the question then arose whether this agreement in the first instance was valid and legal. The original licence came to an end on the 30th June, 1897; the new licence was granted in December, 1898. Now that second licence could not be obtained except upon an application made upon declaration that there was no agreement existing, and that if such agreement had been made thereupon the whole of that land was forfeit. Both parties were now in this delicious dilemma that, if his learned friend succeeded, the whole land was forfeit under the Act, because the declaration was false. If the plaintiff had any rights at all, under the agreement, according to his own showing, he did not notify his election until the 24th July, 1897, and, seeing that the licence had expired on the 30th June, the subject-matter was actually gone, and the agreement must have been at an end, even presuming that it was a legal offer. Again, the agreement was to buy the land if the licence were converted into a quit-rent title. Now, the licence was never converted into a quit-rent title. Counsel submitted (1) that the agreement was never concluded; (2) that if it were the subject-matter came to an end; and (3) that the eventual right which was to be sold never came into existence.

De Villiers, C.J., asked counsel whether the defendant did make a declaration when the new licence was granted.

Sir H. Juta replied that he was not aware. Proceeding, he said that the exception seemed to him to be that the points of the plea had no bearing on the case. He submitted that the points had very great bearing. The misapprehension or mistake could not affect the matter, because the letter sent by the defendant could not make a new contract.

Mr. De Villiers, in reply, said that under section 14 of the Act it was clear that, as soon as a person acquired a quit-rent interest in land, he had full power to transfer. There was no proof that at the end of June, 1897, the licence had fallen to the ground.

De Villiers, C.J., said that they were not now going into the facts for the purpose of the argument on exception; they must take it that all the allegations in the plea were true.

Mr. De Villiers (proceeding) said that the date of the contract was the 22nd May, 1897. He submitted that the plaintiff had notified his election within the limit of time. As to the point of false declaration, he maintained that no false declaration was made by the defendant. It was clear that the oaths referred to the land held under licence, and pending that licence.

Cur. Adr. Vult.

Postea, October 24th.

De Villiers, C.J.: The plea to the declaration raises several grounds of defence the first of them being that there was no consideration for the option alleged to have been given by the defendant to the plaintiff under the document of May 22, 1897. The question of consideration does not, however, arise if the declaration is correct in stating that within the limit of time fixed by the document the plaintiff accepted the offer intended by the defendant to be made when he gave the option. The document reads as follows: "I . . . covenant and agree to give to Mr. Scott the option to purchase from me my claim to the farm for the sum of £425, he, the said Scott, to pay the sum of £2 18s. quitrent annually thereon, as it becomes due. . . The said property being at present under Government licence only, it is further agreed that the said Scott shall have the pre-emptionary right of purchase . . . from this date and until such time as the Government may see fit to issue a deed of grant or title to the said land to me . . ., such pre-emptionary right to be extended for a fortnight from and after the date of such deed of grant or title, the said Scott to have the further right to forthwith take all such steps as he may deem necessary or desirable to resell the farm as a whole or by sub-division." If by "quitrent," the parties meant the yearly fees payable under Act 37 of 1882, there would seem to have been a substantial consideration for the defendant's promise, and the transaction of that date would constitute a binding agreement between the parties, but neither party reads the document as meaning that the plaintiff was to pay the yearly fees before completion of the purchase. Even if there were no consideration at the date when the document was signed, the plaintiff would still be entitled to succeed, if he notified to the defendant within the time fixed that he availed himself of the option. Upon his giving such notice, there would arise a "reasonable cause" for the defendant's promise, and the contract would be complete, provided, of course, the plaintiff had not, before accepting the offer, received any intimation that the defendant revoked the offer.

The plaintiff has excepted to the whole of the plea, including the allegations as to consideration, as being insufficient, and

his counsel has cited several cases in the Dutch, as well as English Courts, in support of the exceptions. The point decided in the Dutch case of *De Villers v. De Vos* (Note to 2 Dutch Cons., 158) was that the right to exercise an option is extinguished by death, and it is not transmitted to the heirs. The decision proceeded upon the peculiar terms of the contract there in question, which satisfied counsel whose opinion was asked, and the Court of Appeal in Holland, which decided the case, that the right was intended to be personal to the promisee. I presume, however, that the case was cited by counsel in the present case on account of the inference which might be drawn from the decision that if the promisee had not died he would have been entitled to exercise the option. The inference is a fair one, but it does not further follow that the promise would have been held to be binding if there had been no reasonable cause for the promise. By the same contract under which De Vos gave the option to De Villers to purchase the land in question another piece of land was sold to De Villers, and the price to be paid in the exercise of the option was to be the same as that for which the other piece of land was sold. The transaction was a single one, and the "reasonable cause," or, as we should now term it, the "consideration" which supported the contract of sale of the one piece of land also supported the contract giving the purchaser the option of purchasing the other piece of land. It follows that, during the lifetime at all events of the purchaser, the vendor had no right to revoke the option.

The question whether under the circumstances disclosed in the present case there was any consideration for the defendant's so-called "covenant" does not arise, but assuming that there was no consideration the English case of *Cooke v. Oxley* (3 Term, Rep. 653) would be an authority for holding that, notwithstanding the notification of acceptance by the plaintiff within the stipulated time, the defendant is not bound by his promise. The decision in that case was not followed by Bacon, V.C., in the subsequent case of *Dickinson v. Dodds* (2 Chan. Div., 463), but his judgment was reversed on appeal. This was a suit for specific performance of a contract embodied in a document which read as follows: "I hereby agree to sell to Mr. George Dickinson the dwelling-house at Croft belonging to me for the sum of £800. This offer to be left over until Friday, 9 a.m., 12th June, 1874.—J. Dodds." In giving judgment on the appeal, James, L.J., said: "The document, though beginning 'I hereby agree to sell,' was nothing but an offer. . . . There was no consideration given for the undertaking or promise, to whatever extent

it may be considered binding, to keep the property unsold until Friday morning. It is clear settled law that this promise was not binding, and that at any moment before a complete acceptance by Dickinson of the offer Dodds was as free as Dickinson himself. . . . Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case beyond all question the plaintiff knew that Dodds was no longer minded to sell the property as plainly and clearly as if Dodds had told him in so many words." Mellish, C.J., said: "I am clearly of opinion that . . . when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer." In the present case it is not alleged that the defendant had either revoked his offer or sold the property to some one else before the plaintiff notified his acceptance, and it is therefore unnecessary to decide whether the decision of the Appeal Court in *Dickinson v. Dodds* is in accordance with the law of this colony. As to the case of *Cooke v. Oxley*, I am not aware that it has ever been followed by this Court, and I am certainly not prepared to accept it as a binding authority in the present case. Even if the writing signed by the defendant were regarded as an offer only, which might be revoked, it was a continuing offer during the time limited for acceptance, and as soon as it was accepted it became a contract binding upon both parties thereto. In the absence of any allegation that the defendant revoked his offer before it was accepted, that offer must be held to have remained open until the plaintiff accepted it. The defendant, however, further alleges in his plea that "the plaintiff did not notify the defendant within the time allowed by the said agreement that he availed himself of the said option." If this allegation is correct there clearly was no contract, for the defendant's offer was to remain open for a definite period only, and after the expiration of that period the plaintiff no longer had the right to exercise his option. It is just possible that the allegation may mean that the date at which the plaintiff alleged notice to have been given was not within the prescribed time, but that is not the reasonable meaning of the words which I have quoted from the plea. For the purpose of his exception the plaintiff must be taken to have admitted the correctness of every allegation contained in the plea. That plea contained several grounds of defence somewhat confusedly mixed together, but the exception is not that the plea is embarrassing, but that it is insufficient as a defence to the action. The allegation to which I have referred, if

proved, would be a sufficient defence to the action, and the exception must, therefore, be disallowed. The costs of the exception must abide the result, for if, at the trial, it should be proved that due notice was given within the stipulated period, and that, in other respects, the plaintiff is entitled to succeed, it would not be just that he should bear any part of the costs.

As the exceptions have not been sustained, it is not necessary for me to say very much about another part of the plea, which raises the defence of the illegality of the contract relied upon by the plaintiff. The defence thus raised is that the licence under which the defendant occupied the land at the time of the contract soon afterwards expired, and that, as it would have been a falsehood on his part, entailing the forfeiture of his right to the land, to make the declaration required by the 8th section of Act 37 of 1882, on applying for a fresh licence, the contract was illegal, and cannot be enforced. The declaration on oath is to the effect that the application is made for the applicant's own exclusive use and benefit, and not directly or indirectly for the use of any other person, and that the applicant has not made any arrangement or agreement to enable or permit any other person to acquire, by purchase or otherwise, the allotment in respect of which the application is made. Under the 12th and 14th sections of the Act, however, the interest in land held on licence is assignable, provided that the Commissioner of Crown Lands approves of the transfer after due application made to him by the licensee. The policy of the Act obviously was not to allow any application for a licence to be made for the benefit of any other than the licensee, but at the same time to allow the licensee, after obtaining his licence, to assign his interest if, after due public notice, no good objection is shown to such a course. It is common cause that the option was given during the currency of the first licence. The defendant's interest in the land was, therefore, at that time assignable under the provisions of the Act, and there is no allegation in the plea of the plaintiff's knowledge that the licence would soon expire, and that if he did not, before such expiration, exercise his option, a fresh licence would be applied for. In the absence of such knowledge on his part the plaintiff might fairly have presumed that the defendant intended to make an application to the Commissioner, under the 12th section of the Act. The plea goes on to say that the terms and conditions under which a licence can be assigned were not complied with, but it was fairly argued that it was the fault of the defendant if, while keeping his offer open, he did not comply with the provisions of the 12th section of the Act.

These are matters upon which further light could be thrown by evidence, and which could not well be decided on exceptions.

[The exception was, therefore, disallowed, question of costs to abide the result of the action.]

Postea, Nov. 11, 1904. The action was tried and judgment given for plaintiff, as prayed, with costs, including the costs of the argument on exceptions.

[Plaintiff's Attorney: D. Tennant, jun.; Defendant's Attorneys: Silberbaur, Wahl and Fuller.]

MCKENZIE V. TABLE BAY } 1904.
HARBOUR BOARD. } Oct. 21st.

Arbitrator — Account — Plant —
Short delivery.

The plaintiff, a Dock agent, sued the defendants for certain sums said to be due in respect of plant sold by him to the defendants, and also in respect of goods short delivered and delivered in a damaged condition by the defendants. The defendants denied purchase of certain portions of the plant named in the declaration, and also that the plaintiff had incurred the liabilities referred to in his declaration by reason of any negligence or misfeasance on their part, beyond a certain sum already assessed by an arbitrator, which sum they now tendered. By agreement of parties the question of all claims in contention was referred to arbitration.

Defendants claimed certain sums in reconvention on their own account, and also certain other sums on behalf of certain clients.

Held, that all claims on their own behalf, and also all claims on behalf of clients from whom they held powers of attorney, and none other should also be submitted to arbitration.

This was an action brought by Andrew Ritchie McKenzie, of Cape Town, forwarding agent, against the Table Bay Harbour Board.

The plaintiff's declaration was as follows:

1. The plaintiff was, at the dates hereinafter mentioned carrying on the busi-

ness of a dock agent and of landing, shipping and delivering cargo at the Alfred Docks, Cape Town. The defendant is the Table Bay Harbour Board.

2. Prior to and in the month of October, 1901, the defendant resolved to take over and perform all the duties of docks agents, and the landing, shipping and delivery of cargo at the Docks, Cape Town, and it was agreed between the parties that the defendant would buy and the plaintiff sell the whole of plaintiff's plant, including that which was already landed and in use in the Colony, that which was on indent and that which was in course of construction, and the parties agreed that the plant already landed and in use should be paid for at valuation, and that the plant on indent and in course of construction should be paid for on arrival here and on completion. An inventory of the plant landed and in use was drawn up and the defendant paid the plaintiff therefor.

3. There were at the same time two road locomotives on indent and five Colonial box trailers in course of construction. The said locomotives have been landed and delivered, the trailers have been constructed and delivered all to defendant. The price of the former is £1,831 4s. 5d., and of the latter £362 10s. 0d. or £2,193 14s. 5d. in all.

4. At the aforementioned date the plaintiff was engaged in the landing and delivery of certain cargoes, and the plaintiff proposed that he should be allowed to complete the said deliveries in order to facilitate the delivery and the adjustment of claims by consignees and others in respect thereto, but the defendant refused the said offer, and thereupon it was agreed between the parties that on and from the 14th of October, 1901, the plaintiff should cease to act as dock agent, and to land and deliver goods, and that the defendant should take over and perform the same, and that the defendant should become responsible for all liabilities in connection with cargo for which the plaintiff had been appointed dock agent, and in regard to which the plaintiff had already had the handling, whether the same had been partially delivered by the plaintiff and completed by the defendant or otherwise.

5. Liabilities to the extent of £4,628 16s. 4d. have been incurred and paid by the plaintiff in respect of the matters set forth in paragraph 4 hereof, and under and by virtue of the agreement in the said paragraph set forth the defendant is liable to the plaintiff for the amount thereof (copy of particulars thereof is hereunto annexed). Of this amount the defendant has admitted liability for £684 6s. 2d., but has not paid same.

6. All things have happened, all times have elapsed, and all conditions have been fulfilled entitling the plaintiff to the

two sums of £,193 14s. 5d. and £4,628 16s. 4d.; but the defendant, though requested so to do, refuses to pay the same or any part thereof.

Wherefore, the plaintiff claims:

(a) Payment of the two sums of £2,193 14s. 5d. and £4,628 16s. 4d., with interest *a tempore morae*.

(b) Alternative relief.

(c) Costs of suit.

To the declaration the defendants pleaded as follows:

1. The defendant admits paragraph 1 of the declaration.

2. On the 13th October, 1901, the defendant took in hand the landing, shipping and delivery of cargo at the Docks, Cape Town, and with that object in view agreed with the plaintiff to purchase and take over, and did purchase and take over all the horses, mules, harness, wagons, carts, buggies, trailers, traction engines, donkey engines, tugs, lighters, machinery, tarpaulins, coal bags and all other plant and articles used by him in connection with his business as a dock agent, and a deed of submission to arbitration was executed between the parties to determine the price to be paid by the defendant.

3. The price was so determined and paid and included a sum of £362 10s. 0d. for certain Colonial box trailers, which include the box trailers referred to in paragraph 3 of the declaration.

4. As to the two road locomotives referred to in the said paragraph, they were never taken over or purchased by the Harbour Board, and the Board does not intend to purchase them. An offer was made in July, 1903, to purchase them, but the offer was not accepted, and is no longer open.

5. Save as aforesaid the defendant denies the allegations in paragraphs 2 and 3 of the declaration.

6. Up to and including the 12th October the plaintiff was engaged in the landing and delivering of cargoes, and the plaintiff proposed that he should be allowed to complete the said deliveries in order to facilitate the delivery and the adjustment of claims by consignees and others in respect thereto, but the defendant refused the said offer.

7. Save as aforesaid the defendant does not admit the allegations in paragraph 4, and says that no agreement was entered into in the terms therein alleged; and the defendant specially denies that any contract such as is contemplated by the Act No. 36 of 1896, section 30, sub-section (c) was entered into relative to the matters alleged in that paragraph so as legally to bind the Board which has no power to contract save in so far as it is authorised by the said Act.

8. The Board was willing after refusing the plaintiff's offer, referred to in paragraph 6, to accept responsibility and answer claims for any loss or damage to goods landed from certain ships,

the discharge of which the plaintiff had commenced before the 15th October, 1901, and subsequently the Board completed on or after the 15th October, 1901, in so far as such loss or damage was found to be not caused during the time when the plaintiff was effecting discharge, and in so far as the amount of such loss or damage should be reported and recommended for payment to the Board by one J. E. P. Close, to whom the Board entrusted the enquiry as to the amount, if any, to be paid to the plaintiff in respect of such claims for loss or damage which he might be called upon to pay and might have paid.

9. The said Close instituted and held a full and comprehensive inquiry into various claims against the Board or the plaintiff made by sundry merchants, including all such claims as aforesaid, which were advanced or communicated by the plaintiff or on his behalf, and including all the claims amounting to £4,628 16s. 4d., now claimed in the declaration, and the said Close thereafter reported to the Board and recommended that the Board should accept liability to a certain extent in respect of certain of the said claims, and should pay to the plaintiff the sum of £684 6s. 2d., which amount the defendant tenders to pay together with taxed costs to this date. The plaintiff has had full particulars of the details comprising the sum of £684 6s. 2d.

10. The Board has never agreed to pay and refuses to pay to the plaintiff any greater sum than the said sum of £684 6s. 2d. with taxed costs aforesaid.

11. Save as aforesaid the defendant denies the allegations in paragraphs 5 and 6 of the Declaration, especially denying that the plaintiff has incurred or paid liabilities to the extent alleged, and specially denying that the Board agreed at any time to pay to the plaintiff such sums as he might pay to claimants, or any sum other than those for which the Board after inquiry as aforesaid accepted the responsibility.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

Sir H. Juta, K.C. (with him Mr. W. P. Buchanan) for plaintiff; Mr. Schreiner, K.C. (with him Mr. P. S. T. Jones) for defendants.

Mr. Schreiner said it was a matter of agreement on the correspondence between the parties that after certain general principles had been determined upon by his lordship, the matter should be referred, if the Court thought fit, to an arbitrator. So far as the claim in convention was concerned, all the items were in dispute, except £9 15s. 11d. As to the claim in reconvention, the plaintiffs said that the Board was not liable for the amounts claimed by the defendant. They denied that the defendants were entitled to sue upon any claim in respect of goods belong-

ing to third persons not parties to the suit, who might allege claims against the Board. That, said counsel, was one of the principal points in dispute. It was quite plain that McKenzie and Co. were putting forward claims for goods in large quantities, which the Board had either delivered or paid for, or in respect of claims which, after investigation by the Board, had been abandoned by the principals. McKenzie and Co. did not state in their declaration that they had power to represent these people, and they did not produce any power of attorney. The Board said they could not go to arbitration on X's claim, unless X were a party to the arbitration. If his lordship heard some evidence, he would see the reasonableness of the attitude the Board took up. Some £400, at least, was covered by goods actually delivered to the principals themselves by the Board or paid for, and there was another sum of £500 odd, or nearly £600, in relation to which after inquiry the principals, for whom McKenzie and Co. now put forward a claim, had abandoned the claim against them. Then, further, the Board could prove that, of the goods claimed for, between £400 and £500 was short-landed out of ships, and never came to the Board at all. The Board repudiated McKenzie's claim also, on account of their own goods, though there was £40 2s. 8d. that the Board were prepared to admit when the figures were gone into. He must call his lordship's attention especially to one large item by McKenzies for £647 12s. 11d., on the claim in reconvention. It was alleged that the Board were responsible to McKenzies in relation to goods which the Board received and "undertook for reward to deliver to the defendants, and which they had wholly failed to deliver, or, if they did not wholly fail to deliver, they had delivered in a damaged and improper condition." This item of £647 12s. 11d. (October 24, 1903) was "charges paid to Searight and Co. for lighters and demurrage of coal, due to failure of the Harbour Board to take delivery according to instructions and in accordance with the terms of the contract with them, and for which payment was made in advance." This was a claim that was absolutely repudiated by the Board. It would be for his lordship to decide, in relation to certain Clan Line steamers, out of which this claim arose, whether the Board were justified in not allowing coal ships to be discharged at the South Arm.

[De Villiers, C.J.: Have the parties considered the name of an arbitrator?]

Mr. Schreiner said that the attorneys had discussed names, and had arrived at a certain decision.

[De Villiers, C.J., said it seemed to him that the arbitrator should be an

efficient accountant, with a good knowledge of shipping questions.]

Mr. Schreiner said that the name of Mr. Gibson had been mentioned.

[De Villiers, C.J., said that the parties might consider the position during the adjournment, and make some statement.]

After the adjournment.

Sir H. Juta said that the claim in convention might be referred. Then came the claim in reconviction, which were a certain number of other claims upon which they would like the ruling of the Court. These were claims where the ownership in the goods was consisted of various items. As to the item of £600 odd, they were agreeable that that should be referred. Then there remained other claims, some of which were for their own goods. There evidence could be brought as to the contract McKenzies made with their principals, and the bills of lading not really in McKenzie and Co., but being made over to them, etc

Evidence was called for the defendants.

Warren B. Sexton, director of the defendant firm, said that, as landing and shipping agents, they undertook the delivery of goods carried overseas from Table Bay to people who instructed them. They had bills of lading, which were endorsed over to them, or orders for the shipping company. A large part of the claim was made up of claims for non-delivery of goods, in accordance with the contract between McKenzie and Co. and the Harbour Board. They also claimed for goods delivered in a damaged condition; McKenzies had authority to claim from people to whom the goods were consigned. They had not written authority.

Counsel having been heard further in argument on the facts,

De Villiers, C.J.: The question raises in an interesting legal one, but I do not think it necessary in the present case to go into that. In regard to the claim in convention, both parties are agreed that it should go to arbitration. With regard to the claim in reconviction, I am not prepared to refer those items to an arbitrator, unless the defendants are prepared to refer only such items as were claimed on their own behalf, or where they produced powers of attorney from third parties in respect of items claimed belonging to them. That is the position I take up, without deciding the legal point aised. Have the parties agreed to the appointment of the arbitrator.

Sir H. Juta said they had agreed to the appointment of Mr. Gibson.

[De Villiers, C.J., inquired if there was any application as to costs.]

Mr. Schreiner asked to have the question held over until the arbitrator's

award had been obtained. This was agreed to.

Mr. Schreiner asked the Court to appoint a date for the discovery of records.

De Villiers, C.J., said there was no application of that kind before the Court. The only thing he could do was to express a strong opinion that it should be carried out as soon as possible. The order was made, and if it was not obeyed, an application for judgment for contempt of Court should be made.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller. Defendants' Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

DREYER V. DREYER. } 1904.
 } Oct. 21st.

This was an action brought by Johannes Mostert Dreyer, of Wellington, against his wife, for a restitution of conjugal rights, failing which a decree of divorce, on the ground of her desertion. Mr. Van Zyl appeared for the applicant.

The defendant did not appear.

Mr. Birch proved the marriage of defendant, and plaintiff.

Johannes Mostert Dreyer, the plaintiff, stated he was married to defendant in June, 1902, and lived happily with her until July, 1904. She then left him, and went on a holiday, and stated she would decide whether she would live with him or not. They had no quarrels. She stopped with an aunt in the village, and witness repeatedly visited her, so often, in fact, that the aunt called him "moing verg." At the expiration of the month she went to Worcester. He wrote letters to her there, but received no reply. There was one child of the marriage, and witness asked to have access to it. They were married by ante-nuptial contract, and witness had made over his life policy on her.

To the Court: He was prepared to support the child, but if so he would like the custody of it. It was only nine months old.

[Buchanan, J.: You only ask for access to the child, and the Court cannot give you more.]

The Court granted a decree of restitution, defendant to return on or before the 30th November, failing which, a rule nisi, returnable on the 12th December, would be granted for divorce. The defendant to have custody of the child.

Postea (December 12).

The rule was made absolute.

DE VILLIERS, LARSSON AND CO. V.
DE KOCK.

In this action, Messrs. De Villiers, Larsson and Co., builders, of the Paarl, sought to recover from Mrs. Samuel de Kock the sum of £244, balance of account due for work done.

The plaintiffs' declaration stated that they were builders and contractors, residing at the Paarl. The defendant was married out of community of property to Samuel de Kock. On or about the 25th November, by agreement in writing, it was agreed by the defendant, with the knowledge of her husband, that the plaintiffs should build for her certain two semi-detached cottages, for which she should pay £983 on the execution of the work. Plaintiffs and defendant, with the knowledge of her husband, signed the agreement. Plaintiffs completed the whole of the work in terms of the agreement, and from time to time received payment for the work done from defendant, through her husband. It was subsequently agreed between the plaintiffs and defendant that plaintiff should do certain other extra work for the defendant, which amounted to £11, making the total amount of the contract £994. Plaintiffs had done their work, and the amount of £994, became payable. The payments on account amounted to £750. There was therefore £244 due. On or about the 3rd May, 1904, the plaintiffs received from defendant, through her husband, a promissory note, payable on the 3rd August, for £240 10s., and signed by her husband as her agent. On the note being presented at the bank it was not honoured.

The defendant's plea admitted the first paragraph of the plaintiffs' declaration. As to paragraph 3, which specifically dealt with the contract, she admitted that on the date alleged she entered into an agreement with the plaintiffs. She entered into the agreement jointly with her husband, and any obligations incurred thereunder were incurred jointly by them. The plea also admitted that the work was done and that the payments were made, but they were made with the husband jointly. Defendant admitted that the £750 was paid, but said that her husband owed the balance of the account due. She also admitted that a promissory note was given, but said that it was signed by the husband, whose estate was assigned, and that he acted for himself alone. She had a receipt in full for her indebtedness.

The plaintiffs' replication stated that the promissory note was received by them for the convenience of the defendant. They denied that they discharged defendant from her liability.

[Mr. Mc Gregor (with him Mr. J. E. R. de Villiers), for plaintiffs. Mr. Burton (with him Mr. Van Zyl) for defendant.]

Mr. McGregor said the Court would

see from the pleadings that there was no question as to work not being done. It was merely a question of liability for work done. The promissory note was given and taken in full satisfaction of the payments due.

Johannes Larsson stated that he was one of the plaintiffs in the present action. Mr. De Kock met him in the street, and asked him to build a house on behalf of his wife. He told him he would draw up a plan for a cottage. By agreement, he sent a plan, and estimated the cost at £983. Mrs. De Kock sent for him and asked him to do the work cheaper, but he replied that he could not. The contract (produced) was then signed. While the house was being built, Mrs. De Kock instructed him, and she pointed out the site. He was building the house for Mrs. De Kock, and she was to pay him.

Cross-examined by Mr. Burton: All the documents were drawn in witness's office, and taken to Mrs. De Kock to sign. Witness had a duplicate original agreement drawn up. It stated that the contract was between Samuel de Kock and his spouse and plaintiffs. The conditions were also drawn in witness's office. It stated that the cottages erected were to be to the satisfaction of Samuel de Kock, Esq., and his wife. In May, his firm was rather hard pressed for money. He could not say that the building was completed then.

Re-examined: Witness knew defendant was married in community of property.

John Louw de Villiers stated he was one of the partners in the plaintiff firm, and drew up the contract. He went to defendant's house, and saw Mrs. De Kock. He signed the original contract. Mr. De Kock signed the duplicate, but witness knew nothing about that. She also signed the plan. Witness asked Mrs. De Kock for a payment on account last January, and she said that owing to the absence of her husband, she was not able to pay.

Cross-examined by Mr. Burton: Witness left the contract with Mrs. De Kock after she signed it. It was not for De Kock to sign it. He did not mean the contract to be made with De Kock. Witness heard about the promissory note, and was vexed because Mrs. De Kock had not signed it.

Re-examined: Witness put Mr. De Kock's name into the contract because he was the husband.

Marcus Jacobus de Villiers, also a partner in the plaintiff firm, stated he knew very little about the original contract. Witness received the payments from time to time. They were never made directly by Mrs. De Kock, but by Mr. Samuel de Kock. When the promissory note was given, the work was almost completed. It was signed by Samuel de Kock. Witness asked Mr. De Kock when the work was completed to accommodate him with the balance

due. He replied that he could not just then, but that he would give him a bill. Witness took the bill, and discounted it, but the defendant did not meet it. He went to Mrs. De Kock and mentioned the matter, and she said that she would see that he got all the money. Mr. De Kock went insolvent shortly after. Witness, after that, asked Mrs. De Villiers to hold good her promise to see him paid, and she replied that she would see to it.

Cross-examined by Mr. Burton: Witness did not ask for the promissory note. Samuel de Kock offered it to him. Witness endeavoured on several occasions to get Mrs. De Kock's signature to the note, but she would not sign, as her husband was away.

For the defence

Samuel de Kock, the husband of defendant, said his estate was insolvent; he surrendered it in July. He signed the contract with plaintiffs to build the houses. The plaintiffs brought the contract to the house, and said they wanted him to sign it. He did not sign plaintiffs' contract, as he was not there at the time. Plaintiffs gave a clean receipt for the balance, in return for the bill, and witness handed the receipt to his wife. The buildings were occupied, but not complete, when he gave the note.

[Buchanan, J.: His wife had not paid the £250 into the insolvent estate.]

Henry Phillip van Zyl, an attorney at Paarl, said he heard a conversation between Mr. De Kock and Mr. A. de Villiers. He heard Mr. De Kock say his wife wanted a clean receipt.

Susannah M. de Kock, the defendant in the action, corroborated her husband's evidence. She did not sign the note, because she had received a clean receipt from plaintiffs.

[Buchanan, J.: But they have built £240 worth of property on your ground, and you do not pay them a penny. Is that honest? It is cheating them out of £240.]

Witness said she thought plaintiffs would get the money from Mr. De Kock when the note was given. She did not know that the money raised on mortgage had been used.

Counsel were then heard in argument on the facts.

Buchanan, J., said that in this case the plaintiffs were a firm of builders, carrying on business at Paarl, and the defendant was Mrs. De Kock, who was married out of community of property to her husband, Samuel de Kock, and in this action was assisted by him. By the written articles of agreement put in, a contract was entered into between the present defendant, called in the contract "employer," on the one part, and the present plaintiffs on the other part. This was clearly a contract be-

tween two persons, each having a different *persona*. It was not as between a husband and wife married in community of property. The contract was to build two cottages for £894. This was done, and payment was made to the extent of £750, leaving a balance of £244 due. According to the contract, the cottages were erected on the land belonging to Mrs. De Kock only. Recently, since the contract had been concluded, the other contractor, Mr. De Kock, had surrendered his estate and become insolvent. If the Court looked at the contract as between two persons, each would only be liable for his share of the work contracted for. In this case, however, it appeared that the cottages were erected on the land owned by Mrs. De Kock, and she had been sued for the balance of the amount due for the work and labour done. The defence set up was that after the work was done, Mr. De Kock signed a promissory note for the balance of the money due. The circumstances under which the note was given were as follows: The cottages were occupied, but a little outside work had to be finished, and a large balance of account was due. The plaintiffs being in need of money, applied to Mr. De Kock for the balance. He told them he was unable to give it to them then, but went with one of the plaintiffs to the bank, where it was agreed that De Kock should give a promissory note. This was done, but the note was dishonoured. Now the defence set up was that that action created a new contract, and that Mrs. De Kock was discharged from any further liability. The question therefore arose as to whether the giving of this note was a novation or not. Under all the circumstances, he did not think it was. The sixth paragraph of the plea helped the plaintiffs very materially. The defendant pleaded that payments to the extent of £750 were made to the plaintiffs by her husband, acting on behalf of herself and her husband jointly, but that when he gave this note, he acted solely on his own behalf. He made the payments on behalf of both in cash, and the question naturally arose: why should he act on his own behalf only when he gave the note? On the suggestion of the bank manager, the plaintiff asked Mrs. De Kock to sign the note. Supposing she had signed this note in conjunction with her husband, she would only be liable for half the amount. This action had been brought on a certain contract, and on that he was bound to hold that they were liable, not severally, but jointly, and that therefore only one-half the amount could be recovered from each party. The defendant must therefore be held liable for one-half the amount claimed, viz., £122. There might still be a chance of recovering the balance

of the account due, but on the pleadings before the Court, it could not be done.

[Plaintiff's Attorneys: Michau and De Villiers. Defendant's Attorneys: D. Tennant, Jnr.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

APPEALS.

REX V. JOE LIS, ALIAS { 1904.
SILVER. { Oct. 24th.

Mr. Burton with the leave of the Court, applied, as a matter of urgency, for a reduction of bail in this case. The accused was a present in gaol. His petition set out that he was a barber, residing in Cape Town. On the 10th August he was charged in the Court of the Resident Magistrate with contravening section 33, sub-section (a), of the Act 36 of 1902, or otherwise, section 32 of the said Act, in that he had been living on the proceeds of prostitution or had been concerned in brothel-keeping. He was found guilty on the alternative charge, and sentenced to three months' imprisonment. Against this conviction he had lodged an appeal. Bail was fixed in a personal surety of £500, and two further sureties of £250 each. While this appeal was pending, accused was arrested on a charge of attempting to defeat the ends of justice, and had been committed to the Criminal Sessions, bail being fixed in a personal surety of £500 and a further surety of £500. This bail was excessive, and more than he could raise, and he applied for a reduction to enable him to prepare his defence. Counsel added that he understood accused would be able to offer half the amount.

Mr. Howel Jones, who appeared for the Crown, said that no objection would be raised to that.

De Villiers, C.J.: The Court will grant an order reducing the bail by one-half. Of course, it is understood that this is done with the consent of the Crown, and that we have not gone into the merits at all. I don't want to say that the Magistrate was wrong.

LE ROUX V. MALHERBE.

Mr. Schreiner, K.C., mentioned this matter, which was an appeal from a judgment of the Divisional Court of the Supreme Court. He said he should like some indication from the Bench as to when the case might be reached.

[De Villiers, C.J.: It will be taken on another day, perhaps next Monday. I think it is desirable that the judge who tried the case should not sit in the appeal.]

Mr. Schreiner pointed out that the Act for the Better Administration of Justice No. 35 of 1896, Sec. 20 said that one of the judges of appeal shall be the Chief Justice.

[De Villiers, C.J.: Are you sure of that?]

Mr. Schreiner said he believed that that was laid down in the Act. The constitution of the Appeal Court was incomplete without the Chief Justice.

[De Villiers, C.J.: If it is, I am very sorry. His Lordship after looking into the Act, added: "Oh, yes, that is so; it had escaped me."]

REX V. WILLIAMS. { 1904.
 { Oct. 24th.

Criminal appeal—Admissibility of evidence—Admission of the defendant's evidence taken under compulsion.

The appellant, who was an insolvent, was examined at the third meeting of his creditors under the 7th section of Act 38 of 1884, and was subsequently charged before the Resident Magistrate with fraud and breach of trust. At the trial the proceedings in insolvency, including the evidence given by the appellant, was admitted as evidence and the appellant's depositions were read. The depositions had an important bearing in the case, for, without them, there was no reasonable certainty of conviction.

Held, that as substantial wrong was done by the admission of the evidence, the conviction should be set aside.

This was an appeal from a judgment of the High Court of Southern Rhodesia, confirming a conviction and sentence passed by the Assistant Resident Magistrate of Salisbury upon one

Williams, formerly an auctioneer and commission agent, on charges of theft and culpable insolvency. Mr. McGregor was for the appellant; Mr. Pyemont was for the Attorney-General of Southern Rhodesia.

Mr. McGregor said that the case came in appeal before their lordships by special leave of the senior Judge of Southern Rhodesia. The appellant was tried on the 1st inst. before the Assistant Resident Magistrate of Salisbury. A preparatory examination was first taken, and the case was remitted by the Attorney-General, and thereupon the appellant was charged in the Magistrate's Court, with theft on four counts, from the Northern Insurance Company, Wilmoughby's Consolidated Estates Co., White's Consolidated Estates Company, and the Cape Orchard Company, and also with culpable insolvency upon two counts under section 71 of the Insolvent Ordinance. On each of the counts the defendant was found guilty, and it would appear from the newspaper report, which had been sent down, that he was sentenced to one month's imprisonment, with hard labour, upon each charge. Then an appeal was made to the senior Judge of the Court of Southern Rhodesia; and his lordship took time to consider his decision, and then confirmed the sentence, but granted special leave of appeal. Mr. McGregor went on to say that as part of the record against the prisoner a statement made by him under section 61 of the Insolvent Ordinance, had been put in. Now, as far as he was aware, there was no reported decision of the Courts of this colony as to whether or not a statement made under section 61 of the Ordinance could be put in by the Crown as part of the evidence for the Crown. He was informed, however, that one of their lordships sitting at Malmesbury in the case of *Re r. Louie* had a similar point before him, but he (counsel) had been unable to ascertain what the decision was.

Buchanan, J., said that the point had been raised before him both on circuit at Malmesbury and also in the Supreme Court. He ruled against the admission of the evidence in both cases. But the objection only applies to the evidence in the charges under the Insolvent Ordinance.

Mr. McGregor: That is so, but if the point is upheld, it will affect every one of the counts. Proceeding, counsel explained that the matter originally came before the Magistrate's Court in the form of charges against Williams and Money, auctioneers and commission agents, both Williams and Money being found guilty by the Magistrate. Both the accused appealed to the High Court, and Mr. Justice Vincent quashed the conviction of Money on all counts, but confirmed the conviction and sentence of Williams. Counsel (proceeding) called

attention to the very meagre character of the evidence of theft of property belonging to the Orchard Company. He also observed that there was a strange neglect and failure to call any principal of the estate companies to show what the relations with the accused were. The contention of the appellant was that he was a debtor.

[De Villiers, C.J.: But take the Cape Orchard Company?]

There we have only the evidence—evidence—not at all conclusive—of an agent. Why were his principals not called to show what were their arrangements with the accused?

[De Villiers, C.J.: But here the accused had to collect rents, and he appropriated the money; surely that was theft?]

Not if he had to pay in only at the end of the month.

[De Villiers, C.J.: Even in that case he ought to have kept the money apart.]

That would have been the better course, but if once credit is given to an agent his liability ceases to be criminal, and becomes purely civil. That disposes of the case of the Orchard Company. Then as to the case of the Insurance Company, Mr. Coxwell can speak only from the books, and they are not evidence.

[Counsel here proceeded to review the rest of the evidence in the Court below, and continued:]

It is very significant that the annexure EE shows that the relations of the accused with "William's Consolidated" were the purely civil relations of debtor and creditor. There is no evidence of *animus furandi*. See *Q. v. Golding* (13 S.C.R., 214. That case shows that the relations of creditor and debtor may subsist between principal and agent. Here the Crown has not shown what the relation was. In the case of "White's Consolidated," all payments were made in round sums. In *Q. v. Golding* the Court laid stress on the fact that there was no subsisting relationship of master and servant. Here no such question can be raised as an auctioneer is clearly an independent contractor.

[Maasdorp, J.: Even if he had not to pay over the money at once he had not the ownership of the money. May not the arrangement have been made merely to save trouble?]

The collector was not a mere bailee of the money because he was authorised to collect his commission, and to operate on the Company's banking account. He sold goods on commission, accounted to the Orchard Company, and was responsible for moneys stolen or lost. The magistrate's reasons show that his standard of negligence is far too severe. As to the evidence taken in the proceedings in insolvency, but admitted at the criminal trial, the magistrate was

clearly wrong *Q. v. Walker* (8 Cox, 1 and 27, L.T. 297) *Stephen's Crim. Law* (Art. 309.) Is the prisoner liable criminally as a bailee? No. *Russell on Crimes* (p. 134, 5th edit.), *Stephen* (Art. 285), *Q. v. Hassell* (3 Law Journal), *Matthias De Criminh* (1-1-2). I submit that if the relations between the parties were somewhat intricate the Court will be inclined to impute civil, rather than criminal liability. To impute the latter the Court must be satisfied as to the *mens rea*, the way in which the books were kept, the fact that accused had authority to operate on the banking accounts, and that he paid over large lump sums of money to his principals, all argue the relations of debtor and creditor.

As to the charges of culpable insolvency, to establish that there must have been a breach of trust on the part of the auctioneer, there was nothing of the kind in the transaction with Major Straker, where the money was not to be paid until the second day after the sale.

[Masendorp, J.: Had he to pay the money whether he had received it or not?]

Presumably so.

[De Villiers, C.J.: But what about the rents?]

My present argument would not apply to them. See *R. v. Filjoen* (7 C.T.R., 465).

Mr. Pyemont: I contend that in this case no substantial injustice has been done, and that the evidence taken in the proceedings in insolvency was properly admitted at the criminal trial. Our law holds a man guilty of theft whether he is a bailee or not if he wrongfully converts to his own use the money of another. As to the Willoughby Company and the White Company, the appellant was instructed to put all moneys collected into a certain bank, and this he did not do. The case as to the Orchard Company is not quite so clear, but an auctioneer has no right to keep money realised in his own hands. *R. v. Simmons and Williams* (13 C.T.R., 1159) and if he does so is guilty of culpable insolvency should he become insolvent. As to Major Straker's sale, the accused was to pay over in two days after the sale, probably because he would then receive the money. None of his sales were really credit sales, but commission sales. I contend that there is ample evidence of the charge of theft independently of the proceedings before the Master.

Mr. McGregor (in reply): The proceedings before the Master were clearly both pertinent and material in the Northern Insurance case, and the magistrate was clearly influenced thereby; that is by evidence which was inadmissible. This being so, I submit that the conviction cannot stand.

De Villiers, C.J.: At the trial of the accused an objection was taken by his legal adviser to certain evidence, which had been admitted at

the preliminary examination, being again used for the trial. The evidence consisted of all the proceedings in insolvency, and included in those proceedings was the evidence given by the accused himself before the Master under the Insolvent Ordinance. The Magistrate, however, dismissed the objection, and he proceeded to try the case upon the merits. There, subsequently, was an appeal against the judgment of the Magistrate to the High Court of Southern Rhodesia. It is not clear whether that objection was taken before the judge. He says nothing about it in his reasons, but I consider that, notwithstanding that the objection was not taken before him, it is still competent to the appellant, whose agent did take the objection in the court below, to take the objection again in this court. Now, it appears to me that the evidence was wholly inadmissible. By the 7th section of the Act 38 of 1884 it is enacted: "It shall be lawful for any creditor, or the attorney or agent of any creditor, as well as for the Master of the Supreme Court, or Resident Magistrate, as the case may be, to examine any insolvent upon oath under the provisions of 61st section of the said Ordinance. And if at any such examination it shall appear to the said Master or Magistrate that there are reasonable grounds for suspecting that the said insolvent has been guilty of culpable or fraudulent insolvency, it shall be the duty of such Master or Magistrate to call for such further evidence and documents as he may deem necessary, and submit such evidence to the Attorney-General, or Solicitor-General or Crown Prosecutor, as the case may be, for the purpose of instituting criminal proceedings against such insolvent, and at any such examination no insolvent shall be entitled to refuse to answer any question on the ground that the answer, if given, might tend to incriminate him." Now, the appellant, who was the insolvent, was bound to answer any question put to him, and I consider that any evidence which was given by him in such circumstances ought not again to be used at any trial against him. Any evidence that is given at such trial should be quite independent of any evidence which the insolvent had given under compulsion. It does not, however, follow that the Court of Appeal would in every case necessarily quash the conviction if such evidence had been given. If it were unimportant evidence, and had really no bearing upon the trial the Court of Appeal would not set aside the conviction by reason merely of the inadmissibility of the evidence. In the present case, however, it is clear that the evidence was extremely important, and that by its admission a substantial wrong was done to the appellant. The case which has been cited of

ber, 1901, and continued service until the 30th June, 1904, and he wished to pass an examination here and to complete his term of service. The point upon which the Law Society wished for a definite ruling from the Court of Appeal was whether, under the law as it now existed, any person could enter into articles elsewhere than in this colony, and, after serving those articles, could then come and claim to count the service that he had undergone in some other country as part of his service?

Sir H. Juta (for the Law Society): The point of this appeal is, whether a man may enter into Articles elsewhere and then come into this Colony and claim to have the period during which he has served outside of it counted?

The learned Judge (Hopley, J.) in granting this admission (see 14, C.T.R. 765) appears to have relied chiefly on *ex parte Crawford* (15 S.C.R., 105) and *ex parte Rothman* (13 C.T.R., 276). Crawford entered into Articles here and then went to Matebeleland. Rothman was articled in Matebeleland. Now, an attorney of England, Ireland or Scotland may be admitted here, and the time during which he has served Articles in any of those countries must count as good service. See Charter of Justice, Secs. 20 and 22 and Rule of Court, 149, which is based upon the provisions of the Charter. See also *ex parte Hall* (1 Searle, 22) and Rule 151. That rule allows service in the United Kingdom to count. When five years' service was required, one year, at least, had to be served in this Colony. When the period was reduced to three years, one year here was still required, and two years in the United Kingdom. *Ex parte Lance* (Buch. 1879, p. 78).

Then after the Charter of Justice came Act 12 of 1858, on which Lance's case was decided. Sec. 3 of this Act puts an articled clerk who had served 3 years on the same footing with those who had served 5 years under the provisions of the Charter.

Notaries, however, were bound to serve the whole of their time within this Colony. Then came Act 27 of 1883, Sec 14 of which requires that the clerk should pass a law examination, save in a few exceptional cases, and, moreover, provides that the Articles must be filed and registered within 3 months of execution.

[Buchanan, J.: What about those who have served part of their time in the United Kingdom?]

They fall under the exception. No doubt His Lordship (Hopley, J.) felt this to be a case of great hardship, and acted accordingly, but the Court has no discretion in the matter.

[De Villiers, C.J.: Cannot Articles be entered into here for less than 3 years?]

I submit not. "Articles" mean for 3 years. Then Act 30 of 1892 deals with reciprocity, and allows certain at-

torneys to be admitted here, but says nothing about articled clerks. Sec. 6, however, makes special provision as to service in British Bechuanaland with a Cape Colony attorney; and that shows that the Legislature never contemplated the recognition of any other foreign service. Act 11 of 1903 arranges for admission of an advocate as an attorney on condition of his being first disbarred and then serving articles for 18 months in this Colony.

[De Villiers, C.J.: In this case the order for admission has already been made; can we go behind that?]

The section of the Charter of Justice which requires service in this Colony is strictly imperative.

[De Villiers, C.J.: It does not say what length of service.]

No, it leaves the time to be fixed by the Rules of Court and the Legislature, and they have said, three years. No doubt was ever raised as to the necessity of service in the Colony till *ex parte Harsant* (Buch. 1873, p. 91). The law in this respect has never been changed.

[De Villiers, C.J.: As an attorney is an officer of the Court, surely the Court has some discretion as to the enforcement of its own rules. Here no right is infringed.]

I submit that the Court has no discretion.

[Maasdorp, J.: It is only a Rule of Court which orders two years' service in the Colony.]

Yes, and possibly your Lordships may have power to alter the rule, but not. I submit, to contravene it as long as it stands.

Mr. P. S. T. Jones (for respondent): The only case I have been able to find bearing on this appeal, in addition to those already cited, is *ex parte Halderness* (13 C.T.R., 254). In that case the Court admitted, though there is no rule under which an attorney of S. Rhodesia can be admitted here. In Rothman's case service in the Transvaal was allowed to count, though there was no rule to warrant such indulgence. If the contention of the Law Society be upheld that will amount to a reversal of the decisions in Rothman's case and in Halderness' case. In *ex parte Crawford* (3 C.T.R., 127) the attention of the Court was expressly drawn to Rule 149, and the Court deliberately refused to enforce it.

Sir H. Juta (in reply): The Court has sometimes gone back on its previous decisions. Thus two men, one Cox and another were admitted to the Bar on an *ad nudum* L.L.B. degree, but subsequently when a Mr. McIlwane applied under similar circumstances the Court refused the application (8 C.T.R., 265).

In no case has foreign service, save in the United Kingdom, been allowed to count.

[De Villiers, C.J.: The question now is: not whether the applicant has a claim to be admitted, but whether the Court has any discretion in the matter?]

I must submit it has not.

De Villiers, C.J.: On behalf of the Law Society reliance is mainly placed on the 20th section of the Charter of Justice, which enacts that the Supreme Court shall have the power to approve, admit and enrol as attorneys and solicitors such and so many persons as may be instructed within this colony in the knowledge and practice of the law; and it is contended that the Court has no power, to admit any person who has not, for the full period—whatever that may be—been instructed in the knowledge of the law within the Colony. The Charter of Justice, however, does not say that he shall be so instructed in the Colony during the whole of the period of his articles. If that had been the true meaning of the 20th section of the Charter of Justice, then it is quite clear that the 151st Rule of Court would be *ultra vires*, because by that Rule of Court a person who has been articled in this colony for only a year may be admitted if, for the rest of the period, he has served in England or Scotland. As far back then as 1829 the Court has exercised the power of admitting persons who had not been instructed for the full period in this Colony. I quite agree with Sir Henry Juta that there has been some degree of laxity of late years. This laxity has probably originated from the fact that there is much closer connection and inter-communication with the other British colonies in South Africa than before. The connection with Rhodesia, for instance, is now so close that this Court, sitting here now, is really a Court of Appeal from the High Court of Rhodesia, and, as a matter of fact, the great majority of attorneys practising in that colony, as well as in the neighbouring colonies of the Orange River Colony and the Transvaal, have originally been admitted as attorneys of this Court. There is good reason, therefore, for exercising every comity towards the other Colonies in the admission of persons who have there been instructed for a part of the required time. I quite agree that such comity should be exercised within the limits laid down by the law, but I am not prepared to admit that the Court has ever exceeded such limits. The object of the Court has always been to ensure the efficiency of persons admitted to practise in this colony, and every order has been made with a view to securing such efficiency, and although in some cases there has been a liberal interpretation of the Rules of Court, I am not prepared to say that there has been any departure from the law. To take the case of Rothman, that certainly seems to be one of the strongest cases. That was only decided last year.

Application was made by Sir Henry Juta on behalf of Rothman, and no objection was made by the Law Society. This Court naturally assumes that if there is any objection on the part of the Law Society, who know that the application is about to be made, such objection would be stated in the Court. Well, my candid opinion is that if the Law Society had opposed, and the matter had been fully gone into, the decision might have been different. The present case came before my learned Brother Hopley, who gave the fullest and most careful attention to the matter, and came to the conclusion that this was one of the cases in which indulgence ought to be granted. He made an order, therefore, that fresh articles were to be entered into, that there was to be another year's service in this colony, and that after such service, petitioner should be admitted. Well, I am not now prepared to reverse that decision; to say that it was wrong. It is quite possible that if the case had been argued before this Court in the first instance—fully argued—it may have been that a different decision would have been arrived at, but the fact is that the learned judge performed the functions of the Supreme Court, and decided that under the circumstances the indulgence asked for should be granted.

Buchanan, J. concurred. An applicant for admission must comply with certain requirements before he could claim admission as a right, but if he came to ask indulgence, he came as a petitioner. And in future applicants must not be surprised if that indulgence was not readily granted. Departures from the strict rule were injudicious, and it was advisable always in future to adhere more strictly to the rules, and he did not wish it to be considered that this ruling of the Court meant that anyone else in similar circumstances would be admitted to practise.

Mr. Justice Maasdorp concurred.

The Court made no order as to costs.

SUPREME COURT

[Before the Hon Mr. Justice MAASDORP and a Jury.]

COCHRANE AND CHERRY V.	1904. Oct. 25th. " 26th. " 27th.
WOODSTOCK MUNICIPAL-	
ITY AND OTHERS.	

Municipal contractor—Town engineer—Progress of work.

C. and C. had contracted to do certain work for the Municipality.

pality of W. The 11th clause of the contract provided that should the contractors, without reasonable or sufficient cause, fail to make such progress with the work as should, in the opinion of the engineers, be proportionate to the total time fixed for the execution of the contract, the engineers should, after having given the contractors 48 hours' notice, in writing, have the power of ejecting them and their employees from the works and taking possession of the works and plans and providing material and labour at the cost of the contractor. When half the time fixed for the completion of the contract had elapsed only one-seventh of the work had been completed. The defendants thereupon ejected plaintiffs from the works and took possession. Plaintiffs now sued for damages.

Held, that it was not within the discretion of the engineer to decide as to whether there had been reasonable and sufficient cause to retard the work, but that he had discretion to determine whether a proportionate amount of work, having regard to the time limit fixed by the contract, had been completed.

This was an action for a declaration of rights, the value of certain machinery and plant, the payment of certain retention money and damages, brought by Messrs. Cochrane and Cherry, of Cape Town, contractors, against the Municipal Councils of Woodstock, Claremont, Rondebosch and Mowbray, and the Committee of the Suburban Municipal Waterworks.

The plaintiffs' declaration was in the following terms:

1. The plaintiffs are Robert Cochrane and John Edwin Cherry, trading in partnership in Cape Town under the style and firm of Cochrane and Cherry.

2. The defendants are the Municipal Councils of Woodstock, Claremont, Rondebosch, and Mowbray, and the Committee of Management elected by the said Councils in accordance with the provisions of the Claremont and Woodstock Water Supply Act, 1898.

3. On September 27, 1901, an agreement was entered into between the plain-

tiffs and the Mayors of the aforesaid four Municipalities duly authorised by their respective Councils, whereunder the plaintiffs undertook to construct a reservoir on the side of Table Mountain at Newlands, for the purpose of carrying out certain works under the aforesaid Act, upon certain conditions and in accordance with certain specifications annexed to and forming part of the aforesaid contract: to which documents, when produced at the trial the plaintiffs crave leave to refer.

4. Under the said Act the Committee of Management aforesaid is entrusted with the management, regulation and control of all matters relating to the water supply of the said Municipalities, and from and after the date of the aforesaid agreement the said committee took charge of all matters connected with the construction of the said reservoir in accordance with the said agreement, appointed an engineer thereunder, and dealt with the plaintiffs in all matters relating thereto.

5. After the signing of the said contract some delay took place on the part of the said engineer in actually setting out the works, and the contractors were in consequence delayed in their work, and certain excavation work was done by them before the exact limits of excavation were pointed out to them.

6. From time to time during the progress of the work, from the commencement thereof great difficulty was experienced by the plaintiffs in procuring a sufficient supply of labour on account of the war then proceeding between the Imperial Government and the South African Republics, and also on account of the outbreak of plague in Cape Town and the suburbs, and on account of the restrictions imposed by the martial law regulations.

7. The engineer aforesaid also insisted on the work being carried on by methods which required more time than was necessary and reasonable being taken upon the said work, and the plaintiffs were compelled to carry away the ground excavated by them under the contract, a long and unnecessary distance by route pointed out by him; and in this manner the work was delayed, and the plaintiffs were prevented from pushing on with it at a time when they had a large number of employees available.

8. A further delay was caused owing to the plaintiffs not being able to get delivery from the Docks of trucks, rails and sleepers imported by them for use on the works, the vessels in which the said plant or material was being unable to discharge on account of the congestion in the harbour; the plaintiffs were unable to procure in Cape Town the said plant or material which was necessary for the construction of the said works.

9. The delay in the works due to the above causes was entirely beyond the control of the plaintiffs, and was not caused in any manner by their neglect or default.

10. On or about June 5, 1902, the said Engineer on behalf of the defendants gave written notice to the plaintiffs that he took possession of the works and plant, and ejected them and their employees therefrom.

11. The said notice purported to be given under clause 11 of the specifications annexed to the contract, which is as follows: "If at any time during the continuance of the contract the contractor shall, without reasonable or sufficient cause, fail to make such progress with the work as shall in the opinion of the engineers be proportionate to the total time fixed for the execution of the contract, the engineers shall, after having given the contractor forty-eight hours' notice in writing, have the power of ejecting him and his employees from the works, and to take possession of the work and plant; and to provide material and the necessary labour at the cost and charges of the contractor, and to pay such sum or sums or wages as they may think just or fair, and to deduct the amounts from any moneys that may be due and payable to the contractor; and should the total of such charges exceed in amount the contract sum, the balance may be recovered by the officer duly authorised by the committee of management to receive the same on the completion of the works, or the engineers shall have power to relet the contract."

12. The plaintiffs contend that they did not without reasonable and sufficient cause fail to make such progress with the work as should in the opinion of the engineer be proportionate to the total time fixed, and that the said question of reasonable and sufficient cause and the right of defendants to eject them and take possession of the works is a dispute between the parties which should be determined by this Honourable Court or by arbitration, and they crave leave specially to refer to clauses 17 and 18 of the said contract as follows: "Clause 17.—All matters of dispute, whether they refer to the manner of carrying on the work, to the quantity of material to be used, or to anything touching the meaning of the clause, matter, or thing in this contract, the specification or drawings shall in the first instance be referred to the decision of the engineers." "Clause 18: Should such decision, however, for whatever good reason not prove satisfactory, the matter or matters in dispute may be submitted to arbitration under the Lands and Arbitration Clauses Act 6 of 1882, the contractor to pay all expenses in connection with such arbitration."

13. On receipt of the said notice from the engineer the plaintiffs gave up possession of the works, and defendants have taken possession thereof and of all the machinery, plant, and tools thereon, the property of plaintiffs, and of a large quantity of cement which had been supplied to them, and the defendants are continuing the construction of the said reservoir, but not in accordance with the conditions of the original contract, which have in many instances been departed from since the defendants took possession of the works.

14. The plaintiffs claim that the defendants had no right to eject them from the said works, and in or about June, 1903, they requested the defendants to go to arbitration as to the right of the defendants so to act; and thereafter, on December the 24th, 1903, appointed an arbitrator after notice to the defendants, and the said arbitrator was about to proceed with the arbitration, but on or about March 1, 1904, the defendants applied to this Honourable Court and obtained an order restraining the plaintiffs (then respondents) from proceeding with the said arbitration.

15. The value of the machinery and plant taken possession of by the defendants is the sum of £2,800; the value of the cement is the sum of £1,693; and the amount of retention money due to the plaintiffs under the said contract in respect of work actually executed is the sum of £1,217 13s. 9d.; the defendants retain all the said money, materials, plant, and machinery in their possession, and they refuse to pay plaintiffs any of the said money or the value of the said materials, plant, and machinery.

16. The plaintiffs say that the defendants acted wrongfully and unlawfully in ejecting them from the works and taking possession thereof and of all the plaintiffs' plant and materials.

17. Since the date of the aforesaid wrongful ejectment of the plaintiffs by the defendants, and the taking over of the said works by the defendants, the defendants have so negligently proceeded with the execution thereof, that great and unreasonable delay has been caused, and in consequence the payment to plaintiffs of the sums owing to them under the contract has been unreasonably and wrongfully delayed and withheld.

18. By reason of the facts set forth in paragraphs 16 and 17 hereof the plaintiffs have suffered serious pecuniary loss and inconvenience, and have been injured in their business and deprived of moneys lawfully due to them, and have in all sustained damages amounting to the sum of £4,500.

The plaintiffs claim: (a) A declaration of their rights under the aforesaid contract; (b) a declaration that the defendants have wrongfully and unlawfully ejected the plaintiffs from the aforesaid

works, and have thereby broken the said contract; (c) the sum of £2,800, the value of the machinery; (d) the sum of £1,683, the value of the cement; (e) the sum of £1,217 13s. 9d., retention money; (f) interest on the aforesaid three sums from June 5, 1902; (g) £4,500, damages; (h) alternative relief; (i) costs of suit.

For a plea to the plaintiffs' declaration, the defendants said:

1. They admit paragraphs 1, 2, 3, 4, and 10 of the plaintiffs' declaration.

2. As to paragraph 5 of the plaintiffs' declaration, save that they admit that some delay was caused by the destruction by fire of certain original survey pegs, and that certain excavation work was done before the exact limits of excavation were pointed out, they deny the allegations therein contained.

3. They admit that there was difficulty in procuring a sufficient supply of labour, as alleged in paragraph 6 of the plaintiffs' declaration, but the difficulty was not insuperable.

4. As to paragraph 7 of the plaintiffs' declaration, they say that certain requirements of the engineer, in accordance with the specifications, were objected to by the plaintiffs, but otherwise they deny that paragraph.

5. Certain plant and material imported by the plaintiffs for use on the works were delayed in delivery at the Docks, but the defendants deny that such delay in delivery did cause or should, by the plaintiffs, have been allowed to cause the delay in the due proclation; save as aforesaid, they deny other allegations in paragraph 8 of the plaintiffs' declaration.

6. In so far as the circumstances referred to in the foregoing paragraphs 2, 3, and 5 were beyond the control of the plaintiffs, and not due to neglect or default on their part, and in so far as they reasonably caused delay in the progress of the works under their contract, all such circumstances were duly weighed and considered by the engineer before forming the opinion upon which he decided, after previous admonitions and warnings, to give the final written notice to the plaintiffs which is referred to in paragraph 10 of the plaintiffs' declaration; save as aforesaid, they deny paragraph 9 of the plaintiffs' declaration.

7. They admit paragraph 11 of the plaintiffs' declaration, and say that in the opinion of the engineer and in fact the plaintiffs, without reasonable or sufficient cause, failed to make such progress with the work as would be proportionate to the total time fixed for the execution of the contract, but negligently and in breach of their contract delayed in carrying out the work, and that by reason of the premises the engineer was justified in his action, and they say specially that, according to the true intent and meaning of the contract, the decision of the engineer, under clause 11 of the contract, is final

and conclusive, and binding on the plaintiffs.

8. They deny the plaintiffs' contentions set forth in paragraph 12 of the plaintiffs' declaration, specially denying that the clauses there quoted are applicable to the matters in issue in this court.

9. They admit the allegations in paragraph 13 of plaintiffs' declaration down to the word "reservoir." They deny that they are not carrying out the construction of the said reservoir in accordance with the conditions of the original contract, but they admit that certain alterations have been made in the original plans since the defendants took possession. They crave leave to refer to clause 14 of the said contract, which is as follows: "The engineer shall be at liberty to make any alteration in or omission from the plans or constructions of the said works, and such alteration shall not annul or invalidate the contract; but the difference in quantities or value (if any) arising therefrom shall be estimated or valued at the same rates as that upon which the contractor shall have formed his estimate for the contract." And they say that in the final adjustment the provisions of the contract will be adhered to.

10. As regards the taking possession of the machinery, plant, tools, and cement, they crave leave to refer to clause 11 aforesaid, and also to clause 8 of the said contract, which provides: All such materials and plant as aforesaid of the contractor, and all other materials and plant used by him, or brought on the premises for the purpose of use in and about the carrying out of the said contract, shall, for the purposes of the contract, be in the legal custody of the engineers, and shall so remain and be utilised by them or their order for the purposes of the contract, whether the contractors shall surrender their estate as insolvent, or assign it, or for whatever reason they shall become unable to carry out the terms of the contract. After the completion of the contract by him provided, the engineers shall return such materials and plant, or what is left thereof, to the contractor or his lawful representative."

11. As to paragraph 14 of the plaintiffs' declaration, they deny that they had no right to eject the plaintiffs. But they admit the other allegations in the said paragraph, save that they crave leave to refer to the deed of submission signed by the plaintiffs, when produced at the trial, for the terms of the said proposed arbitration, and to the said proceedings before this honourable Court in the said paragraph referred to.

12. As to paragraph 15, of the plaintiffs' declaration, they deny the values put on the machinery and plant, and the cement, in the said paragraph. They admit that they have retained in terms of the said contract, the sum of £1,217 13s. 9d., being 20 per cent. of the value of

work certified by the engineer, but they say that during the month of May, 1902, they advanced to the plaintiffs for wages and materials, sums of money amounting to £297 12s. 3d., against the amounts so retained. They admit that they retain the said retention money, and the said materials, plant, and machinery, and that they refuse to pay the plaintiffs any of the said money, or the value of the said materials, plant, and machinery, until the completion of the said works.

They say that they are justified in terms of the contract in so retaining until the said completion, and say that until then they cannot ascertain what sum, if any, will be due to the plaintiffs in terms of the contract, especially clause 11 thereof.

13. They deny the allegations in paragraphs 16, 17, and 18 of the plaintiffs' declaration.

Wherefore, they pray that the plaintiffs' claim may be dismissed with costs.

Sir H. Juts, K.C. (with him Dr. Rainsford) for plaintiffs; Mr. Schreiner, K.C. (with him Mr. Gardiner), for defendant.

John Edwin Cherry, one of the plaintiffs, said that they could not get the plant they required in town. The railway plant arrived here by boat on the 7th October. There was also delay in pegging out the work on the mountain slopes. He said that the ground had been burnt after the first pegs had been fixed. They made a start on the excavation of the reservoir; they were not sure of the site, but they had men who were waiting to work. Mr. Wright told him he thought they were within the reservoir. He found that this was right. The first pegs were put down in the first week of October, 1901, the others some time afterwards. They had difficulty in getting the railway plant from the Docks; it did not reach the spot until the 13th or 14th November. Excavation work was the slowest, though from the money point of view it was the cheapest. He calculated that if they had been allowed to run out more "spurs," and more short sections of rails they would have been able to do a fifth more work in the same amount of time. That would have made about two months' saving in time. Their labour supply was seriously influenced by martial law regulations and the plague. They took steps to augment the supply. They got a batch of thirty natives from Mossel Bay. The boys had been inoculated, and, in consequence of a report getting about that some of the boys who had been inoculated had died, no more would come down. The location was full of boys who were principally employed at Table Bay Docks. They also asked for 200 boys from the Transkei; as a matter of fact, they only got 71. These boys began to leave the works almost immediately after arrival; only four or five remained till the end of the month. They also tried to get 300 more boys

through Colonel Stanford, from East London, but were not successful. His firm took a quantity of cement, of the value of £1,653, to the works in January, 1902. No payment was made to them by the Board on account of this. The cement was several times tested, but the engineer would neither reject nor accept the material, though he did not appear to be satisfied. After witness's firm had been ejected from the works, the Board took over the identical casks. Plaintiffs were greatly incommoded by not receiving the money due on the cement from the defendants. In consequence they had to approach the Board for the fares of boys whom they desired forwarded from the Transkei. On the 10th May, this application was made; on the 12th, the Board replied that they would not pay the fares; and on the 16th May they received the first notice from the Board. They afterwards obtained a number of Italians, having about 80 on the works when the notice of the 16th May was received. In June, 1903, they began to take proceedings to go to arbitration, a year after the Municipality had taken over and had charge of the works. The Court, however, held that they could not proceed with the arbitration, hence this action. The works were still unfinished; he believed the reservoir would not be completed until July next. He understood that some departures in the work had since been made from the plans supplied to his firm. With regard to the plant taken by the defendants, the total cost was £2,263 3s. 6d., as shown by an extract taken out from their books. The amount of retention money due was £1,217 13s. 9d. This was admitted by the defendants. As to the payment made by the Board of £297 12s. 3d., that was for labour during May, 1902; and was paid after plaintiffs had been ejected from the works. They did not receive from the defendants a certificate of work done during May; they would be entitled to 80 per cent. of the value. Witness considered that they could have made a profit of 10 per cent. on the contract. They were fined for not being up to contract time with the work. After the witness's firm had been ejected from the works, the labour market improved a good deal. They had suffered damage from being deprived of their plant and material, since it was taken over by the defendants; they had been unable to do any work, because their plant and capital had gone. Considering the position of affairs in May, 1902, he calculated that they had made a profit of from 5 to 7½ per cent. on the contract. He thought they could have completed the work by April, 1903, and have made 5 to 7½ per cent. profit. That would be after allowing for four months' fine at £7 a day.

Cross-examined by Mr. Schreiner: This was the first large reservoir the firm had undertaken. Coochrane really

was the practical man of the firm. Cochran was away at the time a good deal, attending to the Harbour Works contract that they had under the Government at Mossel Bay. This contract was subsequently taken over by the Government at their (plaintiffs) request. The primary cause of the delay in their work at Newlands was the lack of labour. It was not impossible to have completed the reservoir by December, 1902, if they had had a proper supply of labour. He had not heard that theirs was the lowest tender by thousands of pounds, and that others had tendered up to £180,000. He admitted receiving a letter from the engineer on the 18th March, 1902, complaining about the progress of the work. The engineer had also, he was aware, made complaints previously, even as early as January, 1902. In March, 1902, only portions of the excavations and embankment had been carried out, while the largest item, the laying of 12,000 yards of concrete had not been touched. It was on account of the want of means that they could not take the boys collected at Butterworth on the 12th May.

Mr. Schreiner: Of course, you hoped for the best. But you had no capital on which to carry on either of these contracts.

Witness made no reply.

Further cross-examined: The bill for the cement had not been entirely paid by his firm. They had paid nothing to Crux and Co., the firm from whom they bought the cement, at the time they asked the Board for an advance. He maintained that the cement was up to the specification. The Engineer insisted on carrying out the specification of the contract in its entirety; witness suggested that the specification should be modified in certain details, and these modifications would have made a better job as a matter of fact. He thought it was better that the work should be consolidated by the Kafirs' feet than by rollers; they were quite willing, however, to roll the work. In March, 1902, they were employing over 300 men on the works; this went on until the 4th April, and the number was then reduced to about 200 or 220. They had had instructions from the Engineer to keep the minimum supply at 300.

Mr. Schreiner (to witness): Now, tell the jury, Mr. Cherry, when you dropped the idea of a 10 per cent. profit and came to the conclusion that you were not going to make a penny of profit.

Witness: I dropped it when we came near the end of May, and found that we were not making the profit we had counted upon.

Further cross-examination: He could quite believe that the cost of the work had, under departmental management, exceeded the total of their contract already. He did not think the present

management was what it should be. He thought Mr. Wright's management was profuse and lavish. The Board were not getting a proper amount of work from the number of men employed there. When the dispute arose he wrote a letter to the Board stating that there would have to be a full inquiry into the matter of the progress of the works and the action of the Board's engineer in turning them off the job. He knew that the contract gave certain powers to the engineer, but he did not consider that the engineer's views on this question of the rate of progress were final, because in one part of the contract it was set out that any disputes between the contractors and the engineer were to be referred to an independent engineer. He had been under the impression, therefore, that a question of this kind would be dealt with by an independent engineer. Only about six casks of cement were damaged; the rest were all right. The cost price of the plant was put in. The Harbour Board took over the plant at Mossel Bay. On the 10th June he had an interview with the Board, and he confirmed Cochran's contention that the delay was due to martial law and the plague regulations. The boys were stopped at East London owing to the plague regulations. After a year arbitration was asked for, and some steps would have been taken, only that the plaintiffs wanted to see how the Board got on with the work. Witness was confident that he could finish the contract in two and a half year's time. Time after time the engineer expressed his entire satisfaction at the progress made on the new works, but witness thought he went behind the plaintiffs' back to complain of the work. It was true that the engineer wrote a letter of warning on the 18th March, but witness could not understand it. The engineer was dead against them, and therefore they wrote that it was impossible to carry out the work.

Re-examined by Sir H. Juta: In March and April the amount of work went up immensely. Mr. Wright gave plaintiff the impression that he was anxious to take over the work himself. There was no correspondence about the damaged casks.

Robert Charters, Member of the Institute of Civil Engineers, stated there were great difficulties in obtaining labour on the mountain from October, 1901, to May, 1902. The boys preferred to work at the Docks owing to the increased wages. In comparison with the work at the Hely-Hutchinson Reservoir, it would be seen from a chart put in that when the labour dropped there it also dropped at Newlands Reservoir. When he was on the spot the men were being employed to the best advantage. He estimated that the contractors would have finished

the work with the same number of men the defendants employed by the end of April, 1903.

Cross-examined by Mr. Schreiner: There were difficulties in obtaining labour between October, 1901, and May, 1902. He could see no reason why the natives should dislike the Newlands Reservoir in comparison with the Hely-Hutchinson Reservoir.

Robert Charteris, further cross-examined by Mr. Schreiner, stated that the contract could have been finished four months after the stipulated time at a profit of £3,000. He had worked out the actual cost of the work as £67,280, but he could not at the moment detail the total profit on each item.

Re-examined by Sir H. Juta: He formed the estimate as an engineer, not as a lawyer. The result of his figures was that the plaintiffs did more excavation work per man than the Municipality.

John Delbridge, contractor, Wynberg, said he had considerable difficulty in finding labour from October, 1901, up to February, 1902, and through that he was greatly hampered with one of his contracts at Wellington. About June last year the labour market began to improve. From his own experience the cement used on the reservoir was a good class article.

Cross-examined by Mr. Schreiner: He did not test the cement that came out for the Newlands Reservoir, but he believed cement from the same makers had been used at the reservoir at Wynberg. There was a difficulty in getting coloured labour owing to martial law. Witness tendered £86,750, £15,750 over the tender of the plaintiffs.

Re-examined by Sir H. Juta: Of course, he would rather not say what profit he intended to make. At Wynberg he had as many spurs as he wanted.

Brandon Kirby, contractor, for the Cape Town Municipality, on the main drainage, said that between September, 1901, and May, 1902, there was a great scarcity of labour, and the Council could not proceed with some of their work. The boys would work a couple of days, and then go away. Witness did not finish his contract within the time, but the Town Council met him there. It was impossible to compete with the Docks, where the boys got a shilling an hour at night.

Cross-examined by Mr. Gardiner: He sent boys to the top of Kloof-street to get labour from the reservoir. Witness tendered £77,245, and calculated he would have made about £15,000 profit.

By Maasdorp, J.: With the full knowledge of the circumstances now he estimated he would have made from £13,000 to £14,000 profit.

Sir H. Juta closed his case.

John Mose Wright, engineer, stated that in 1901 he prepared the plans and specifications for the reservoir. The

contractors were getting ready for the work before the 27th September. The whole of the area was covered with young fir trees, and a serious fire took place while wood was being removed, but that did not delay the contractors. Witness permitted two spurs on condition that they were consolidated by beating, and subsequently he had to complain that there was not ample consolidation. By having extra spurs the facility for rolling would be reduced. Witness offered to allow another spur, provided they rolled it. The plaintiffs never wrote to witness complaining of this. There was a congestion in the harbour, and plague was about being stamped out when the contract was signed. The principal delay was in the order for trucks and sleepers; the plaintiffs having to work with barrows until November. He had not the least desire to take over the contract departmentally. When the plaintiffs made progress with the work, witness expressed satisfaction; but time after time he had to express his disapproval. He considered there was not sufficient cause for the delay of the plaintiffs. Witness tried to aid them in every way in getting labour. The plaintiffs paid 3s. 6d., while others were paying 4s., 4s. 6d., and 5s. On one occasion the natives struck work for higher wages. Before May 16 he found the work done by the plaintiffs was not in proportion to the time in which the work was to be pushed. He never considered the work could be done by December 31, 1902, the time stated in the contract. Subsequently plaintiffs admitted that they could not finish by that time, and at their request, witness's committee agreed to extend the contract to the end of March, provided the plaintiffs showed an earnestness to bring the work to a conclusion. In point of labour and finance, he came to the conclusion that the plaintiffs could not have finished the contract. Since the department took over the work, there had been some additions in the plans. He could not see how the work could have been finished at the contract price. The highest, out of nineteen tenders, was £180,000. The department had to raise the rate of wages when they took the work over. The proportion of work per man when the contractors were at work should be greater than when the contract was taken over by the department, as work in the first stages was easier. As to the cement, the test was not satisfactory, none of the bricks standing a strain of 400 lb., the average being 333 lb. The contractor had set down the excavation in his tender at 1s. 5d. per yard. From his experience of this class of excavation, he should put the cost price at 2s. 3d. or 2s. 6d. In regard to the embankment, the plaintiffs' figure was 9d. per yard, while witness fixed 1s. 3d. as a fair figure. In regard

to the concrete work, he thought that the figure of 41s. adopted by the contractors was low, and that a fair average price would be about 51s. or 52s. In the light of his experience of this kind of work, witness thought that the contractors would have made absolutely no profit on the prices at which they tendered. He regarded it as a losing contract.

Cross-examined by Sir H. Juta: He had not been engaged upon reservoir works in this country prior to this work at Newlands. He had had experience of excavation in connection with the investigations for the Steynsburg irrigation scheme; considerable excavations were made there to prove the foundations, but the dam was not proceeded with. His estimates of the cost of work were based upon his experience in this colony. He had been in the Public Works Department; he could not, however, give specific instances of works where he had gained his experience. Witness's terms of employment on the reservoir changed a little time before the contractors were ejected. Witness had not been anxious to find fault with the contractors. He thought that the time limit of the contract—fifteen months—was short. Witness did not say anything about this; he was away on the Oliphant's Hoek scheme when the contract was let. As to the burning of the pegs of the original survey, it would have been difficult for anybody else to have gone and picked up the pegs after the fire. Only charred remains were in the ground, and anybody unacquainted with the survey would have had great difficulty in finding the pegs. There was, however, a plan prepared of the survey. He objected to the construction of "spurs," because of there being a danger if they were not thoroughly consolidated, and also because the sections would be too small to roll by mules. It would be impossible to roll the sections properly by mule power. If the rollers were pulled by hand, it would not be economical.

Sir H. Juta: Don't trouble about the economy of the matter. We want to know what the reason is from an engineering point of view. You seem to smile at Mr. Charteris, Mr. Wright, but he has had experience in this country that you have not had.

Witness: I beg to differ there.

Counsel: You tell us that, from an engineering point of view, apart from economy, men can roll as well as mules?

Witness (hesitatingly): Yes.

Counsel: What is the objection, then, to cutting up sections of 50 yards, instead of 100 yards.

Witness: Because it will take up more time.

Counsel: Now, are there any other reasons? Except on the ground of time, these small sections could have

been rolled by men just as well as by mules?

Witness: We were complaining of the scarcity of labour at that time. When labour was scarce, I could not see 60 or 70 men taken off and put on a roller.

Cross-examination continued: Witness added an extra "spur" in July, 1902. He objected to the plaintiffs' "spurs," because they did not consolidate the work. The two "spurs" put in by plaintiffs were consolidated by beaters, because they were without heavy rollers. He offered to let plaintiffs have another "spur" if they would properly roll the work. Plaintiffs would not agree to this. He admitted that there was difficulty in obtaining labour in the latter part of 1901, and the early part of 1902. Labour was scarce at that time, and the supply unequal to the demand. He thought plaintiffs did not do their utmost to obtain a sufficient supply of labour; they should have employed a labour agent earlier to collect boys in the Territories. He had heard Cherry say that the boys they got down would not stay. There was an explanation for that. Plaintiffs were paying 3s. 6d. a day, with free quarters. The boys found that the current rate was 4s. 6d. a day, and naturally they would not stay at the reservoir works. Matters came to a head in April and May, because of the small number of men in the contractors' service.

Herbert Rouse, secretary of the Waterworks Committee, was then called. He said Mr. McCorquindale saw him in reference to the labour employed on the works. Everything asked for by Mr. McCorquindale was supplied by witness. The work was a very extensive one, and included the counting of eight wages-books of 300 folios each. There were other labourers besides those shown in the list. These labourers were not included under any head that Mr. McCorquindale asked for, and might be employed on half a dozen other kinds of work. It was impossible to have a return for more than two, three, or four months out of the twenty-seven months prepared by this (Thursday) morning.

Cross-examined by Sir H. Juta: Mr. McCorquindale asked him at first for information as to the men employed on excavation, embankment, rubble drain, benching, and clearing up. Afterwards Mr. McCorquindale asked him for information in regard to the men employed on making, mixing, and placing in position of the concrete. He thought the return was incomplete, because there were men employed under other heads of employment than those shown.

Sir H. Juta said that the plaintiffs would be satisfied if Mr. Rouse would take out a return of the total number of men employed on the work in Decem-

ber, 1902; the number of men employed on excavations between March and September, 1904; and the number of cubic yards of excavation carried out to the end of September.

Witness said that he would endeavour to have the details ready by the following morning.

Herbert Roux, secretary of the Board (re-called) said that since the adjournment on Thursday he had searched in order to ascertain whether there had been any estimates before the Board in regard to the construction of a reservoir. He found that there were reports from Mr. Bennett and Mr. Wright dealing with the construction of a reservoir to hold 30,000,000 gallons. Mr. Bennett's estimate was £50,000, and Mr. Wright's £52,000. Witness was not secretary of the Board when the estimates were submitted. The present reservoir was to hold 30,000,000 gallons; he did not know whether it was the reservoir referred to in the reports of Messrs. Bennett and Wright.

Andrew B. Reid, of the firm of A. B. Reid and Co., builders and contractors, said he was a member of the Water Board, and was a member at the time when the contract was proceeding. He had had nearly 24 years' experience of construction work, including 21 years in this colony. The contract had been fixed when he joined the Board; at the first meeting he attended the plaintiffs came to sign the contract. Witness represented the Mowbray Municipality on the Board, having been Mayor of Mowbray two years. He saw the work as it was carried on by the plaintiffs; he formed an opinion in the beginning of 1902 that the work was not being attempted to be pushed forward in a practical way so as to get it finished within the contract time. Witness had considerable experience both of concrete work and excavation, though he had had no experience of the construction of large reservoirs. At the time when the contractors were at work unskilled labour was somewhat scarce; the rate of wages was 4s. 6d., without quarters. Quarters would be equivalent to about 2s. a week. Witness's firm were retarded to a certain extent in the contracts they had on hand at that time owing to the state of the labour market, but they got through without any complaints. He was present at the Board meeting when the contractors applied for an advance to enable them to bring down natives from the Territories. The average price of excavation on the works witness's firm had in hand during that period was 2s. 8d. per cubic yard. That would include 10 per cent. for profit. The plaintiffs' estimate of 1s. 6d. per cubic yards was, he thought, entirely out of the question. The contractors' figure of 41s. per cubic yard for concrete work was, he contended, very much too low. Taking the class of concrete work that

the plaintiffs had to do at the reservoir, he thought a fair average price for floors would be about 44s., and walls about 60s., giving an average of about 52s. He regarded the plaintiffs' estimate of 41s. all round for concrete work as too low. He had not had much experience of embankments, but he should take as a fair figure for such work 1s. 6d. per cubic yard. The Board were very reluctant indeed to turn the plaintiffs off the work, but they were compelled to do so in the interests of the ratepayers whom they represented. If the work had been seriously pushed on by the plaintiffs he, as a member of the Board, would have been prepared to grant them an extension of the contract time.

Cross-examined by Sir H. Juta: As to the figures for the excavation, he did not think the cost of the work departmentally, which worked out at 2s. per cubic yard, was excessive. He had quoted his firm's contract prices; he considered that the work which had to be done on the slopes of the mountain at this reservoir was much more difficult than the work his firm had to do. His firm had carried out a good deal of excavation both in Cape Town, Woodstock, on the Groot Schuur Estate, and at Somerset West. Witness's firm had not brought down labourers from the Territories; they had always managed to obtain their native labour locally. In several of their contracts about the period of the plaintiffs' operations, witness's firm completed within the specified time; there were very few contracts in which they had an extension. He would have been willing in April, 1902, to grant the contractors an extension of time, as suggested in the engineer's report, although he thought the plaintiffs had not been proceeding with due despatch. He would have wanted an undertaking that the work would be completed within a reasonable time.

Sir H. Juta (to witness): What fault had you to find with the contractors in April, 1902, when the figures show that in March they had done more work in the way of excavation and embankment than the Board ever did afterwards?

Witness: So they ought to have done—considerably more.

Counsel: Now, I want to know what fault you had to find in April with this work?

Witness: The work was falling off. Men were leaving.

Re-examined by Mr. Schreiner: It was entirely the spirit of the Board that the contractors should be given an extension of time if the work had been proceeding at a reasonable rate.

By the Court: He saw a large number of labourers leaving in April; the explanation was largely because the contractors were not paying the current rate of wages. The contractors were also

short of plant. At the time he did not think it was possible, even if all went well, to complete the contract within the specified time.

Mr. Schreiner read the correspondence leading up to the institution of proceedings.

Mr. Wright, the engineer (recalled by Mr. Schreiner), said that on the 20th May, 1901, before the construction, he prepared an estimate of a thirty million gallon reservoir to cost £52,000 by a very rough estimate.

Mr. Schreiner closed his case.

Sir H. Juta, on behalf of the plaintiffs, said that it would be important for the jury in the first instance to carefully consider the position of the two parties in order to get a fair idea of what was done. The plaintiffs had been carrying on large public works in this colony, and they called on the defendants to make inquiry from the Public Works Department as to their character. On the other hand, they had got Mr. Wright, who, whatever his capacity was, had no experience whatsoever in this colony of making reservoir works, with the exception of a little bit of a dam at Steynsburg, that had never been built. The conditions in this country were so extremely different to elsewhere that the most able man from England might make very serious mistakes. Mr. Wright, they would remember, would have them believe that the contract was an absurdity and a farce, and that when he framed his estimate of £52,000 he did not go into figures. While Mr. Wright said the contract could not be finished within 2½ years it was important to note that many able contractors were confident they would finish it in the stipulated time. It would be difficult to say exactly how Mr. Wright approached the work, but from the beginning there were complaints that the engineer did not know anything of the practical part of the work. What would any of the jury say if they undertook certain work, and had to look at the newspapers to find their employers' complaints? Nothing but the accusations of the engineer appeared in the press, and there was never any publication of the plaintiffs' defence. Under such circumstances, could the jury for a moment fancy that the engineer and Cochrane and Cherry were on the best of terms? In March, the plaintiffs by several thousands did more work than the Board had done at any time since. It was hardly likely that Mr. Wright, when he had daggers drawn with the contractors, could in a calm and unbiassed way judge the work of the latter. While Mr. Wright pointed out that the contract could not be finished within the time, and that it would take three and a half years, was it not playing with his principals when he advised them to grant an extension for a couple of months? It was signi-

ficant, when the contract was taken over, that alterations of an extensive character were proceeded with by the Board. Coming to the question of whether the delay was without "reasonable or sufficient cause," counsel drew the attention of the Court to the contention of the defendants that the opinion of the engineer on this point was final. He submitted that the question divided itself into two parts. The first was whether the ejecting clause (No. 11) was within the arbitrament of the engineer. Then, supposing it were, he should say that a further point arose whether there was any conduct on the part of the defendants which brought about delay. It would be unreasonable to suppose that the engineer should be the arbiter of whether there was any delay on the part of the defendants. The grammatical construction and meaning of the clause constituted an exception, because the words read, "If the contractors shall fail to make such progress with the work, as shall, in the opinion of the engineers, be proportionate to the total time fixed, without reasonable or sufficient cause," etc. The engineer was to decide whether the work was proportionate, but counsel submitted it was not intended that he should determine whether there was a reasonable or insufficient cause.

[Maasdorp, J.: The point arose, though not precisely in this form, in the case of *Hills v. the Colonial Government*, in connection with the construction of the Klipplaat Railway.]

Sir H. Juta said that the clause was not really identical in the respective contracts. He went on to say that usually, where there was provision made for the engineer to be arbiter, there was also power given to him to extend the contract time. There was nothing in this contract about that. He submitted that the engineer was not to be the sole arbiter under this contract. Counsel cited *Hendricks and Socker v. Atkins* (13 "Cape Times" Reports, 517), and the English case of *Wells v. Army and Navy Co-operative Society* (vol. 86, "Law Times," 764).

Counsel contended that if the plaintiffs showed that they were turned off the works without reasonable and sufficient cause, they were excused the delay, and the defendants had not been justified in ejecting the contractors. He next dealt with the evidence as to whether the plaintiffs had employed as much labour on the works as they could have done. He urged that it was not a matter of higher wages that prevented the plaintiffs from obtaining sufficient native labourers, but that the plague scare and martial law regulations were strong contributory causes to any shortage that the plaintiffs had. The plaintiffs, he contended, took all ordinary, energetic precautions to obtain an adequate supply of labour. Now the best test was to compare the work the defendants did with the work done by

the plaintiffs. In March, 1902, the engineer complained about the work done by plaintiffs in February. Now what were the facts? Out of twenty-one months, when the defendants were at work, in one month only did they exceed the work done by the plaintiffs in February, 1902. In other months, the defendants approached the plaintiffs' work for that month. The plaintiffs carried out 15,600 cubic yards; the plaintiffs did 14,000 in September, 1902; 10,600 in March, 1903; and 12,000 in April, 1903. As for the rest, the defendants' work ranged from 7,000 down to 2,000 cubic yards in the month. Again, the engineer complained in April, 1902, about the work of the previous month. Again, what about the facts? In excavation and embankment the plaintiffs performed in March, 1902, 29,100 yards, whereas the monthly returns of the work, as done departmentally by the Board, fluctuated from 24,900 in October, 1902, to 4,000 in September, 1903. Counsel compared the cost of the work departmentally to the end of September with the contract price. He asked the jury to find that the plaintiffs should not have been turned out on the *ipse dixit* of the engineer, who was not on the best of terms with the contractors. He went on to submit that there were other causes for the delay—for instance, the late arrival of the plant through the congestion at the Docks, and the engineer's unnecessary restraint of the contractors from running additional "spurs" to carry away the soil. He submitted that the Municipalities were too hasty, and ought never to have expelled the plaintiffs. In addressing the jury on the question of damages, counsel urged that a sum of £3,000 was a reasonable compensation to be paid to the plaintiffs.

Mr. Schreiner then addressed the jury. At the outset he pointed out that it was not from the defendants that the suggestion of a jury had emanated, because it had seemed to them that the question was very largely one of legal construction. It had not seemed to them to be so much a question for the jury as for his lordship to determine the construction of clause 11. His learned friend, in dealing with this clause, had placed the words "reasonable or sufficient cause" not exactly where they occurred in the clause. The contract said: "If, during the continuance of the contract, the contractors shall, without reasonable or sufficient cause, fail to make such progress with the work as shall, in the opinion of the engineer, be proportionate to the total time fixed for the execution of the work," etc. What followed? Not an arbitration, not a judge and jury, not an independent inquiry; but the clause went on to say that the engineer should, after having given the contractor forty-eight hours' notice, have the power to eject the contractor and his employees from the works. Counsel admitted that the

clause was very stringent, but it was, he said, a contract to which Cochrane and Cherry were bound. The clause was not unreasonable in the sense of being unprecedented. It was such a clause as was found in many contracts. It had not been suggested by the plaintiff Mr. Cherry, that there was *mala fides* on the part of the engineer. He put that question to Mr. Cherry when he went into the box, and very fairly Mr. Cherry said that he did not think that the engineer had acted *mala fide*. He was sorry that his learned friend had seen fit to paint Mr. Wright such a scoundrel.

Maasdorp, J., put it to counsel whether the proportion of work done could not be determined by the engineer, quite apart from the reasonable or sufficient cause.

Mr. Schreiner submitted that the question of the proportion of work done could not be determined by arithmetical methods. He contended that the words "without reasonable or sufficient cause" were the most operative words in this contract, and, as a matter of fact, stood to some extent for the protection of the contractors. He urged that the words quoted could not be dissociated in the interpretation of the clause from the context. He proceeded to contend that all that the clause contemplated was urgency and emergency, not an independent inquiry, not a trial before judge and jury for three or four days.

[Maasdorp, J.: Very well, then; we might as well never have sat here if your contentions be correct.]

Mr. Schreiner said that the point that should come before the jury was the delay occasioned by the non-acting out in time, or at once, of the survey pegs.

[Maasdorp, J.: A question that could be determined in an hour. Is it your contention that that is the only point I should direct the jury upon?]

Mr. Schreiner said that the jury might also be directed on the point of the additional "spurs." He adduced these submissions in all humility to his lordship. He could not but regret that there had been such a long inquiry into questions that were settled when the Board put into operation clause 11. Counsel quoted the case of *Roberts v. Bury Commissioners* (L.R. 5, Q.P. 310-329). He proceeded to trace the subsequent events, and referred in some detail to the demand of the plaintiffs for an arbitration, and their appointment of an arbitrator. The refusal of the defendants to be joined in the arbitration, and the Board's subsequent application, upon notice of motion, in the Supreme Court for an interdict to restrain the arbitration. This application was granted by Mr. Justice Hopley, not, it was true, for the same reasons as were now brought for-

ward, but upon the same dicta. That judgment had not been appealed against. Continuing, counsel submitted that there had been no wrongful disturbance of the contractors on the part of the Board or their servants. Referring to the evidence of Mr. Wright (the engineer), he submitted that, though Mr. Wright had not fairly grasped the trend of his learned friend's severe cross-examination, he had given his evidence as a honest, honourable, professional man would do. The argument which had been used by his learned friend contained insinuations against Mr. Wright, which, if they were well founded, were such that he should be hounded out, and he would deserve to lose his billet. On a calm day, after the heat of cross-examination, his learned friend descended to this, that he asked the jury to argue, because there had been some friction between Cherry and Wright: "Gentlemen, you are all men of the world, and as men of the world, knowing human nature, of course you know what the engineer would do. Why, he would get them out of the work." Was Mr. Wright such a scoundrel as that? That was an insinuation which he (Mr. Schreiner) thought Mr. Wright did not deserve. Continuing, counsel commented on the fact that Mr. Cochrane, the practical partner of the firm, although he had been in court, had not been put into the box. The plaintiffs had undoubtedly made a mistake. Mr. Cherry came down from the Telegraph Department of the Transvaal, and in his youth and inexperience and enthusiasm though he could make a profit of 10 per cent. He thought the war would be over in September, 1901, and he would be first in the field. He had not anticipated the plague and the martial law regulations, and the prolongation of the war until May, 1902. Counsel submitted that the jury could not find that there had been any breach of contract for which the Waterworks Board could be held responsible. How could Cochrane and Cherry complain, when they did not provide themselves with anything like the means necessary to carry out a £71,000 contract? They took the risks, and they could not come and complain now because they had been ejected.

Sir H. Juta, in reply, said that in regard to the point of law—

[Maasdorp, J.: I don't think you need argue the law. Sir Henry; if I am wrong, it can be set right hereafter.]

Sir H. Juta: Very well, my lord. Proceeding, counsel said that his learned friend had made his remarks about the engineer infinitely worse than anything he (Sir Henry) had said. He certainly never called Mr. Wright a "scoundrel," or intended to insinuate that he was a scoundrel. The point was that either Mr. Wright did his duty to the Board

at the time or his memory had failed him. It was ungenerous of his learned friend to say that all these things came from him (Sir Henry), and nothing came from the contractors. The correspondence showed that the contractors repeatedly complained about the treatment they received from Mr. Wright. They all knew that if there was friction the weaker man went to the wall. That was human nature; it did not make that man a scoundrel at all.

Maasdorp, J., said that he had to decide the point whether it was in the discretion of the engineer to decide whether a proportionate amount of the work had been done, and also whether there was reasonable and sufficient cause for the failure to do that work. The defendants said that the engineer had to dispose of both these questions, and it made all the difference to the issues that the jury had to consider whether that was so, or whether the question was still open as to the reasonable and sufficient character of the cause of the failure. He (the learned Judge) found, as a question of law, that it was not in the discretion of the engineer to decide the point as to whether there was reasonable and sufficient cause to bring about the failure to do work. It seemed to him that, taking the grammatical construction of this clause, the only thing that the engineer had to do was to find whether such progress had been made in the work "as shall, in his opinion, be proportionate to the total time fixed for the execution of the contract." He had to decide that question in this way. He said that one-half of the time had elapsed, and only one-seventh of the work had been done. He thought the question of whether there was a sufficient reasonable cause was a question that the jury had to decide. That was his direction to the jury on the point of law. The main question for the jury to decide was: Had the plaintiffs shown to them what they claimed to be the position at the time, that there was reasonable and sufficient cause for their having failed to do the necessary proportion of the work. His lordship went on to review the evidence at some length.

The jury, after an absence of twenty-five minutes, returned into court with a verdict for the plaintiffs. They found that the plaintiffs were entitled to £1,217 13s. 9d. retention money, less an advance of £227 12s. 3d., leaving a net amount of £929 1s. 6d.; to £1,600 for cement, £2,500 for machinery, and £2,500 damages for retention, and loss of profit.

Sir H. Juta moved for judgment for the plaintiffs for £7,520 1s. 6d., in terms of the jury's finding.

Mr. Schreiner moved for a stay of execution under the Jury Act, on the ground that the defendants were entire-

ly dissatisfied, with the result. There should, he said, be an adjournment of the entering of judgment to enable the defendants to consider their position.

Sir H. Juta said he did not see that it would make any difference whether the entering of judgment was adjourned or not.

Counsel having been heard further,

His Lordship said that judgment would be entered for the plaintiffs for £7,520 1s. 6d., with costs. He would make a note of the opposition of the defendants.

Mr. Schreiner applied for a stay of execution. He mentioned that it was probable there would be an application for a new trial, but that was not the ground on which he now asked for stay of execution.

His Lordship said that the Court would grant a stay of execution until the 15th November.

[Plaintiffs' Attorneys: Fairbridge, Arderne and Lawton. Defendants': Van Zyl and Buissinné.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

LENNOX V. MURRAY AND { 1904.
STEWART. { Oct. 25th.

Mr. Gardiner, who appeared for the defendant, asked to have judgment signed in terms of a consent paper put in.

Judgment entered accordingly.

RAPHAEL V. MAY.

Mr. Gardiner, who appeared in this case, said he and Sir Henry Juta, who were engaged for the defendants in this case, were also engaged in the jury trial in the court below. They had no idea that the case would have come on so soon; if they had, they would have made other arrangements. He asked to have the hearing of the case postponed.

Dr. Greer, who appeared for the plaintiff, said that, in view of Mr. Gardiner's explanation, he could not oppose the application, but he would ask for costs, as all his witnesses were present, some of whom had come from Somerset Strand and others from the Paarl.

Mr. Gardiner said he would leave that matter in the hands of the Court.

His Lordship said that he did not see that he could do anything but grant costs. The case would be allowed to stand over *sine die*.

IN THE MATTER OF THE PETITION OF HAMILTON MAXWELL FLEMING, IN HIS CAPACITY AS LIQUIDATOR OF THE BUFFALO COLD STORAGE CO.

Mr. Close applied for an order restraining the National Bank from delivering to either Alexander or Maurice Bergl 15,000 shares in the Federal Cold Storage Co., Ltd., pending the institution by petitioner of an action to recover same. Plaintiff sued in his capacity as one of the joint liquidators of the Buffalo Cold Storage Co., in liquidation. The company's business was acquired by the Federal Company in 1902, and the shares in question were said to have been deposited in the National Bank by the respondent Maurice Bergl.

His Lordship granted the application; the action to be instituted forthwith, and the respondents to have leave to anticipate the return day.

MAYNARD V. MAYNARD.

This was an action brought by John Lucius Maynard, of Sea Point, against his wife, for an order for the restitution of conjugal rights, failing which a decree of divorce, on the ground of desertion.

Mr. Sylvester Williams, who appeared for plaintiff, said the defendant had written declining to defend the action.

William Thos. Birch produced the certificate of the marriage.

The plaintiff stated he resided at Sea Point, and was an overseer by occupation. He was married to defendant on the 24th June, 1901. For the first two years of their married life they were happy, but after that they had family quarrels. He had to complain of her going out without his permission in his absence. She continually deceived him as to her movements. He also had to complain of her lending money to her family, without acquainting him of the fact. In August last he found her wearing a bangle. He questioned her as to who gave it to her, but she made no answer. He also found letters addressed to her from other men. He questioned her about them, and she tore them up and left him in August last.

To the Court: He never ill-treated her. The defendant was a fairly well-educated woman. She wrote to witness and told him she would not defend the case. They were married in community of property.

The Court ordered that the defendant return to plaintiff on or before December 31, failing which, a decree of divorce would be granted on January 12.

Postea (January 12, 1905). The rule was made absolute.

SUPREME COURT

SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

PRICE AND CO. V. WEBNER. { 1904.
Oct. 26th.

Promoter of company—Novation.

The defendant, who at the time was promoting a limited liability Company, bought certain goods from the plaintiff for the use of the intended Company, but he bought the goods in his own name, and the plaintiff debited the defendant in his books with the price. The Company was afterwards formed, and the plaintiff on one occasion sent an account for payment to the Company, but on another occasion the defendant gave him his own cheque in part payment.

Held, that the mere sending of the account by the plaintiff to the Company did not constitute a novation or release the defendant from his liability.

This was an action brought by Messrs. E. J. Price and Co., upholsterers, Strand-street, to recover from J. F. Webner, of Mouille Point, £240, less £100 paid on account, for goods sold and delivered.

The matter had already been before the Court on an argument on exception. (See 14 C.T.R., 630).

The plaintiff, in his declaration, stated that he carried on business as an upholsterer and furniture dealer at Strand-street, Cape Town. On or about July, 1903, he supplied defendant with certain articles of furniture and fixtures, amounting to £240 13s. 2d., of which defendant paid £100 on account, but had refused to pay the balance.

When the case was last before the Court the defendant denied having made any payments, but he now wished to amend his plea. The original plea denied severally each of the allegations of the declaration save those which were purely formal.

Mr. W. P. Buchanan appeared for the plaintiff, and Mr. Alexander for the defendant.

Mr. Buchanan explained that when the case was last before the Court the

defendant denied having made any payments, but he now wished to amend his plea.

Mr. Alexander explained that the difficulty in this matter had arisen through all the papers of the Dr. Grosz Medical Bath Co. being in the hands of the liquidators. Since they had seen the documents it had come to the notice of the attorneys that the sum of £50 had been paid to the plaintiff by the defendant. At the time the plea was filed they were under the impression that nothing had been paid, but they were since informed that two sums of £25 each had been paid.

Edmund J. Price, the plaintiff, stated he carried on business as E. J. Price and Co., Strand-street, Cape Town. Witness had known the defendant for a number of years. In April, 1903, defendant approached him about furnishing and decorating a house. Witness accompanied him to the house, which was situate at Mouille Point. Witness prepared an estimate for doing the necessary work, and defendant accepted it. Witness confirmed the contract by letter, and proceeded to execute it. The estimate was for soft goods. The majority of them were forwarded by means of a carrier, and the rest by a messenger. When the estimate had been accepted the defendant said he was starting a medical company. Witness asked him if he wanted him (witness) to take shares in it, and he replied in the negative, and said he would pay cash when the contract was completed. Subsequently the defendant purchased a drawing-room suite from witness, which was delivered. He also purchased eight mattresses. Witness debited defendant with everything purchased. When the contracts had been completed witness asked defendant for some money on account, and he gave him a cheque for £50. The defendant never told witness that he had purchased the things on behalf of the "Dr. Grosz Medical Baths." The defendant was credited with the amount received, as the block of the receipt book would show. Witness asked him on several occasions for payment, and he promised to pay, but said he was rather short of cash. Witness wrote to the managers of the "Dr. Grosz Medical Baths" asking for payment. The defendant paid witness another £25 on account in September. [De Villiers, C.J.: Where's the receipt for the £50 cheque?]

Mr. Alexander: We have the secretary of the company here, who will prove that he paid the £50 on behalf of the company.

Witness: I gave a receipt to Mr. Webner, as the block of the receipt book will show.

Continuing, witness said that as he could not get payment from Webner he placed the matter in the hands of the South African Trades Protection

Society, and they applied to both Webner and the Grosz Medical Baths. They applied to the latter without his authority. He received a cheque for £25, for which Mrs. Price gave the receipt produced. The goods were all supplied in accordance with the terms of the contract.

Cross-examined by Mr. Alexander: Witness had no dealings with Dr. Grosz's Medical Baths. Witness did not personally send any accounts to the Medical Baths; his accountant may have done so. Witness gave the Protection Society the particulars of the amount to claim. He may have authorised them to claim from "The Dr. Grosz Medical Baths," but he doubted it. Witness had no dealings with Dr. Grosz. The defendant and the Baths Company had their offices together. Witness often went to the office to ask for a cheque.

[De Villiers, C.J.: Did you ever see the Medical Baths?]

I did.

[De Villiers, C.J.: I suppose you never used them?]

No, my lord.

De Villiers, C.J., said the question the Court had to decide was who the goods were sold to.

Mr. Alexander said they were for the company.

[De Villiers, C.J.: Was the company incorporated then?]

No, my lord; but it was being formed, and in that state, of course, certain liabilities would be undertaken in furnishing, etc.

John Thomas Williams, assistant in plaintiff's firm, stated he recollected the transaction in April with the defendant. Witness carried out the order, and debited defendant with the amount. Witness heard nothing of the "Dr. Grosz Medical Baths" until very lately. Witness was also present when the drawing-room suite was purchased.

Cross-examined by Mr. Alexander: Witness never heard of Dr. Grosz until lately.

Mrs. Wilhelmina Price, wife of plaintiff, stated that at the time the contract was entered into with Webner she kept the books. The first time she saw him was when he purchased the drawing-room suite. The defendant did not pay her the £25 personally, but she made out a receipt for the amount received. He then said there would be another cheque shortly.

Cross-examined by Mr. Alexander: Witness seldom or never spoke to gentleman customers.

Re-examined: Witness sent out accounts from month to month. She always submitted the accounts to somebody else before posting them.

A messenger in the employment of the plaintiff's firm stated he took the goods to the house at Mouille Point. Dr. Grosz received them.

John Hector Gibb stated his firm acted as carriers for plaintiff. Witness took a number of the parcels himself. They were all addressed to Mr. Webner.

Cross-examined: Witness never saw either the defendant or Dr. Grosz there.

Thomson Mlella stated he was employed by the plaintiff firm. He took goods for them to Mr. Webner. They were addressed to him. He handed the goods to some carpenters, who were working there.

P. J. Messcheart, ledger clerk, in the Netherlands Bank, stated Mr. Webner had an account there. The cheques produced were debited to him.

For the defence,

Isidore Frederick Webner, the defendant, was called, and stated he promised plaintiff to introduce him to a man who was floating a company, and who would give him a good order. He subsequently introduced Dr. Grosz, who gave all orders for the goods. The company did business long before it was registered in July. The delay in registering the company was due to the resignation of two directors. Witness never received any account for the goods. Witness had nothing to do with the payment of £50. He only heard about that since. Witness admitted making two payments of £25 each, because Mr. Price was pressing for money, and witness paid him on behalf of the company, the secretary of which promised repayment. Witness had on various occasions lent the company sums amounting to £700, and had otherwise assisted Dr. Grosz, who could not speak English very well.

Cross-examined: Witness had purchased goods from other dealers, who understood they were for the company, and not for witness himself. He understood that Mr. Price, who was a personal friend of his, knew that too.

Frederick McDonnell, secretary of the Dr. Grosz Medical Baths Company, Ltd., said the goods purchased from the plaintiff were all debited to the company in the company's books. Mr. Price must have understood they were for the company, which had never repudiated its liability. Witness had paid plaintiff £50 on account.

Cross-examined: Mr. Webner financed the company to a certain extent. Mr. Price never asked for Dr. Grosz when he called at the office.

J. H. Little, chief clerk, of the South African Protection Company, said he received orders from Mr. Price to press the Dr. Grosz Company for payment of the account.

Cross-examined: Mrs. Price subsequently told him that they knew nothing about the company, and only recognised Mr. Webner as liable for the amount due.

Hendrick Moller stated he was clerk in the offices of the liquidators of the Dr. Grosz Medical Bath Co., Ltd., and produced the books of the latter firm.

The firm debited itself with £240 worth of furniture, and credited itself with two items of £50 each, cash paid on account. From the books, it appeared that various sums of money were loaned by Mr. Webner to the company. The furniture was included in the assets of the company.

Cross-examined: The books produced were in the same condition as they had been received from the company. They had not been newly written up. The defendant had paid various accounts on behalf of the company.

[De Villiers, C.J.: Supposing you were called upon to pay this debt, could you?] I don't know that.

[De Villiers, C.J.: Why, are you not liquidator?]

No, I am in the liquidator's office.

Counsel then entered into argument on the facts, after which His Lordship inquired if the defendant disputed the accuracy of the account, if judgment was given against him.

Mr. Alexander said there were a few slight discrepancies, which brought the amount of the claim down by £7 10s.

De Villiers, C.J., said it was not seriously denied in this case that the articles alleged to have been supplied to the defendant were supplied, except £7 10s. worth. The real question in dispute between the parties was whether credit was given at the time, when the goods were ordered, to the defendant Webner, or to a company which was intended to be formed, and to be called the "Dr. Grosz Medical Bath Company." The evidence showed that at the time the goods were ordered, certain communications did take place between the defendant and the plaintiff. On the 21st April, the plaintiff handed an estimate of the goods which would be delivered, and the letter containing that estimate was addressed, not to the company, but to "J. F. Webner, Esq., Savings Bank Buildings, Cape Town." It was clear that at that time it was intended to establish this company, and that within a couple of days after a secretary was appointed who wrote letters to different parties on behalf of the company. The letters referred chiefly to advertisements, which the promoters of the company wished to have inserted in the newspapers, and it was quite clear from the evidence of the secretary that the moving spirit of the whole matter was the defendant. In his evidence, the defendant wished the Court to believe that he acted merely as a friend of Dr. Grosz's, as Dr. Grosz could not speak English properly, and that he interpreted for him. The evidence, however, showed that he was not a mere interpreter; on the contrary, he was the moving spirit of the company. He obtained the option of the property at Mouille Point to be used by this company, and he sold his right to the option at a considerable profit. He

(his lordship) did not blame him for that. He gave £3,000 for the property, and sold it for £3,500 and £2,500 worth of shares in the company. The secretary *pro tem.* of the company stated that, when writing any letters, he took his instructions from the defendant. In one of the letters, where the Midland Printing and Publishing Company refused to accept their advertisement, the secretary referred them as to their respectability to Mr. Webner. The facts showed that the defendant was not acting merely as a friend of Dr. Grosz, but that he was an active promoter of the company. Now, if it had been intended at that time that the plaintiff should look for his money to the company alone, the secretary would have communicated with the plaintiff, and it would have been made clear that the person to whom plaintiff was to look would be the company to be formed. It would require a good deal to persuade the Court to believe that the plaintiff would have given credit to a non-existing company. Supposing the company had never been formed, whom would the plaintiff look to for his money? The defendant, in reply to that question, said, "Oh, to Dr. Grosz." But why to Dr. Grosz? He (his lordship) could not see why he should be applied to. Both defendant and Dr. Grosz seemed to have stood on very similar footing. There seemed to be no reason advanced why Dr. Grosz would be more liable than the defendant. The plaintiff's statement was that the defendant himself went to the shop and ordered the things for himself, and this statement was corroborated by the estimate which was given to him at the time, and then there was the further fact that the goods were supplied at the house, which was the property of the defendant. No doubt the defendant was entitled to rely on the fact that in September the account was made out in the name of the "Dr. Grosz Medical Baths Co.," but the sending of such an account did not amount to a substitution of the company for the defendant as debtor to the plaintiff. There was no novation of the debt and the mistake was probably caused by the plaintiff having received a cheque signed by the "Dr. Grosz Medical Baths Company." The plaintiff had supplied the goods, and wanted to have his account settled. It did not matter to him who paid it. The mere fact of the acceptance by the plaintiff of a cheque from the Baths Company did not make him accept the company as debtors. For those reasons he was of opinion that judgment should be for the plaintiff for the amount claimed, less £7 10s., with costs, and also costs of the exception.

[Plaintiff's Attorneys: Silberhaur, Wahl and Fuller; Defendants' Attorney: F. B. Andrews.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

RHODES V. RHODES AND { 1904.
BOWMAN. { Oct. 27th.

Mr. P. Jones applied, on behalf of the plaintiff, who was taking divorce proceedings against the defendant, and claiming damages from the co-defendant, for the appointment of a commission to take the evidence of the captain, surgeon, steward, and stewardess of the S.S. Turakina, which was expected to arrive in Table Bay en route from New Zealand to England on the 29th inst.

The application was granted on the understanding that if the evidence was objected to by defendants the evidence would be of no avail. Mr. Giddy, K.C., was appointed commissioner.

ADMISSIONS.

Mr. Roux applied for the admission of Owen Balleine Payn as an attorney.

The application was granted.

Mr. Burton applied for the admission of Alexander Gromer as an interpreter.

The application was granted.

Mr. Alexander applied for the admission of Louis Moss Cohen as an attorney and notary public.

The application was granted, the oath to be taken before the Registrar of the High Court, at Kimberley.

PROVISIONAL ROLL.

SCOTT V. STABCK. { 1904.
{ Oct. 27th.

Mr. P. Jones applied for the final adjudication of the defendant's estate.

The provisional order was granted on the 19th October.

Hopley, J., asked what service had been made on the defendant.

Mr. Jones replied that he could not say.

Hopley, J., said that the service of every summons ought to be briefed to counsel in every instance. That was an absolute rule in the High Court of Griqualand West. How was he to know whether the defendant knew anything of the proceedings, when there was no proof that he had been served with a summons? He did not know how young attorneys' clerks were learning their business. Was it too much trouble to send one round to the Registry to find out the nature of the service?

The application was granted, His Lordship instructing counsel to ascertain the nature of the service.

GORDON MITCHELL AND CO. V. TURNER.

Mr. Sutton applied for the final adjudication of the defendant's estate. The provisional order was granted on October 22.

The application was granted.

VAN BRED A V. TURK.

Mr. Lewis moved for provisional sentence on a mortgage bond for £2,600, with interest at 6 per cent., from July, 1904, and also that the property specially hypothecated be declared executable.

The application was granted.

ROBINSKY AND CO. V. NORTON.

Mr. Sutton moved for provisional sentence on a promissory note for £100.

The application was granted.

FLETCHER V. VIVIERS.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £442, with interest at the rate of 6 per cent. per annum, from 31st July, 1903.

The application was granted.

ESTATE AURET V. LEVITAN.

Mr. P. Jones applied for judgment on certain conditions of sale for £215, together with interest at 6 per cent. from February 13, 1903.

The application was granted.

STEPHAN V. MYBURGH.

Mr. Roux moved for the final adjudication of the defendant's estate. The provisional order was granted on September 17. He could not say what service was effected, but he knew the summons was served, as the defendant had asked for a postponement of the case.

Granted.

SPENGLER V. AIMIAN.

Mr. De Waal moved for provisional sentence for a sum of £24, being six months' interest, due on a certain mortgage bond.

The application was granted.

GREENBERG AND CO. V. LEWIS.

Mr. Lewis moved for provisional sentence on a promissory note for £6, and also for £20, under Rule 329d. He asked to have the application for judgment on the promissory note allowed to stand over, as the certificate of presentation had not come to hand, but asked for provisional sentence, under Rule 329d, on the other claim.

[Hopley, J.: Why not postpone the whole case until this day week?]

I am instructed to apply for provisional sentence in the one case.

[Hopley, J.: You can take judgment in the one case and apply again next week in the other, but two lots of costs will not be allowed.]

Under the circumstances, I will allow the whole case to stand over until next Thursday.

WESSELS V. FERREIRA.

Mr. De Waal applied for provisional sentence on a mortgage bond for £350, together with interest at 6 per cent. from June, 1903, and also that the property specially hypothecated be declared executable.

The application was granted.

SMITH AND ANOTHER V. ELBURG.

Mr. Struben moved for provisional sentence on a mortgage bond for £600, less £100 paid on account, together with interest at 6 per cent. from January 1, 1904.

The application was granted.

LOMBARD V. ESTATE CLARK.

Mr. Alexander moved for the final adjudication of defendant's estate. Letters of administration had been granted to defendants. The provisional order was granted on October 8.

The application was granted.

Mr. Benjamin applied on behalf of several creditors for the appointment of a provisional trustee. The applicants were creditors to the extent of £36,300.

Hopley, J., inquired if the value of the property would deteriorate if the application had to stand over.

Mr. Benjamin said he understood it would. He read the application of the petitioners, who suggested Mr. G. W. Steytler as a fit and proper person.

The application was granted; Mr. Steytler to be appointed, with powers to do the various duties.

MAXWELL AND EARP V. LEWIS.

Mr. Lewis applied for the final adjudication of the defendant's estate.

The provisional order was granted on October 22.

The defendant appeared, and said he did not see why the order should be granted.

Hopley, J., said apparently the defendant had committed some insolvent act, or the application would not be made.

The defendant said he would not be able to earn anything if he was made insolvent.

Hopley, J., said that perhaps the best thing the defendant could do would be to go insolvent.

Defendant said he was willing to pay something off monthly.

[Hopley, J.: You should have gone to your creditors, and said that. I am afraid I cannot help you. If you incur debts and cannot pay them, you must be declared insolvent.]

The application was granted.

WOOD, WILLIAMS AND CO. V. DUGGAN.

Mr. Bisset moved for provisional sentence on a promissory note for £266.

The application was granted.

TUCKER V. TANNER.

Mr. Sutton applied for provisional sentence on a mortgage bond for £250, with interest at 6 per cent. from the 9th September, 1903, and also that the property specially hypothecated be declared executable.

The application was granted.

LAWRENCE AND CO. AND ANOTHER V. SMYTHE AND CO.

Mr. Russell applied for the final adjudication of defendants' estate. The provisional order was granted on October 22.

The application was granted.

SMITH V. MARTIN.

Mr. Van Zyl moved for provisional sentence on a judgment of the Magistrate's Court awarding plaintiff £20, together with £2 14s. taxed costs, and that certain landed property be declared executable. There was already a return of *nulla bona* with regard to the movable goods.

The application was granted.

COUCH V. MARTIN.

Mr. Van Zyl moved for provisional sentence on a judgment of the Magistrate's Court awarding plaintiff £69, together with £14 taxed costs.

The application was granted.

ESTATE MARSH V. CLEWS.

Mr. Lewis moved for provisional sentence on a mortgage bond for £3,500, together with interest at 6 per cent. from August, 1902, also that the property specially hypothecated be declared executable.

The application was granted.

HANAU V. STERNER.

Mr. Du Toit moved for provisional sentence on a mortgage bond for £200, together with interest from August, 1903, also that the property specially hypothecated be declared executable.

The application was granted.

GABLICK, JAGGER AND OTHERS V. ALBERT.

Mr. Bisset applied for the final adjudication of the defendant's estate.

Defendant said he had done his best to get in funds to meet his liabilities, but had been unsuccessful.

Hopley, J., advised the defendant to become insolvent. There was no good rushing against such a strong stream.

The application was granted.

ILLIQUID ROLL.

LISSACK AND CO. V. CART- (1904,
WRIGHT.) Oct. 27th.

Mr. D. Buchanan moved for judgment, under Rule 329d, on a sum of £37 7s. 9d., amount due for goods sold and delivered.

The application was granted.

ESTATE CLEAR V. LONSDALE.

Mr. Struben applied for judgment, under Rule 329d, for £45, being nine months' rent due to October 6.

Defendant was barred from pleading.

Defendant appeared, and said that before the proceedings started he offered plaintiffs two-thirds of the money owing, and made arrangements for paying off the balance. The clerk accepted it provisionally, but the plaintiffs wrote declining to accept it.

Hopley, J., said the case was certainly a hard one, but he had to grant sentence.

MAISEL BROS. AND CO. V. CLINGMAN AND BERNSTEIN.

Mr. Alexander appeared for the defendants, and applied to have judgment signed against plaintiffs for not proceed-

ing with this action within the time stipulated by the Rules of Court.

Judgment for defendants in the action, with costs, was granted.

KRUGER V. FACSHE AND CO.

Mr. D. Waal moved for judgment, under Rule 329d, for the sum of £60, being rent due for twelve months.

The application was granted.

TRUTER V. SMIT.

Mr. Buchanan moved for judgment, under Rule 329d, for a sum of £465, being money paid by plaintiff on behalf of defendant.

The application was granted.

Ex parte THE EXECUTORS OF JAMES AND MARTIN KENNEDY.

Mr. Van Zyl moved, as a matter of urgency, that the Court allow this matter to be re-opened. On last motion day, a provisional trustee was appointed in the estate of James and Martin Kennedy, and later on in the day another trustee was appointed. He now applied to have the case re-opened, and that both applications be then considered on their merits.

Hopley, J., said he thought it would be rather unprecedented for him to re-open this case, and set aside a decision of the Chief Justice on the meagre details before him. He advised counsel to make application to the Chief Justice when he was next on the bench. He would have to refuse the application.

WATSON AND CO. V. JONES.

Mr. Burton, who appeared for the defendant, moved for the appointment of a commission to take the evidence of the defendant and her witnesses in the above case, which is set down for hearing on November 4. The applicant made an affidavit in which she stated that she was a hotel proprietress at Vryburg, and if her evidence was taken on commission, it would save her considerable expense and inconvenience.

Mr. Van Zyl, who opposed the motion, read affidavits made by the attorneys in charge of the case, stating that if the Court granted the application, it would necessitate the postponing of the case to next term.

Hopley, J., said he thought it would be better for Mrs. Jones to make the trip to Cape Town. It would probably do her good, and, besides, there was not much time to get necessary particulars from her.

The application was refused, with costs.

Ex parte KLEIN.

Mr. Buchanan asked to be allowed to mention this matter, as a matter of urgency. The matter had been before the Chief Justice in the shape of an application for leave to transfer certain property from applicant to her son. The Chief Justice had adjourned the case to ascertain how the applicant intended to secure the money for the benefit of the children. She intended to secure their interest by means of a mortgage.

Hopley, J., said he would mention the matter to the Chief Justice.

ELLIOT BROS. V. BARTLETT.

Mr. Jones, who appeared for the applicant in this case, said there were two other motions on the list concerning the same case, and he thought it would be as well to take the three collectively. He appeared for Elliot Bros. in each case.

Mr. Russell appeared for the Bartletts in each case. Mr. Jones said he thought that if the third motion, which was an application to hypothecate certain property, made by Sarah Anne Bartlett, was considered first, it might shorten matters considerably.

This course was agreed to.

Mr. Jones explained that Elliot Bros. got a rule *nisi* from the Chief Justice to sell a certain interest, which was a usufructuary interest, and also to sell the interest of one Percival Douglass Bartlett, a major son of Sarah Anne Bartlett, in two farms, whatever it might be, and which comprised portion of the community between Sarah Anne Bartlett and her late husband. The rights of the mother and son had to be determined according to the terms of the will. The rule *nisi* against Percy Bartlett was made absolute, and under that rule his rights were sold. The mother's matter was ordered to stand over until October 15, and it now came before the Court. So far as concerned the sale of Percy Douglass Bartlett's interest, he now brought an application before the Court to set aside that sale, shortly, on the grounds that the Rules of Court which provided for the sale of immovable property had not been complied with, and that the sale was in other respects wholly irregular.

Mr. Russell said that Sarah Anne Bartlett, with her children, inherited two farms, Angledale and The Plains, which were let at the yearly rent of £300. She had got into financial trouble through signing promissory notes for her son, Percy Douglass Bartlett. If the Court granted leave to have her rights attached, she would have nothing to live on, as the rents from the farms was all she had to subsist upon. She believed that if she got authority to mortgage the farms for the sum of

£2,500, she would be able to pay off her liabilities. If she lost possession of her farms she would be penniless. The value of the property would appear to be £6,000, as it brought in a rental of £300 per annum.

Hopley, J., said that the applicant would be allowed to mortgage the properties for £2,500, but the exact terms as to how the amount would be raised, applied, and the interests of the minors, would be embodied in terms to be thought out by parties on each side, when the order would be confirmed by Court, and suspended for three months, in order to give the applicant time to raise the money, the other matters to stand over.

CROSBIE V. ESTATE CROSBIE.

Mr. Joubert moved for the appointment of a commissioner to take the evidence of Mr. Hutton, an important witness in the case.

Granted. Mr. Van Zyl to act as commissioner; costs to stand over.

Ex parte FULLER.

Mr. Uppington moved for leave to the applicant to sell certain properties in the estate of her late husband at Stutterheim for £2,000, and to invest the money as first mortgage at 6 per cent.

Order granted.

GUTHRIE V. MILLER AND CHIAT.

This was an application by Francis Alexander Charles Guthrie, the *curator bonis* in the estate of J. Jacobs and Co., to make absolute a rule *nisi* restraining the respondents from disposing of stock in a shop near Caledon, formerly belonging to one J. Traswiski, who traded as Jacobs and Co. The respondents purchased the shop and stock from Traswiski, and the petitioner alleged there was a conspiracy between him and the respondents to defraud the creditors of Jacobs and Co. Traswiski had since been committed for stealing assets in the estate.

Mr. Uppington was for the applicant, and Mr. Burton for the respondent.

Mr. Burton read the affidavit of the respondents, which set out that Traswiski concealed the fact that he had assigned his estate, and they denied the existence of any conspiracy.

Hopley, J., said he could not help thinking that the circumstances of the proceedings were highly suspicious, and if there was any foundation for the allegation made on behalf of the applicant, it would be exceedingly dangerous to trust people who were capable of such a bold stroke

as alleged against the respondent. Traswiski, on his own admission, was a very dishonest man, and it seemed he got hold of a lot of money in a very dishonest fashion. He felt at this stage it would be unsafe to allow Miller and Chiat to have anything to do with the realisation of the assets in the estate. The balance of convenience, he thought, lay in making the rule absolute. The interdict would be confirmed, and be suspended on the respondents finding security to the satisfaction of the Resident Magistrate of Caledon for £500, the applicant to proceed with the action on the appointment of a trustee, costs to be costs in the cause.

PEACOCKE, BULUS AND FARQUHARSON
V. BAILEY.

Mr. Benjamin moved for leave to take the evidence of James Ray, a material witness in the case, on commission in England.

Mr. D. Buchanan (for the other side) offered no objection.

Leave granted. Mr. Mackarness to act as commissioner.

SUPREME COURT

SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

BUTLER V. BUTLER. { 1904.
 { Oct. 28th.

In this action Alfred Paterson Butler, of Hex River, sought an order against his wife, Jessie Maud Paterson, for the restitution of conjugal rights, failing which, a decree of divorce, on the grounds of desertion.

Mr. Gutsche appeared for the plaintiff.

The defendant was in default.

The plaintiff's declaration stated that he was domiciled at Hex River, and the defendant was domiciled in Chicago, U.S.A. Plaintiff and defendant were married at London in 1886 out of community of property. There was issue of the marriage, one child. In the month of November, 1897, defendant deserted plaintiff, and had refused to return to him.

The plaintiff stated he was married to defendant in London in 1886. In 1894

they came to South Africa, and they went to Johannesburg in 1897. Defendant's mother being ill, witness advised her to go Home. He corresponded with her every mail. In March, 1898, he received a letter from her stating that she did not think he would be much surprised to hear that she had gone away with Jack. She did not wish to make any excuses, but she wished to state that she did not think it was half so immoral to live with a man she loved, as to stay on after marriage with a man after the love was gone, simply because they had been through the marriage ceremony.

De Villiers, C.J., remarked that it was unnecessary for counsel to proceed further with the letter.

Mr. Gutsche: It is all in the same strain.

In reply to His Lordship, witness said he was willing to take the defendant back. He still corresponded with his daughter.

De Villiers, C.J., granted a decree for restitution of conjugal rights, the defendant to return to or receive the plaintiff on or before the 30th December, failing which, to show cause on the 12th March why a decree of divorce should not be granted. The rule to be served on defendant personally, six weeks before the return day.

Postea (March 14, 1905) the rule was made absolute.

LEVENSON V. VURICK.

Principal and agent—Onus of proving agency.

This was an action in which Lipman Levenson, of Prince Albert, sought to recover from Isaac Vurick, of Oudtshoorn, the sum of £225, money paid by plaintiff on behalf of defendant.

The plaintiff's declaration stated that he was an auctioneer and produce dealer, residing at Prince Albert, and the defendant was a general dealer, residing at Oudtshoorn. In or about August, 1903, the defendant, through his agent, Max Levenson, authorised plaintiff to purchase and store for him eleven leaguers of brandy at £17 10s. per leaguer. Plaintiff received the brandy, and paid £192 10s. for it, and also £33 for the twenty-two hogsheads. The defendant asked plaintiff to store the brandy at Prince Albert for his account, and he got a store at Prince Albert at the rate of £1 a month. Plaintiff had not since received instructions as to the disposal of the brandy. He was prepared to deliver the brandy to the defendant on the receipt of the amount of his claim.

Defendant's plea denied that the brandy had been purchased on his behalf. He admitted that he wired to plaintiff, asking if there was any brandy to be pur-

chased in Prince Albert, but nothing further transpired between them.

Mr. Burton (with him Mr. Van Zyl) appeared for the plaintiff; and Mr. McGregor (with him Mr. Alexander) appeared for the defendant.

Max Levenson stated he was an auctioneer carrying on business at Oudtshoorn. He was brother to plaintiff, and brother-in-law to defendant. Formerly he resided at Prince Albert. Early in 1903 the defendant was dealing in brandy in the Oudtshoorn district, and asked witness if there was any brandy to be obtained in Prince Albert. Witness said he did not know, and defendant asked him to telegraph to his brother at Prince Albert.

Mr. Burton said the telegrams in question had been destroyed by the Post Office authorities, and the copies kept by witness had been destroyed by a fire which took place in witness's store.

Witness said the telegrams his brother sent to him had been mislaid.

Mr. McGregor said he did not acknowledge the receipt of any telegrams.

[De Villiers, C.J.: You had better prove that the telegrams have been destroyed.]

Alexander Mann, principal clerk in the Telegraph Office at Cape Town, said application had been made to him for the delivery of certain telegrams which passed between plaintiff and his brother in August, September, and October, 1903, but it was impossible to produce them, as all the telegraph forms for 1903 had been destroyed.

To Mr. McGregor: They are destroyed after six months.

Mr. Burton said there was the question of the telegrams being destroyed by fire, and he would call the plaintiff.

Libman Levenson, the plaintiff, stated he at present resided at Prince Albert. He had a business there as produce dealer. The telegrams he had received from his brother were burned in a fire in his store last August. In August, 1903, he got a telegram from his brother, asking him to try and purchase brandy in Prince Albert. Witness made inquiries, and telegraphed to his brother that Mr. Martinus de Witt had brandy to sell at £18 per leaguer. There were eleven leaguers. Witness's brother accepted the offer, and went to Prince Albert and went to the farm. On his return from the farm he told witness that he had purchased the brandy at £17 10s., and it was to be delivered at witness's store, and that witness was to pay De Witt if he wanted money, and that the defendant would settle with him. The brandy was delivered in August, and De Witt asked if the money had arrived. Witness replied in the negative, and eventually paid De Witt. He had not paid in full, but De Witt had a "good for" for the balance. A little later witness got a wire saying, "Hold brandy for instructions." Witness then hired a store at £1 a

month, from a man named De Vries, and stored the brandy there. Witness had not yet paid De Vries. Not receiving any further instructions, witness wrote to his brother asking him what he was to do with the brandy, but received no reply. Witness saw the defendant in March, 1904, and asked him what he intended to do with the brandy, but the defendant did not answer him. Witness, on his return to Prince Albert, wrote to defendant expressing surprise at not receiving the money due, and asking for a settlement, without fail. Witness received a reply from defendant's solicitor, repudiating the whole matter. Witness did not care to press defendant for payment, as he was a member of the family. Witness could not give the Court any particulars about the price of brandy in August and the following months. Witness had no licence to deal in liquor.

Cross-examined: Witness purchased brandy for Prince. Vincent and Co. in 1892, but none in 1893. Witness had only a general merchandise licence in 1893. Witness's brother had no interest in plaintiff's business. He worked for witness as a clerk, at £10 a month and his board. Witness denied that the defendant had wired him directly witness began to take proceedings against defendant, about last June. He could not give any reason for not handing the papers over to his attorney then. Witness did this work gratis, as the defendant was marrying his brother's sister-in-law. Witness did not buy the hogsheads, his brother did so. If witness did not get the money from his brother-in-law, he did not know what he would do.

By De Villiers, C.J.: Witness did not apply to the defendant during the period before March, because he relied on his brother to see the amount due being paid.

Max Levenson (recalled) said his brother undertook to ascertain if there was any brandy to be obtained. He wired next day, saying De Witt had eleven leaguers, at £18 per leaguer. Witness showed Nurick the telegram, and he told witness to sample it, and if it was good to purchase it. Witness asked Nurick for a cheque for the amount due, and he said he would not pay until the brandy was delivered. Witness proceeded to Prince Albert and purchased eleven leaguers at £17 10s. per leaguer, and told him to deliver it at his brother's store. Witness pressed defendant for payment of the amount due. He met him a couple of days before his marriage, and asked him to pay the amount due, and he said he would not. Witness advised his brother not to press Nurick, as he believed he would pay. Witness had not a liquor licence. The value of brandy fell considerably after August, owing to the Exise proposals.

[De Villiers, C.J.: What is the price of brandy now?]

Witness: I cannot say the exact price, but it is very low.

[De Villiers, C.J.: I thought the new Excise would raise it!]

I don't know, my lord. From what I can hear amongst the farmers, it is very low.

[De Villiers, C.J.: I remember reading a statement in the newspapers to the effect that the price of brandy was increasing.]

Mr. Burton: The £100,000 bonus by the Government was supposed to do that. Whether it will do it or not, we will see.

Cross-examined by Mr. McGregor: Witness said he received no commission from his brother-in-law for purchasing the brandy. Witness went to Prince Albert because he had a number of live-stock there. Witness had endeavoured to settle the case. He did not tell the defendant that he was responsible for the whole thing.

Martinus Andries de Witt, a farmer, residing in the Prince Albert district, stated that plaintiff made inquiries in August or September of last year as to whether he had any brandy for sale. Plaintiff's brother went to the farm a couple of days after, and brought eleven leaguers of brandy and 22 hogshhead casks at £17 10s. for the brandy, and 30s. each for the hogshheads. He told witness he was purchasing the brandy for Nurick. Witness, at Max Levenson's directions, took the brandy to plaintiff's store, and subsequently received part payment for it, and a "good for," for the balance (£90).

Cross-examined: Two of the casks were Levenson's.

Moses Marks, a feather buyer, of Oudtshoorn, stated that Nurick was a dealer in brandy and he asked witness if it was possible to get brandy at Prince Albert. The Prince Albert brandy was of better quality than that made in Oudtshoorn. Nurick's inquiry was two or three days before Levenson purchased the brandy at Prince Albert. Subsequently, witness met defendant at Oudtshoorn, and asked him why he did not take the brandy, and he replied that he would have done so if it had been sent to him before.

Mr. Burton closed his case.

Hugh McGregor, broker, of Cape Town, stated that the price of brandy, in Cape Town, in August of last year, averaged £22 5s. per leaguer ex. wood, delivery, Cape Town. In September it averaged £22 12s. 6d. At Prince Albert the difference would be five to seven per cent. less. On March 1 of this year the price was £16 7s. 6d., and after the opening of the new season it fell to £14 10s.

Cross-examined: The price fell in October, and never recovered.

Isaac Nurick, the defendant, stated he carried on business at Oudtshoorn as a feather and produce dealer, and he had also a wholesale brandy store in partner-

ship with Leutau Bros., of Willowmore. In June, 1903, he wired plaintiff inquiring at what price brandy could be obtained in Prince Albert, but received no reply. He saw Max Levenson in the following August, and told him that if he could buy brandy at Prince Albert at £20 per leaguer he would purchase it. He saw him repeatedly afterwards, but he never mentioned the matter to him. In September, however, Levenson met witness, and told him he had got 30 leaguers of brandy, and asked witness if he wanted it. Witness replied that he did not, as he had his full stock, and Levenson said he could get more for it elsewhere. Witness saw plaintiff several times, but the first time he heard of the brandy was in March, when he received a demand for the price. Max Levenson admitted to witness that he had made a mistake, and asked him to endorse a bill for £90, to help him to pay for some brandy, which witness declined to do. Witness gave no authority to Max Levenson to purchase brandy for him.

In cross-examination, witness denied that he told Marks he would settle up if he got the brandy. Witness paid £20 per leaguer for brandy at Oudtshoorn, and heard nothing of brandy being obtained in Prince Albert at £17 10s. per leaguer.

Mr. McGregor closed his case, and Mr. Burton having reviewed the evidence, De Villiers, C.J., without hearing counsel for the defence, said the onus of proving the agency of Max Levenson lay on the plaintiff. If that was proved, the plaintiff would be entitled to succeed, because, according to the plaintiff, Max Levenson had been instructed to make all the requisite financial arrangements, and if, therefore, the agency was established, and the plaintiff acting on the knowledge of that agency and on the instructions of the agent, advanced the money and paid it to the vendor, clearly the plaintiff would be entitled to recover the amount from the defendant, who instructed him. Therefore, the whole question hinged on the further question whether that agency had or had not been established. Counsel had contended that the fact that De Witt stated, and no doubt, truthfully, that Max Levenson mentioned his principal—the defendant—as the purchaser, went far to corroborate Max Levenson's statement. Max Levenson may have understood that he received instructions from the defendant, but that was not sufficient to show that he was so instructed. He had to prove that he was so instructed, and on that point there was the statement of the defendant that he did not appoint him. The impression on his (his lordship's) mind was that Max Levenson might have misunderstood the defendant, but that the defendant never intended to give any authority to Max

enson to purchase the brandy on behalf. It seemed to him that the liabilities of the case were in favour of the defendant rather than plaintiff, one circumstance that it was impossible to lose sight of was the long delay he had been on the part of the plaintiff—he would not say in bringing the on—but in making it clear to the defendant that he had grounds for an on. Plaintiff must have been doubtful as to the agency. If the agency clear, one would think that plaintiff would have lost no time in informing the defendant that brandy was being stored in a hired place. The plaintiff did not pretend he was not a man of very moderate means, or that he was a man to whom £10 or £190 was of no importance, what he ought to have done, and what he would have done if he had been of his case, would have been to give clear and definite notice to the defendant that the brandy was in the case. Now he did not do that. This action took place in August, and had been proved that no definite decision was made on the defendant until then. It was not likely that if the plaintiff had been sure of his case he would have allowed this time to pass. Under all the circumstances, therefore as the onus of proving the case lay on the plaintiff, and he had done so, there was nothing to do but give judgment for the defendant with costs.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset. Defendant's: Michau and De Villiers.]

DELPORT V. NESER.

{ 1904.
Oct. 28th.
" 31st.

Purchase and sale—Transfer—
Tender—Divisible obligation—Non-joinder of parties—Exceptions.

The plaintiff and one R. bought from the defendant four farms for £11,500, the price being payable in two instalments and by bond to be passed by the purchasers for the balance. After paying half an instalment, R. became insolvent, and the plaintiff, after paying half an instalment, tendered to pay half of the second instalment and to pass a bond for half the balance, and he claimed transfer of one-half undivided share of the farms.

Held, on exceptions to the plaintiff's declaration, that the

obligation to pass transfer is indivisible, and that the plaintiff's tender of half the purchase price does not entitle him to claim transfer of half the farm.

This was an argument on exceptions, the defendant excepting to the plaintiff's declaration on the grounds of non-joinder and no cause for action being disclosed.

The declaration set out that the parties were farmers, residing in the district of Colesberg. On the 17th April, 1903, the plaintiff and one Jacobus Benjamin le Roux purchased from the defendant certain landed property, consisting of the farms Ruigtefontein, Landdroskopp, Godeelte Kopjes, and Schalkwykskraal, for the sum of £11,500. The plaintiff was unable to pay his *pro rata* share of the first instalment, but the defendant agreed to give him an extension, and repeated it again on the second instalment falling due. On the 11th December, 1903, plaintiff paid on account of his *pro rata* share of the first and second instalments the sum of £2,200. The plaintiff asked for time to pay the balance of £300, but the defendant refused to allow any further extension, and subsequently plaintiff tendered to pay the £300, with interest from 1903, and to pass a first mortgage bond for £3,250, and otherwise comply with the conditions of the deed of sale. Le Roux paid his *pro rata* share of the first instalment, but had paid nothing further, and his estate had been surrendered. Prior to and on the 3rd May, 1904, the plaintiff requested the defendant to pass transfer to him of his undivided one-half share of the said property, tendering to the defendant the said balance of £300, and to pass a mortgage bond for the remainder, but the defendant refused to accept the tender or pass transfer. Plaintiff claimed damages to the extent of £500 and transfer to him of an undivided one-half part or share of and in the said property.

The defendant excepted on the ground that the action was improperly instituted and the summons and declaration bad in law, in that the trustee in Le Roux's estate was not joined in the suit, and also that the declaration disclosed no cause of action against him, in that, according to the true intent and meaning of the deed of sale the plaintiff and Le Roux were together the purchaser, and the defendant had nowhere agreed to pass transfer to the plaintiff of an undivided one-half share.

Mr. Burton was for plaintiff and Mr. Close for the defendant.

Counsel were then heard in argument; the chief points of which sufficiently appear from the following judgment.

Cur. Ad. Vult.

Postea (October 31st.).

De Villiers, C.J.: The declaration alleges that the plaintiff and one Le Roux bought certain four farms from the defendant for £11,500 upon certain conditions, one of which was that the price was to be paid in two instalments of £2,000 and £3,000 respectively, and by a mortgage bond on the farms for the balance of the price, viz., £6,500. The declaration further alleged that the plaintiff paid a *pro rata* share of the first instalment, and afterwards tendered to pay a *pro rata* share of the second instalment, and to pass a bond on half-share of the farms for £3,250. The declaration further alleged that Le Roux paid his *pro rata* share of the first instalment, but has paid nothing further, and that his estate has been sequestrated as insolvent. The prayer is for transfer of half-share of the farms and for £500 damages, alleged to have been sustained by the plaintiff by reason of the defendant's refusal to give transfer. The defendant has filed a twofold exception to the declaration, namely, that the action is bad, without Le Roux or his trustee being joined as co-plaintiffs, and that, regard being made to the terms of the contract, no cause of action is disclosed in the declaration.

I see no reason for altering the view which I expressed at an early stage of the argument, that either Le Roux should have been joined as a co-plaintiff, or the plaintiff should have tendered the full price before he could claim transfer to himself of one undivided half-share. There has been much learned argument as to the difference between divisible and indivisible obligations, and numerous cases have been cited, but none of these cases bears upon the exact point which has arisen in the present case. The defendant's counsel has altogether relied upon the express terms of this particular contract, and has not relied much upon his general rights as vendor under our law. To my mind, however, the fact that the purchasers were entitled to pass a bond for £6,500, does not give either of them a greater right to claim transfer of one-half than he would have had if the sale had been for cash. It is an elementary rule of our law that the vendor may retain the thing sold for cash until the price is tendered and this rule applies whether the thing sold be moveable or immovable property. It is not a part, but the whole of the price which must be paid, and until that is done, the vendor of moveable property is not bound to deliver it, and the vendor of immovable property is not bound to transfer it. If, therefore, two or more persons buy land together, they must all join in the action against the vendor for transfer, and tender the price, or, if one alone sues for his share, he must tender the whole price. If

authority were required I need only refer to the following passage in *Foet* (19.1.1), which, strangely enough, was not cited by counsel on either side. After defining the *actio empti*, *Foet* says: "If more persons than one have together purchased the same thing at the same time, for one price, or if more persons than one are heirs of one purchaser, it is not competent for each to sue by the action *ex empto*, in respect of his share, for delivery of part of the thing sold on tender of a *pro rata* share of the price; but it is necessary that the action should be at the suit of all of them, or at the suit of one of them, on tender of the full price for the delivery of the whole thing." The circumstance that, in the present case, a bond had to be passed for the balance of the purchase price, certainly strengthens the position taken up on behalf of the vendor, but even if the sale had been for cash, he would not have been bound to transfer one half of the farm on tender to him of half the purchase price. The opinion of *Pothier*, who follows that of *du Moulin* in this matter, does not quite agree with *Foet*. In his treatise on Obligations (295), *Pothier* says: "The obligation to deliver a piece of land, *fundum tradi*, is a divisible obligation; for this delivery may be made in parts, the act which forms the object of the obligation being therefore a divisible act, it cannot be doubted, according to the principles which we have established, that this obligation is divisible; our decision is confirmed by the texts of our law; for although the obligation of a borrower is the obligation of returning a specific thing, *obligatio rem tradi*, nevertheless, the law decides that the heirs are regularly bound for the part only of which they are heirs, which is the character of divisible obligations." Further on, however, *Pothier* admits that another passage in the Digest (72 De Verb. Obl.), is diametrically opposed to his view. The passage reads as follows: "Stipulationes non dividuntur earum rerum quae divisionem non recipiunt; veluti viae, itineris, actus, aquaeductus, caeterorumque servitutum. Item puto et si quis faciendum aliquid stipulatus sit; ut puta, fundum tradi, vel fossam fodiri, vel insulam fabricari, vel operas, vel quid his simile; horum enim divisio corrumpit stipulationem." *Ulpian*, whose statement of the law is there given, places an obligation to transfer land on the same footing as an obligation to build a house, and holds that both obligations are indivisible. *Pothier* however, holds that the obligation to transfer land is divisible unless it is accompanied by circumstances which show that it was intended to be indivisible, as, for instance, where a person wishing to build a house and not having a place to lay the necessary materials agrees with his neighbour that the latter should give him land near

the site of the house. In a subsequent passage (section 515), he says: "If I have bought a certain estate, though this estate be susceptible of parts, yet one of the heirs of the person who sold it to me would not be entitled to offer me his part of the estate, divided or undivided, in discharge of his obligation, if his co-heirs were not also ready to deliver me theirs, because the division of this estate would be a prejudice to me. I only bought it in order to possess the whole of it, and I should not have bought a part of it only." An analogous mode of reasoning would, however, be applicable to the case of the vendor of an estate where one of the purchaser's heirs offers him payment of part of the price, and demands transfer of part of the land. The vendor might fairly say that the division of the estate would be a prejudice to him, and that he only sold it because he wished to part with the whole of it, and that he would not have sold a part of it only. I am clearly of opinion, for the reasons already given, that the obligation of the defendant in the present case to transfer the four farms is an indivisible obligation, and that without a tender of the whole of the purchase price, or of a bond for the whole of the unpaid balance, he is not bound to transfer one-half of the farms to the plaintiffs. The exceptions must therefore be allowed, with costs.

[Plaintiffs' Attorneys: V. A. van der Byl. Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

APPLICATIONS.

FERNANDEZ V. FERNANDEZ. } 1904.
Oct. 31st.

Mr. Alexander applied, as a matter of urgency, for some direction of the Court pending the hearing of this matter, which appeared in the list of general motions. The plaintiff sought alimony, etc., from her husband. She alleged that she had been turned out of the house since last Friday week without any clothing, except that which she was wearing, and that she was destitute. She

was at present living at a boarding-house, and was living on charity. Replying to the Bench, counsel said that the applicant could wait until the matter was reached in the ordinary course, if she were given her clothing and so on.

Mr. Burton (for the respondent) said he would not object to the applicant being given back her clothing.

Mr. Alexander said that he would like an order from the Court under the second prayer. Prayer (b) called upon the respondent to show cause why he should not be ordered to restore immediately to applicant her home, clothing, furniture, and effects, and custody of the children.

Mr. Burton said that his learned friend was now eating into the whole case.

Mr. Alexander said he was instructed that the applicant desired access to the two children, and also her clothing and documents.

Maasdorp, J., said that by consent, the applicant would be allowed to obtain her clothing, the question of costs to stand over.

WATSON AND CO. V. JONES.

Mr. Burton applied, as a matter of urgency, for the fixing of a day for hearing the trial of Wm. Watson and Co. v. Jones, at present set down in the list for Friday next. He said that it was important that they should have some definite idea as to whether it would be taken on that day because witness would have to come down from Vryburg. There were eleven cases down for Friday, and this case stood tenth in the list.

[Maasdorp, J.: We are not going to run beyond the term if we can possibly get out of it. When does the Long Vacation commence?]

It is supposed to begin on the 15th November, but I may mention that there are cases set down for the 21st November.

Maasdorp, J., said that the only other date that the Court could grant would be the first day of next term. There was very little chance of the case being set down out of term.

Mr. Gardiner said that he had drawn the pleadings for the plaintiffs, but he had not been instructed in regard to the present application.

The Court eventually ordered the matter to stand over pending further inquiries.

Later in the day, it was stated that the parties were agreeable to the case standing over till next term.

CRIMINAL APPEALS.

REX V. MOFUKING AND KOTZE.

Spoor evidence.

Evidence that a certain spoor might have been made by the foot of an accused, the spoor being an old one and not clearly traceable all the way to accused's hut, held not be of itself sufficient evidence to support a conviction.

This was an appeal from a conviction of the A.R.M. of Albert, who had convicted the appellants of being concerned in the theft of an African sheep, the property of some person or persons unknown, and sentenced each of them to six months' imprisonment with hard labour. The charge was laid under Act 35 of 1893. The grounds of the appeal were (1) that the conviction was not supported by the evidence, and (2) that it was contrary to law.

From the evidence it appeared that the skin of a certain sheep had been found at a slaughter-place, near Groenvlei, situate about 300 yards from the hut occupied by the prisoners. It was the opinion of the principal witness that the sheep had been slaughtered about 8 or 9 days before the discovery was made. The prosecution was founded upon an allegation that the spoor of the prisoners led straight from the slaughter-place to the hut that the men occupied. For the defence, evidence was led to show that no spoor could be traced between the slaughter-place and the hut, and that the hard nature of the ground and the recent wind made it impossible for spoor to be formed. The slaughter-place was situate at a stone kopje.

Mr. Burton was for the appellants; Mr. Howel Jones was for the respondents.

Mr. Burton submitted that it would be most dangerous to convict on evidence of the kind brought by the prosecution, and that the evidence was not satisfactory or conclusive.

[Maasdorp, J., said that the witnesses for the prosecution seemed to be most positive that the spoor could be traced from point to point, and the question seemed to be one of credibility as between the witnesses.]

Mr. Burton pointed out that there was absolutely nothing in the case to connect the accused with the crime, except the evidence as to spoor, and he submitted that that evidence was of such a character that the prisoners ought not to have been convicted.

Hopley, J., said it seemed peculiar to him that the "spoor" found in the

damp sand corresponded with the spoor made in the dry sand further on.]

Mr. Burton contended that there was not sufficient evidence to convict the prisoners of the crime.

Mr. Jones said that, of course, the whole question rested on "spoor" evidence, but that evidence was very clear, and was the only evidence that could convict in this case.

[Hopley, J.: You need not defend "spoor" evidence, because men have often been hanged on that evidence.]

Maasdorp, J., said that in this case the two accused were convicted by the Magistrate with the theft of a sheep. It appeared that the slaughter-place was discovered some 300 yards from the hut of the accused and some spoor were also discovered there. These spoor were traced in the direction of the residence of the accused, and one of the witnesses stated that they were actually traced up to the accused's house. Now, in dealing with the case, he thought it would be advisable to take the case of the second accused first, and consider whether there was evidence enough to justify the finding of the Magistrate in the case. It appeared that a bare foot spoor was found near the slaughter-place, and a bare foot spoor was found at the hut in which Koetsee resided. Upon arrival at Koetsee's house, the policeman did not find him. Nothing was found in the hut connected with the theft. From the evidence, it appeared that the policeman sent for Koetsee, who was some distance off, and on his arrival examined his foot, and found that he had a broad foot like the spoor. That was the sole evidence against Koetsee. The Magistrate arrived at the conclusion that that spoor must have been the spoor made by Koetsee. He (Mr. Justice Maasdorp) was not satisfied that the Magistrate should have drawn the inference that the spoor of a foot like Koetsee's was Koetsee's. For that reason, the Court felt that they ought to quash the conviction. That decision decided the case of the second accused. If in the case of the second accused doubt was thrown on the evidence of the policeman as to the second charge, it would certainly affect his evidence with regard to the alleged spoor of the first accused. The evidence in that case was however, somewhat stronger, because it was alleged that it was a boot spoor, and it might be possible to identify it as having been made by the boot worn by the accused; but they had evidence that it was difficult to follow the spoor, and the evidence of the policeman had not been corroborated. Under the circumstances, he thought that when the Court bore in mind that some time had elapsed after the spoor were made, and when they were found, that,

from the nature of the weather, there was good reason to arrive at the conclusion that the spoors were to some extent effaced, they had to arrive at the conclusion that, although the Magistrate appeared to have gone carefully into the case, he had not allowed certain circumstances in favour of the accused. The conviction in each case would be quashed.

Hopley, J., concurred.

REX V. FARQUHARSON. { 1904.
Oct. 31st.
Nov. 7th.

**Water—Municipal regulations—
Act 39 of 1879, Secs. 35 and 37.**

Under certain regulations framed under Sec. 37 of Act 39 of 1879, the Municipality of Q. forbade persons residing within a certain Municipal area to water gardens by means of hose pipes attached to pipes connected with the public water supply within certain hours. One F., being convicted of contravening this regulation, urged (on appeal) that it was ultra vires, inasmuch as the Act gave the Municipality no power to regulate the supply of water.

Held on appeal, that under Sec. 37 of the Act the Council had power to make such regulations as they might deem expedient for carrying out the powers as to supply of water, etc., thereby entrusted to them, and that hence the said regulations were intra vires.

This was an appeal from a decision of the Magistrate of Queen's Town fining Robert C. Farquharson (the appellant) 10s or the alternative of seven days' imprisonment for contravening the provisions of the Queen's Town Municipal Council water regulations.

The appellant was summoned on the complaint and information of the Acting Chief Constable, in that he did, on or about the 6th day of August, contravene the provisions of the Queen's Town water regulations in that he did wrongfully and unlawfully, by means of a water-hose use water for the purpose of irrigation during the time which the use of water for such a purpose was restricted. The regulations stipulated that any person contravening the regulations was liable to a penalty not exceed-

ing £2, or the alternative of seven days' imprisonment. The seventh section of the Act stipulated that it should be lawful for the Council to decrease the daily supply of water, and should there be a reduction in the supply the Council should not be responsible for it. In August a Corporation notice was issued which stated that the residents of the district in which the appellant resided would be allowed to irrigate their land with a hose from 3 to 7 p.m. on Thursdays of each week, and daily from 5 to 7 p.m. with watering cans. The appellant was fined for using his hose during the "can hours." Sir H. Juta, K.C. (for the appellant), contended that although the Council might have powers to regulate the hours of use for the public taps, he (counsel) contended they had no right to interfere with the use of water on a man's private land. They had no right to say you cannot use a hose. You must use a watering can.

[Hopley, J., remarked that if Sir H. Juta's contention was correct there could never be a prosecution for the unlawful use of water.]

Sir H. Juta said at the trial of the case exception was taken to the summons on the ground that it was bad in law, as it should be made out in the name of the Mayor and Councillors of Queen's Town, instead of which it was made out in the name of the Acting Chief Constable. Under section 35 of Act 39 of 1879, under which the summons was brought, no power was conferred on the Council to regulate the supply of water. Exception was also taken to the summons on the ground that the hose was attached to a Municipal tap, when in reality it was attached to the appellant's private tap. It was also contended that the regulations did not allow the Council to state how the water was to be used. The appellant contended that if the supply of water was decreasing it was the duty of the Council to restrict the supply of water to the Cape Government Railway, and a local brewery, which they did not. Counsel (continuing) said that under the Queen's Town Municipal Act there was no power given them to make regulations with regard to the water supply. They had no power to say to a man, "You shall not use a hose, but you may use a can." His submission was that the Queen's Town Council had no rights to make any regulation such as they had.

Postea (November 7), without calling upon Mr. Schreiner, K.C., who appeared for the respondents.

Maasdorp, J.: Amongst the regulations of the Queen's Town Municipality, promulgated by Proclamation No. 372, of 1891, under the provisions of Act No. 39, of 1879, are the following: Water Regulation No. 7: It shall be lawful for the Council at any

time, after 24 hours' notice, when from the decrease of water in the reservoir, or any other cause, to decrease the daily supply of water to the public aqueducts, and to close the public water leadings. And No. 18: The Council at all times reserve the right as to the quantity of water to be supplied for domestic or irrigation purposes, and the times and manner for supplying the same. And any person taking water during unauthorised hours shall be liable to a penalty not exceeding two pounds sterling, or in default of payment to be imprisoned for a period not exceeding seven days." Acting under the terms of the 7th Regulation, the Council gave public notice on the 29th June, 1904, that: (A) Residents in the Earl of Dugmore-street, also those on the north side of the railway line, may irrigate by means of a hose, etc., from 3 to 7 p.m., on Thursdays. (B) In addition to above, water will be turned on daily for domestic use from 6 to 8.30 a.m. and 5 to 7 p.m., during which hours watering by means of a can is permitted. On Saturday, the 6th of August, the defendant, whose residence comes within the terms of this notice was seen watering his garden by means of a hose attached to the top of a water-leading, communicating with the Municipal pipes, at 6 o'clock in the afternoon. This act is alleged in the charge against the defendant as a contravention of Regulation No. 18, in that he irrigated by means of a hose contrary to the terms of Notice No. 40, given by virtue of Regulation No. 7. Certain exceptions were taken to the charge at the trial, which were overruled by the Magistrate. Counsel for the appellant admitted that the exception taken to the power of the Chief Constable to prosecute is disposed of by section 5 of Act 32, of 1902. But it was contended that the third exception is good, because Act 39, of 1879, does not in express terms confer upon the Municipality, the power to make regulations in respect of the control, and distribution of the water supplied for the use of the inhabitants. It does seem curious that when section 37 of the Act was framed, which deals so minutely with many matters of public interest, that no express mention was made of the regulation of the supply and distribution of water under the control and management of the Council. But we find that under section 35 power is given to the Council to lay down watercourses, water-pipes, and reservoirs for supplying the inhabitants of the Municipality with water. It is therefore within the powers of the Municipality to take measures to supply the inhabitants with water, and, under section 37, the Council can make such regulations as may be expedient for exercising their powers, and such as may be necessary for the benefit of the

Municipality and the comfort of the inhabitants. The Council, therefore, possesses the right to make regulations for regulating the supply of water. But, then, it is contended that the restrictions imposed by the notice are *ultra vires* of the regulations, because the regulations only provide for a decrease of water in case there is a decrease of water in the reservoir. Now, although the notice itself does not state that there was such a decrease of water in the reservoir, it was proved at the time that the water in the reservoir was falling. Under Regulation 18, the Council has the right to regulate the quantity of water to be supplied for domestic and irrigation purposes, and the times and manner of supplying the same. Under Notice No. 40, water is supplied for irrigation and domestic use on Thursdays, and for domestic use on other days. If the notice had stopped here, no exception could be taken to it. But in order to meet possible urgent necessity, the Council provided for the use of a limited quantity for watering plants on days when the water is supplied for domestic purposes. To ensure the use of only a limited quantity, it is directed that the watering shall take place by means of a can, and it seems to me quite reasonable to expect that such will be the effect of the regulation. The defendant, instead of being thankful for the privilege of using a limited quantity of water in the manner prescribed on days, when he might be wholly prevented from taking it for any but domestic purposes, resents the action of the Council as an interference with his rights. In my opinion, both the regulations and the notice are within the powers of the Council, and the fact that the Council continued to carry out their contracts with others for supplying water, cannot justify the defendant in contravening the regulations of the Municipality. The appeal must be dismissed.

Hopley, J., concurred.

Mr. Schreiner, K.C., applied, on behalf of the respondent Municipality, for an order for costs of appeal. He said he thought it was quite unnecessary to have gone beyond the Magistrate's decision.

Sir H. Juta, K.C., for appellant, contended that it had not been an ill-brought appeal, and that costs should not be allowed to respondents. The case was really brought by the police and not by the Municipality.

Counsel having been heard further, Maasdorp, J., said that this was really a police case. There would be no order as to costs.

LE ROUX V. MALHERBE. { 1904.
Oct. 31st.
[For Head Note to this case, see *Ex parte*
MALHERBE (14 C.T.R., 614.)]

This was an appeal from a decision of De Villiers, C.J., making absolute a certain rule nisi (see 14 C.T.R. 614). The appellant now sought to have this order under the Derelict Lands Act, in favour of the present respondent set aside. Mr. Schreiner, K.C., with him Mr. Benjamin, was for the appellant; Mr. Burton, with him Mr. Van Zyl, was for the respondent.

Mr. Schreiner said that this was an appeal from a decision of the Chief Justice, sitting alone, in a matter in which the respondent, Malherbe, had obtained a rule nisi in Chambers, under the Derelict Lands Act, thereafter made absolute, in regard to a certain farm, Berg Rivier's Hoek, in the district of French Hoek. At the hearing of the application to make the rule final, he (Mr. Schreiner) appeared on behalf of Mrs. Le Roux, who was one of two parties desiring to show cause against the rule nisi. The widow Le Roux now appealed against the decision, and he (counsel) thought it would appear that a nice point arose in regard to the practice and procedure under the Derelict Lands Act in connection with this matter. The petitioner said that in or about the year 1872 he purchased from one John Orris Douglas, a certain farm, called La Dauphine, and also an undefined one-eighth share in the quit-rent farm called Berg Rivier's Hoek, in extent 478 morgen 211 square yards, both properties being situate at French Hoek, and on the 6th October of that year he obtained transfer of the said properties. In 1891 he sold one-half of his eighth share in Berg Rivier's Hoek, and on the 27th October transferred it to J. P. le Roux. In March of last year he sold his remaining one-sixteenth share in the said farm to one Edward Starke. The Registrar, however, declined to register the transfer to Starke, on the ground that the late A. A. de Villiers, from whom the said Douglas, petitioner's predecessor in title, had bought it, had only a sixteenth share in the said farm, and so had no power to transfer a one-eighth share, as was wrongly done by him. Petitioner had caused search to be made in the Deeds Office, and had ascertained that, although at the time that the executors of the said De Villiers passed transfer to the said Douglas, the said De Villiers was the registered proprietor of a one-eighth share in the said farm, he had, as a matter of fact, already transferred away a one-sixteenth share, which had not been noted against his deed of transfer, and petitioner had also ascertained that a one-eighth undivided part or share in the said farm still stood registered in the name of Peter Eduard Hauman,

one of the original grantees of the said farm, which was granted on the 30th April, 1839. Proceeding, counsel said his point was that there was nothing in the statement of the case anywhere in the affidavits to show that, in point of fact, there was any such prescription against the share of P. E. Hauman, senior, by the applicant. The name of P. E. Hauman, senior, was as a matter of fact registered as proprietor of the one-eighth share after his death. Barring an expression of opinion by the applicant that there must have been some transaction by which A. A. de Villiers would have purchased or acquired a portion of P. E. Hauman's share, there was nothing to link P. E. Hauman's share acquired in 1839 in any way with the occupation of Malherbe, the applicant. His contention was that the applicant must come and make good his claim under the Derelict Lands Act. The applicant should have brought, he submitted, a declaratory action against those who had an interest in the farm. The farm was valuable, the Cape Town Council had turned its attention in that direction, and the interest of the appellant was a matter of some importance to her.

[De Villiers, C.J.: She has no interest whatever.]

That, with very great respect, would seem to beg the question. I am putting it that, when the facts fully appear, applicant has no prescription of his own over against P. E. Hauman, senior, specially, other than that he is now in the possession of a portion of the farm, using and occupying against the owners of the farm. He has got a right against the farm, but not a right to the one-eighth share of my client specifically. Proceeding, Mr. Schreiner said that there was no principle of law which allowed the petitioner to prescribe specifically against the appellant any more than against the other owners. The Town Council had become the owner by purchase of a very large portion of the shares, twenty-three thirty-seconds were now in its possession, and it was now only a question of paying out certain moneys. He submitted that the Derelict Lands Act was not intended to give the petitioner title in the farm in such a case as this. The appellant, in her affidavit, denied that Malherbe had since 1872 occupied and made use of a one-eighth share of the farm Berg Rivier's Hoek. The farm was only used as a grazing ground. It was not divided or fenced off in any way, so that no one of the numerous co-owners could say that he used an eighth or a sixteenth. There was no ground for the petitioner's statement that his predecessor in title, A. A. de Villiers, bought a half of the one-eighth share belonging to Pieter Eduard Hauman, sen. There was no ground

for the statement of the petitioner to the effect that there was a half of the share of the said farm belonging to Malherbe registered in the name of P. E. Hauman. The said eighth share, which was still registered in the name of P. E. Hauman, belonged to deponent, who purchased the same in 1894 at a sale by public auction, from the estate of the late P. E. Hauman, jun., who was a grandson of the said P. E. Hauman, sen. P. E. Hauman, sen., who owned the farm La Brie, some time near the end of the eighteenth century, or at the beginning of the nineteenth century, was one of the eight farmers who got the Berg Rivier's Hoek as a grazing ground for the eight farms which they respectively owned. This grant was not made out until 1839, and prior to that date, P. E. Hauman, sen., had died. On the death of P. E. Hauman, sen., La Brie, with one-eighth share in Berg Rivier's Hoek, was bought at public auction by his son J. S. Hauman, sen., who, however, never obtained grant of the eighth share in Berg Rivier's Hoek, though he occupied and enjoyed the use thereof from 1831 to the date of his death in 1862. In 1862 La Brie, together with the eighth share in Berg Rivier's Hoek was sold to P. E. Hauman, jun., who took transfer of La Brie, but did not take transfer of the eighth share. He died on the 17th April, 1894, and his landed property was put up for sale by auction on the 15th June, 1894, and sold to deponent, it being stated by the auctioneer that La Brie was being sold with a share in Berg Rivier's Hoek appertaining to it, but that transfer had not been taken of the share, and the purchaser could find out about transfer and obtain same for himself.

Mr. Burton said that his learned friend admitted that there was somewhere in the farm a derelict share, which must be given to Malherbe, and which Malherbe must get. The other owners held six transfers, and there was no notice of omission on their part. The one-eighth share left to Hauman was transferred in 1839, and counsel submitted those who advanced the argument that Hauman owned the share were mistaken. In all probability, Mrs. Le Roux's attention was drawn to the matter by the publication of the rule nisi. Counsel could not find a word in the affidavits as to her occupation of this share. To a man who was in possession of a share, it was open to the respondent to show a better title. Counsel submitted that the whole position came down to one as to whether the appellant had satisfied the Court as to the claim of the one-eighth share from P. E. Hauman, and if that had not been done, then he submitted it was derelict.

Mr. Schreiner having been heard in reply,

Cur. Ad. Vult.

Postea (November 14th).

Maasdorp, J., delivered judgment in the matter, which was an appeal from a judgment of the Chief Justice sitting as a Divisional Court: At the hearing of the original motion in this matter when the applicant applied to be registered as the owner of 1-16th share of Berg Riviers Hoek on the ground of prescription, the respondent, Helena le Roux, disputed his entire claim to any share in the farm, and she herself set up a claim to be registered as the owner of one-eighth. On appeal that position was abandoned by her, and she admitted that Malherbe was entitled to some share by prescription, but contended that it should not go in reduction of her share, but in abatement of the shares of all the owners of Berg Riviers Hoek. If she be entitled to more than the 1-16th, which was allowed her in the order made by the Chief Justice, then I think her contention is correct, that the occupation of the applicant should not be regarded in the question of prescription as an adverse holding against her particular share. It is therefore necessary to consider whether she is entitled to more than the 1-16th share awarded to her by the order. She alleges that her title to one-eighth of the farm Berg Riviers Hoek can be traced in unbroken succession from the right thereto held by P. E. Hauman, senior. It is quite evident from the affidavits that none of the witnesses can have any personal knowledge of what occurred before 1831, and their evidence in that respect is entirely hearsay, or based on tradition. There is no legal proof that P. E. Hauman, senior, had during his lifetime any right to a share in Berg Riviers Hoek, or had as of right any tenure which could by prescription have ripened into ownership. There is no legal proof that he had any right in that farm, or pretended to have any, which he could have transferred upon his death to his son, J. S. Hauman, junior. Again, it can hardly be known to any of the witnesses what occurred in 1831 after the death of P. E. Hauman, senior. Yet we have the positive statement made by Helena le Roux that on his death the farm La Brie, together with one-eighth share in Berg Riviers Hoek belonging to his estate, was sold by public auction to his son J. S. Hauman, senior. In this she is supported by J. S. Hauman, junior, the grandson of P. E. Hauman, who could not 73 years ago have been of an age to speak positively as to what then occurred. But if Malherbe is to be believed, these statements as to Berg Riviers Hoek must be correct, because it appears from search in the Master's Office that the farm La Brie was bequeathed by P. E. Hauman, senior, in his will to his son, J. S. Hauman, senior, and no mention is made in the will of any

place in the Berg Riviers Hoek farm. If that be so, we have documentary evidence to set off against hearsay statements, and proof that nothing passed to J. S. Hauman, sen., in respect of the farm Berg Riviers Hoek, nor is there any evidence that he had any right to the farm which could be passed to his son. In 1839, the first authentic proof of title to Berg Riviers Hoek is discovered. In that year the Government granted Berg Riviers Hoek in eight undivided shares to P. E. Hauman, the owner of La Brie, and seven other owners of seven neighbouring farms. If J. S. Hauman, sen., was at that time entitled to the 4th by succession to his father, it is difficult to see why the grant was not made to him, or why he did not secure his rights. It is, on the other hand, easy to understand that he could make no claim under this grant if he purchased La Brie, and nothing more. This grant to P. E. Hauman in 1839 disposes of all idea of prescription, before 1839, in those who pretend to claim through him. But it is said that from 1839 to 1862, J. S. Hauman, sen., used and occupied 4th share of Berg Riviers Hoek, as of right, and prescription was, therefore, running in his favour during that period. The evidence upon this point is of a very doubtful character, since the witnesses upon the point can hardly give us, as of their own knowledge, any positive statements as to his intentions at the time. But for the present I shall leave this part of the case there. H. le Roux says that in 1862 the executors of J. S. Hauman, sen., sold at public auction the farm La Brie, together with one-eighth share in Berg Riviers Hoek, appertaining thereto, to P. E. Hauman, jun. Malherbe says the records filed in the Master's Office contradict this, and that the liquidation accounts filed in the estate shows that the farm La Brie was sold to P. E. Hauman for £1,500, and Berg Riviers Hoek ground to one P. A. le Roux for £549. This share in Berg Riviers Hoek, the said J. S. Hauman had transfer of, and no mention is made of any other share in the said farm. This piece of documentary evidence would have the effect of showing that no share in Berg Riviers Hoek was sold to P. E. Hauman, jun., and also that when J. S. Hauman, sen., occupied Berg Riviers Hoek he did so in respect of a share other than the one in dispute. This would weaken the evidence of prescription between 1839 and 1862. If P. E. Hauman, jun., purchased La Brie only in 1862, he could not have occupied Berg Riviers Hoek by virtue of such purchase, and his intention to do so is doubtful when we find that he had other shares in Berg Riviers Hoek, bought in 1868, 1885, 1883. Then it is stated that in 1891 two and a one-eighth shares of Berg Riviers Hoek were sold in the insolvent estate of P. E.

Hauman, and that he himself bought out of the estate the farm La Brie and the one-eighth share appertaining to it. Here, again, upon reference to the agreement between him and the trustees, we find that La Brie and adjoining ground is mentioned, but nothing said of the one-eighth share. Up to this point there is no clear proof that the title to one-eighth of Berg Riviers Hoek passed to the successive owners of La Brie; on the contrary, there seems to be pretty strong proof that it did not. Nor is there proof that independently of title, the successive owners of La Brie occupied Berg Riviers Hoek in a manner which made prescription run in their favour. When we come finally to the sale to the respondent, H. le Roux, it would seem that at the sale by the executors of P. E. Hauman, jun., there was some idea that some right to an eighth share in Berg Riviers Hoek did exist, and such right was sold for whatever it was worth. It is only too probable that the executors would not have made themselves responsible for more, in view of the doubtful and uncertain nature of the right. I do not think H. le Roux has established a right to one-eighth of Berg Riviers Hoek, and considering the doubtful and hazy nature of her claim, she should have been well content with the one-sixteenth share awarded to her, to which there was no other claimant. It is admitted now that the applicant is entitled by prescription to a share in the farm. It was found that his prescription ran in respect of one-sixteenth of the farm, and there being one-sixteenth to which no title in any other farm is set up, I think the applicant is entitled to have it registered in his name. The appeal must therefore be dismissed, with costs. Mr. Justice Hopley concurred.

The Chief Justice said that his reasons for the judgment appealed against had been fully stated. He added: I only wish to add that, in view of the legislation of last session, the Act 35, of 1896, would seem to me to need further amendment. The 19th section of that Act directs that appeals from the Superior Courts shall be heard before not less than three judges, one of whom shall be the Chief Justice of the Colony. By the 2nd section of Act 35, of 1904, it is enacted that an appeal shall lie from the decision of any Divisional Court, to the Supreme Court, sitting as a Court of Appeal. Where the appeal is from the decision of the Chief Justice sitting alone in a Divisional Court, it seems highly desirable that he should not take any part in the Court of Appeal. I do not suggest that any judge would allow his previously expressed opinion to outweigh good counter-arguments brought forward on appeal, but there is a decided advantage in admitting his judgment to the scrutiny

of judges who have taken no part in the original hearing, and to the unfettered criticism of counsel for the appellants.

[Appellant's Attorneys: Walker and Jacobsen; Respondent in default.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

DEN V. DEN.

{ 1904.
Nov. 1st.

This was an action brought by Mrs. Den, of Maitland, against her husband, who was now stated to be residing in the Transkei, for restitution of conjugal rights, on the ground of his wilful and malicious desertion. Mr. Rainsford was for the plaintiff; the suit was undefended.

Mr. Rainsford applied for leave to amend the declaration, and to substitute for the alternative prayer of judicial separation a prayer for a decree of divorce, with forfeiture of the benefits of the marriage in community.

His Lordship assented to the amendment.

Wm. Thomas Birch, clerk in charge of the marriage register at the Colonial Office, produced the duplicate entry of the marriage.

The plaintiff said she was married to the defendant at St. Luke's Church, Salt River, on the 3rd October, 1900, and afterwards they lived at Maitland. In August, 1901, he deserted her. She heard from her husband for the last time about two and a half years ago.

By the Court: They had a quarrel before her husband deserted her. He was addicted to drinking habits, and he was unable to support her. The separation was due to his drinking habits and his inability to support her.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 15th January, failing which, defendant to show cause on the 1st February why a decree of divorce should not be granted, with forfeiture of the benefits of the marriage in community; rule to be served on the defendant personally, in time to enable him to appear on the 1st February.

Postea (April 18th, 1905). The rule was made absolute.

NGATWYN V. NGATWYN.

This was an action brought by Elias Ngatwyn, of Indwe, against his wife, for restitution of conjugal rights, failing which, a decree of divorce, with custody of the child of the marriage and forfeiture by defendant of the benefits of community. Mr. McGregor was for the plaintiff; the suit was undefended.

Wm. Thomas Birch, clerk in charge of the marriage register, Colonial Office, produced duplicate copy of the entry.

Elias Ngatwyn, a Tembu, said he was married to his wife in 1890 in Tembuland. They lived together two years; there was one child. At the end of two years his wife ran away with her sister. He went and asked her to come back, but she would not return. Witness also went and spoke to the headman, but his wife would not come back. Witness was now working at Indwe. He desired to have custody of the child of the marriage—a girl.

Decree of restitution granted, defendant to return to the plaintiff on or before the 31st December, failing which, a rule to issue calling upon her to show cause on the 12th January why a decree of divorce should not be granted, why the plaintiff should not have custody of the child, and defendant be declared to have forfeited the benefits of the marriage in community.

Postea (January 12th, 1905). The rule was made absolute.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

B. S. A. ASPHALT CO. v. { 1904.
CAPE TOWN GAS CO. { Nov. 1st.
" 16th.

Contract—Sale and purchase—
Preferent rights.

The defendants had contracted to supply the plaintiffs with a certain quantity of coal tar per annum at 2d. per gallon. The defendants further agreed to sell all their coal tar to the plaintiffs, over and above the quantity they were bound by contract to deliver at the same price, save and except such small quantities as they might sell to ordinary customers. They had disposed of considerable quantities of coal tar to a certain firm, and the plaintiffs now sued for damages.

Held, that under this contract the Gas Company were entitled to supply only old customers and only the quantity which had been supplied to them during the preceding twelve months.

This was an action brought by the B.S.A. Asphalte Co., carrying on business at Strand-street, Cape Town, and elsewhere, against the Cape Town Gas, Light and Coke Co. for an interdict and £5,000 damages for breach of contract.

The declaration set out that on or about the 18th August, 1903, the plaintiffs and defendants entered into an agreement in writing, in terms of which the defendants undertook to supply the plaintiffs for a period of five years, reckoned from the 1st July, 1903, with a minimum yearly quantity of 80,000 gallons of coal tar, at a price of 2d. per gallon, to be removed by the plaintiffs from the works of the defendants at the rate of not less than 6,500 gallons per month. The defendants further agreed that the plaintiffs should have the right to call for and purchase from the defendants at the said price of 2d. per gallon all the surplus coal tar manufactured by the defendants, over and above the said amount of 80,000 gallons, not disposed of by the defendants to their ordinary customers in small quantities. The defendants further undertook not to supply coal tar in any quantities to companies competing with the plaintiffs. The defendants, in breach of the said agreement, had (a) failed to supply the plaintiffs with 6,500 gallons during October, 1903, and January and February, 1904, though requested to do so by the plaintiffs; (b) failed to supply the plaintiffs, though requested so to do, with the whole of their surplus quantity of coal tar over and above 80,000 gallons per annum, but the defendants had supplied the said coal tar in large quantities to customers other than those who were such at the date of the taking effect of the said agreement; and (c) knowingly supplied coal tar in large quantities to companies competing with the plaintiffs. In consequence of the plaintiffs being unable to obtain sufficient coal tar, they had lost certain contracts, and had been deprived of large profits, having sustained damages in the sum of £5,000.

The plaintiffs claimed:

(a) An interdict restraining the defendants from supplying coal tar in any quantities to any company or persons competing with the plaintiffs.

(b) An interdict restraining the defendants from supplying coal tar to any person, firms, or companies who were not customers of the defendants on the 1st July, 1903, or prior thereto.

(c) An order compelling the defendants to supply the plaintiffs with all surplus coal tar manufactured by them at the rate of 2d. per gallon, whenever the same is required or demanded by the plaintiffs, in terms of the said contract.

(d) £5,000 as and for damages aforesaid.

(e) Alternative relief.

(f) Costs of suit.

The defendants, in their plea, said that the agreement did not bind the company to supply the plaintiff company with coal tar at the rate of 6,500 gallons per month, or any precise rate; but, in point of fact, from the 1st July, 1903, to the 29th February, 1904, the quantity of coal tar supplied under the agreement to the plaintiff company exceeded the average of 6,500 gallons which the plaintiff company had undertaken to remove monthly, and there was no failure, as alleged in the declaration. They admitted that the plaintiff company, on the 12th February, 1904, gave notice to the defendants that they wished to take the whole surplus supply of tar from the works of the Gas Company, both in Cape Town and Woodstock, and they admitted that after such notice, they continued to supply coal tar to a certain customer, Nuttall and Co., who was, in fact, not a customer on or before the 18th August, 1903, and who was, in fact, competing with the plaintiff company, and the defendants admitted that such supply to a firm competing with the plaintiff company was a breach of the agreement aforesaid, in respect of which the defendant company was liable for damages, and they tendered the sum of £225, together with taxed costs to date. Save as aforesaid, they denied the allegations in the declaration. The defendants further undertook not to supply tar in quantities to any but ordinary customers, or to any company or person competing with the plaintiff company, so long as the plaintiff company performed its obligation under the agreement, and the said notice to take the whole supply of surplus tar at 2d. per gallon, and further undertook that they would regard as ordinary customers, in terms of the agreement, only those persons, firms, or companies who were customers on or before the 1st July, 1903. Subject to the said tender and undertaking, the defendants prayed that the plaintiffs' claim should be dismissed, with costs.

The plaintiffs, in their replication, said that the tender was incomplete, and referable only to one of the alleged breaches of contract, and, in so far as it applied to the said breach of contract, was wholly insufficient to satisfy the claim in this action. The undertaking of the defendants did not safeguard the interests of the plaintiffs under the agreement.

Mr. W. P. Buchanan (with him Mr. Sutton) for plaintiffs; Mr. Schreiner, K.C. (with him Mr. P. S. T. Jones) for defendants.

Mr. Buchanan said that the matter had previously been before the Court in the form of a motion for an interdict and an inspection of the books on the 21st March (14 C.T.R., 229) and the Court made an order that the applicants should proceed by action, and that notice thereof should be given to Nuttall and Co. that they might intervene as co-defendants, if so advised; notice of motion to stand for summons, and applicant to have the right to insert a claim for damages in their declaration. Since then Messrs. Nuttall and Co., through their attorneys, had notified that they did not wish to intervene in the case.

Evidence was called for the plaintiffs.

Andrew Allen, managing director of the plaintiff company, said that he had known Mr. Reilly, the manager of the defendant company, for some years. He described the scope of the plaintiff company's business, and mentioned that they had branches in Durban and Johannesburg, both of which had been opened before July, 1903. Mr. Reilly was aware of the purposes of the company. The agreement in question was signed in August, 1903, but they had been in negotiation since August, 1902. The draft agreement had been in the hands of Mr. Reilly; he saw Mr. Reilly hand it to the solicitors. After the agreement had been signed, they had considerable difficulty in obtaining tar from the defendant company. They really required for their works and sales all the coal tar they could get. The demand for the product had increased largely since the plaintiff company started business; in fact, the demand had really sprung up since the plaintiffs began operations. Formerly the tar was dumped on the Woodstock beach by the defendants. The greatest difficulty plaintiffs had was about October and November last year. The plaintiffs supplied proper receptacles for the reception of the tar. He saw Mr. Reilly, and brought pressure to bear upon him. In February of this year, further demands were made upon the defendants. He found that the bulk of the tar was being sold to Messrs. Nuttall and Co. Plaintiffs frequently sent their carts to Woodstock and Cape Town for tar, but were refused any supply, being referred from one place to the other. Nuttalls were using the tar for street pavements. Plaintiffs carried on a similar business, and had also sent in a tender to the City Council for the contracts that were let to Nuttalls. Mr. Reilly said that he had a good many customers, who came to the windows and bought for cash, and he would like to retain those customers. He also said he had supplied the Corporation of Cape Town with a certain amount of coal tar, and would like to continue.

Witness found that the defendants were supplying coal tar to Jenkins and Co., who were competing with the plaintiff company. The only other works in South Africa from whence coal tar could be secured were the gas works at Port Elizabeth and Johannesburg, but both concerns were small in comparison to those of the defendant company. If they could not obtain a supply of coal tar from the gas company, they would be compelled to import. They had to make further complaints in April that the supply was insufficient. Witness also spoke as to the correspondence in regard to the contract, and an interview between the Board of the plaintiff company and the gas company's manager. Since the defendants had filed their plea in August, the supply had increased, but it was not yet as large as plaintiffs desired. They had since been receiving more than the minimum quantity of 6,500 gallons per month. He had seen the books of the defendant company. He had seen what had been charged to Nuttall and Co. The total quantity supplied to Nuttall's between February and July was 31,600 gallons.

By the Court: The plaintiffs were quite prepared to have taken all the quantity of tar supplied by the gas company to Nuttalls. Their works were paralysed because they could not get a sufficient supply of tar.

Their manufactures of goods had been starved through the want of tar. They had articles which were composed of tar costing 6d. per gallon, and other constituents costing about 6d. per gallon. They got for the resultant product 2s. to 2s. 6d. They made from 1s. to 1s. 6d. profit. He could not say how many gallons they ordered during the period February and July; they could have found use for the whole of the quantity supplied to Nuttall's upon their manufactory. He could not give figures, because their books were destroyed during a fire at the works. The plaintiff company had had to import tar from Home at a cost, stacked in Cape Town, of 9d. per gallon. Upon their sales of coal tar they made a profit of from 6d. to 7d. They had lots of orders that they were unable to execute—he should say to the extent of 10,000 gallons. They had had constant inquiries from their Johannesburg branch for a better supply of tar.

Cross-examined by Mr. Schreiner: The plaintiff company had carried on the manufacture of tar macadam for some time; Nuttall's were working in a similar product to the plaintiffs. The two products were practically the same; the difference was that one could be made by machinery and the other by hand. The tar paving that they both produced was practically the same. The Johannesburg branch of the plaintiff company was opened before the agreement with the defendant company was entered into. He estimated the damage under the head of

the Johannesburg branch at £1,000. He estimated that the gas company's make of tar was 16,000 gallons per month; he calculated that their small customers would require 1,000 gallons. He put forward the claim for £5,000 damages in March last. He believed that they had sustained damages in more than that sum. Witness had brought his claim down to the 31st October.

De Villiers, C.J., put it to counsel whether it would not simplify matters if they confined their attention to the 31,600 gallons supplied to Nuttall's.

Mr. Schreiner acquiesced.

Mr. Buchanan said that it would certainly simplify matters, but he did not think that would be a fair test of the damages sustained by the plaintiffs.

De Villiers, C.J., said that the plaintiffs would only be entitled to damages up to the 12th July.

Witness, in further cross-examination, said that the plaintiff company was not paying a dividend, nor had it yet declared a dividend. He could give the profits on the manufactures. The business would have been profitable had it not been for other people getting the tar the plaintiffs should have had. He did not know who, besides Nuttalls, had been receiving from the Gas Company tar which the plaintiffs should have had. Their contention was that they were to have the first call on the supply. He did not know that the agreement was that the Asphalt Company were to be supplied by the defendants with surplus tar after the ordinary customers had been supplied. Before the contract was entered into, he did not know that the Gas Company were supplying other large customers, beside those who were being dealt with at the window. He was only aware of one customer of that class, the Cape Town Corporation. He was not aware that the Table Bay Harbour Board, the Railway Department, and Forrest and Co. were customers of that class. He understood that "small quantities" only referred to the people to whom sales were made at the window. Mr. Reilly told him that they could get larger prices for the small quantities sold at the window, 6d. or 8d. a gallon, and that he would like to retain those customers. Witness, before he floated the present company, negotiated with Mr. Reilly as the head of the B.S.A. Asphalt and Vulcanite Roofing Company. Witness had made a mistake in saying that they imported coal tar from England; they had only obtained pitch, or distilled tar from England. He believed they had imported 10 tons of pitch, the cost being about £4 a ton. He reckoned that 1,000 gallons of tar would distil four tons of pitch. They were not importing pitch independently of the insufficient supply of coal tar by the defendants.

De Villiers, C.J., intimated that unless the case were completed that day, the further hearing would have to be adjourned until next term. The Court would be unable to give another day during the present term. He also thought that it would perhaps materially facilitate the hearing if, at the conclusion of the witness's evidence, the Court determined the construction of the agreement.

At the conclusion of the witness's evidence, counsel were heard in argument as to the construction of the agreement.

De Villiers, C.J., said that the view he took of the contract was, firstly, that the defendants may not supply coal tar to any persons, firms, or companies who were not customers of the defendants during the twelve months preceding the 1st July, 1903; and, secondly, that the defendants may not supply any such customer during any twelve succeeding months beginning with the 1st July, with any quantity exceeding the quantity supplied to such customer during the twelve months preceding the 1st July, 1903. The parties might proceed on the basis of that opinion. The only other question now was the amount of damages. It had been clearly proved that, as to 31,600 gallons, supplied to Nuttall and Co., there was a breach of contract. The main question would be whether it should be on basis of 1s. profit, which would make £1,500? If the rate were reduced, of course, the damages would be reduced proportionately.

Mr. Schreiner said that the defendants took the figure at 2d. simply because they had sold the tar to Nuttalls at 4d.

[De Villiers, C.J.: Twopence seems very low.]

Mr. Schreiner said he admitted that the sum of £225 would be insufficient, and his learned friend and himself might perhaps be able to arrive at a figure between that sum and £1,500. He contended, however, that there was no reason for interdicting the defendants.

[De Villiers, C.J.: I am inclined to think that 6d. per gallon would be a fair measure of damages. That would be equivalent to £790.]

Mr. Buchanan (after consulting with his clients) said that they were willing to take the rate of 6d. The only point was whether his lordship confined the rate to the quantity supplied to Nuttalls.

[De Villiers, C.J.: Oh, no; the total damages claimed in this action.]

Mr. Buchanan: At the rate of 6d. per gallon on whatever amount may be assessed?

De Villiers, C.J.: It is only a suggestion. We have only had evidence in regard to the 31,600 gallons supplied to Nuttalls. I think perhaps the best plan would be to go on with the case. Mr. Schreiner does not accept the figure. The

evidence may be continued with reference to the profit that would have been made by the plaintiffs if they had been supplied with this coal tar, and to the customers whom the defendants supplied contrary to the agreement.]

Mr. Buchanan then proceeded to call further evidence.

Harry George Davis, secretary of Asphalt Company, denied that his firm had ever had regular supplies from the defendants. From January to June about 48,000 gallons had been delivered to them.

To the Court: He maintained that the 31,000 gallons sold to Nuttall and Co. were worth at least 10d. a gallon to them, in addition to what they were paying for it.

Witness (continuing) said that owing to the defendant's failure they had lost two very good customers in Johannesburg, who were now using imported tar. His firm made a profit varying from 6d. to 8d. per gallon on the tar sold in Johannesburg. They used to supply these customers with 4,000 gallons per month.

Cross-examined by Mr. Schreiner: Under their contract they were supposed to get 80,000 gallons of tar yearly, and any surplus they had if necessary. All his company wished to know was when the defendants were selling. Witness complained that his firm was not getting a sufficient supply. Witness heard that the defendants were manufacturing for a competing firm, and supplying them with tar, so he then wrote to them, complaining of the act. Witness contended that his firm lost the two customers in Johannesburg owing to the failure of the defendants to carry out their contract. He denied that he lost them because they could import the tar from Delagoa Bay cheaper than from Cape Town. Certainly the freight rate was lower, but delivery was very uncertain. The company were at present selling the tar at 3d. per gallon, but it would fetch 6d. per gallon if put on the market. Witness's company had not paid any dividend up to the present.

Re-examined: Witness could put in a paper which contained the secrets of the manufacture of asphalt, but it would give away their business secrets.

George Sorrie, clerk in Mr. J. E. P. Close's office, stated he examined the books owned by the defendants at the instance of the plaintiff. He put in a list of the quantity of tar supplied to plaintiffs and to other firms. Witness made out a list of those who were not customers before July, 1903.

Alfred E. Ruthford, manager of the Johannesburg branch of the plaintiff business, stated they got all their tar from the Cape Town office. They were not able to get a sufficient supply. They made 6d. per gallon profit in Johannesburg.

Mr. Schreiner objected to evidence of what the firm did in Johannesburg being given. The contract simply stated that the agreement was between the Asphalt Company trading in Cape Town, it should have stated, and Johannesburg.

De Villiers, C.J., overruled Mr. Schreiner's objection, and stated it was the same as if a man with a business in Cape Town called his agent from elsewhere to prove his business was suffering through a certain thing.

Witness (continuing) said he had to account to the Cape Town branch for all the money he received. Witness considered he could sell 4,000 gallons of tar per month in Johannesburg. He had to pay 6d. per gallon for 2,000 gallons at Port Elizabeth, and 1s. 6d. per gallon for a small quantity at Johannesburg, so as not to disappoint his customers.

Cross-examined: A gallon weighed about 14 lb. Witness paid 3d. and 10 per cent. per gallon for tar in Cape Town. There was no contract between the Cape Town branch and the Johannesburg branch. He denied that the Johannesburg branch kept any profit over 3d. per gallon. Cape Town office benefited by any profit.

Charles Holliday, manager to Messrs. Flower and Son, stated that it would cost 8d. per gallon to import tar from England.

Cross-examined: Witness had seen the tar produced by defendants. They did not import that sort. They imported "refined" tar, and manufactured it into another product. They used to buy from the defendants. They then paid 3d. per gallon.

Re-examined: They sold the Gas Company's tar at 1s. per gallon.

Mr. Buchanan closed his case.

For the defence,

Edward P. Reilly, general manager of the defendant company, stated he was thoroughly conversant with the work of his company. When witness undertook to supply Nuttalls he did not know the agreement existing with plaintiffs. Witness did not regard Nuttalls as a competing firm with plaintiffs. Witness continued to supply Nuttall until the 12th July, when he took advice from counsel, and made the tender mentioned. Witness was annoyed with the plaintiffs for going to law, as he thought the case could have been settled outside the court. Witness had had the figures with regard to the supply of coal tar from July, 1903, to date made out, and put in. The defendants supplied Nuttalls with large quantities of tar during April, May, June, and July. He tendered plaintiffs £225, which he considered was a very fair price. None of the purchasers had paid over 4d. per gallon. There was no contract for supplying it. It was impossible to sell large quantities of tar at

1s. per gallon. Small quantities, such as a gallon, might fetch that price. It was erroneous to say that 9d. per gallon profit could be made on 31,600 gallons in Cape Town. The larger the quantity taken the less was the price per gallon demanded for it. If witness had the 80,000 gallons of tar put aside for defendants he would supply anybody that wanted the surplus.

Cross-examined by Mr. Buchanan: Witness denied that he wrote asking for a copy of the contract.

Mr. E. P. Reilly was further cross examined: He held that 6,500 gallons was in accordance with the agreement with the plaintiffs. There was no arrangement for the plaintiffs to remove any surplus at the end of the month. In 1903-4 the Town Council received 39,000, and the year previous only 19,000 more were supplied. It was not the case that he was trying to keep down the supply to the plaintiffs. He believed the plaintiffs should get any surplus after all the customers had been served.

Ernest Roberts, local manager for Peabody and Co., New York, said his firm would quote 22s. 14d. per barrel of 50 gallons c.i.f. New York.

Cross-examined: They had just recently gone into the question on account of a shortage of tar at the Cape.

Counsel having been heard in argument,

Postea (November 16).

De Villiers, C.J., after referring to two of the most important clauses in the contract, said in his opinion the contract meant the purchase out and out by the plaintiff company of 80,000 gallons of coal tar during every year at the rate of 2d. per gallon, reserving the right to the plaintiff company in addition to that to call for at similar prices whatever additional coal tar there might be after the ordinary customers in small quantities had been supplied. It was difficult to decide exactly what small quantities meant, and only a relative meaning could be given to the term. He thought what was meant by it was that the Gas Company could supply their old customers, but with not more than had been supplied during the preceding twelve months. The Court would declare "that so long as the plaintiff company performs its obligation under the agreement attached to the declaration, and under the notice given by the plaintiff company to the defendant company to take the whole supply of surplus coal tar the defendant company is not entitled to supply coal tar to any persons, firms, or companies that were not customers to the plaintiff company during the twelve months preceding the 1st July, 1903, and that the defendant company is not entitled to supply such customers during any successive

twelve months beginning with the 1st July, with any quantity exceeding a quantity supplied to such customers respectively during the twelve months preceding the 1st July, 1903. On the question of damages he thought it would be fair to allow the plaintiff company 6d. on 31,600 gallons, and judgment would be entered for £790, with costs, including £10 expenses for Mr. Sorrie, as an expert accountant.

[Plaintiff's Attorneys: Herold and Gie; Defendant's Attorneys: Van Zyl and Buissinné.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTION.

Ex parte DE VILLIERS. { 1904.
Nov. 1st.

Mr. Burton applied as a matter of urgency on behalf of the applicant for an order restraining any more goods being sold from the shop of one Charles Budricks. Counsel stated that applicant was the secretary of the Dutch Reformed Church, Adderley-street, and, as such, entered into a contract of three years with Budricks for the letting of the premises attached to the church at an annual rental of £660. Since July no rent had been received, and the stock was now being sold by public auction.

An interdict was granted restraining respondent from disposing or removing any more goods until the rent was paid, with leave to the respondent to move to have the interdict set aside.

TRIAL CAUSE.

TOUCHER V. OOSTHUIZEN. { 1904.
Nov. 1st.
" 2nd.

Sale and purchase—Suitability of goods supplied for a specific purpose.

This was an action to recover from the defendant, a farmer, residing at Steynsburg, in the district of Albert, £238 15s. 1d., balance of account for work and labour done.

The declaration set out the plaintiff carried on business in Cape Town, and elsewhere in the Colony, as a water borer and waterworks engineer, and the defendant was a farmer residing at Steynsburg, in the district of Albert. The plaintiff claimed £238 15s. 7d., the balance of account incurred between January 30, 1903, and 31st January,

1904, for certain plant supplied at the defendant's request. Certain material the defendant objected to, the plaintiff was always ready and willing to receive back and allow credit to the amounts of £24 10s. and £5 1s. 3d.

The plea set out that when the defendant entered into the contract with the plaintiff through Carlo Toucher, it was agreed to purchase certain machinery for the purpose of pumping water, and the plaintiff guaranteed that a 4-inch pump would raise the water to a height of 25 feet. An oil engine was also purchased, and guaranteed to work the pump. Defendant, relying on the guarantee, paid £232 2s. on account. After the plaintiff's engineer had fixed the machinery, it was found wholly incapable of delivering the water according to the contract. The plaintiff sent defendant another pump, but it brought no better results, and the whole machinery was, therefore, useless and unserviceable to the defendant. Instead of supplying the defendant with kerosene the plaintiff supplied him with an explosive oil, which was also useless to the defendant. The defendant was willing to return the articles on the terms specified in the declaration. For a claim in re-convention, the defendant claimed repayment of £232 2s., which had been paid to the plaintiff on account, and by reason of the breach of contract he had suffered damage to the extent of £500.

The replication denied that the plaintiff guaranteed at the time that the said centrifugal pump would raise a 4-inch stream of water 25 feet. The defendant required the stream raised 8 feet, and when the pump was found to be unsatisfactory, plaintiff tendered to receive it back. Plaintiff asserted that the second pump was all right.

Mr. Upington (with him Mr. Alexander) was for the plaintiff, and Mr. Burton (with him Mr. Rainforth) was for the defendant.

Mr. Upington submitted that the onus lay on the defendant to establish a special contract.

Maasdorp, J., said it seemed there was a dispute about the contract, and without deciding about the onus, it might be as well to go on with the plaintiff's case.

Garibaldi Toucher, plaintiff, stated that he was in England when the purchases were made, his brother Charles managing the business during his absence. A 4 h.-p. Crossley oil engine would raise water 8 feet in 1,200. The engineer he sent to fix up the machinery was a competent man.

Cross-examined by Mr. Burton: He knew nothing about the purchase of this particular engine. The pump, as far as it was concerned, was capable of lifting the water 25 feet. The defendant wrote complaining that the engine could not do the work, and the engineer reported that the engine was

working to its utmost capacity, but it did bring the water up.

Carlo Toucher, brother of the plaintiff, said that in July last year the defendant came to witness, and stated that he wanted to purchase a pump for four-inch piping. The defendant seemed to have a doubt of the efficiency of the pump, and witness explained that by suction it could raise water 25 feet, and by force an additional 40, but witness pointed out the higher the elevation, the greater horse power would be required. The defendant said the water would have to be brought about 1,200 feet, and there would not be a greater elevation than 8 feet. Witness found 2½ h.-p. would about do the work, and suggested a 4 horse-power engine. Then the defendant agreed to purchase the engine, pump, and piping. Witness never guaranteed 25 feet. Benzine was sent by error to the defendant, instead of kerosene. When witness went in company with another engineer to see the engine and pump, it was apparently in good order, but they could not test the machinery, as the pipes were disconnected. The defendant was present at the time, and said that he had told witness that the height was 12 feet, and not 8 feet. The defendant said that he was only dissatisfied with the engine.

Cross-examined: He would admit, as matters were at present, the engine could not do the work in a satisfactory manner. Witness said to the defendant that no pump was really capable of drawing water by suction more than 25 feet. The defendant never mentioned 12 or 15 feet when the purchase was being made; he was positive that 8 feet would be ample.

[By Maasdorp, J.: If he had been told that a 12 feet elevation was required, he would probably have given a five h.-p. engine.]

Chas. Richard Jones, mechanical fitter, and engineer, who fitted the engine on the instructions of the plaintiff on defendant's farm, said that the place where the engine was placed was selected by the defendant. It was found, when the second pump was sent out that the engine was not powerful enough, although it did deliver water. On returning to the farm at a later date, he found that the governor of the engine had been altered, and there was too much oil in the engine, which impaired its power.

Cross-examined: The engine was not strong enough to do the work.

Arthur Pengarry, qualified engineer and partner in the firm of Davis, Anderson and Co., who examined the machinery on defendant's farm, stated the oil engine of four horse-power was an efficient engine, but someone had been tampering with the governor. Both engine and pump had been fixed properly. If the pump had been required to raise water 25 feet a 9 h.-p. engine would be required.

Cross-examined: The 9 horse power for 25 feet was practical, and a 6 horse power would be required for 15 feet, a 4½ horse power or 5 horse power for 12 feet, and a 3 horse power for 8 feet.

Mr. Upington closed his case.

Frederick Oosthuizen, brother of the defendant, stated that at the interview respecting the purchase, the defendant gave the depth at not more than 15 feet. The plaintiff said the pump could not suck for more than 25 feet. The plaintiff was quite confident that the machine could work at 400 yards, and that the engine was strong enough to work a 6-inch centrifugal pump.

Cross-examined: Witness was satisfied that the pump could suck water at 25 feet. The plaintiff guaranteed to deliver the water at a distance of 400 yards, otherwise witness would not have told his brother to purchase the machinery. He was quite sure that his brother gave the height as from 12 to 15 feet.

A. Oosthuizen, defendant, stated that the plaintiff suggested to him that he should buy an oil engine instead of a windmill. Witness showed plaintiff a diagram, and the latter replied that a 4½ h.p. engine would deliver the water. The lands he wanted to irrigate were 400 yards off. From the first day, Jones erected the engine, he said that it was not strong enough to do the work. He had had no benefit whatever from the machinery. He never touched the engine from the time Jones was there on the second occasion.

Cross-examined: All that was required was a stronger engine. Plaintiff guaranteed the machinery to deliver a 4-inch stream of water 400 yards, but did not guarantee to pump the water with an elevation of 25 feet.

H. Oosthuizen, son of the defendant, stated that the second pump delivered about half an inch of water, and when the pipes were altered they obtained two inches of water. The engine did not work satisfactory. None of the water delivered by the machinery was used by his father for irrigating the land.

William Fraser, mechanical engineer, stated that he inspected the water machinery at defendant's farm. He started the pump, which was pumping about 80 gallons a minute. The engine was then doing its utmost. The pump should deliver about 180 gallons. The whole trouble was through the engine not being powerful enough. He considered the engine should be a 10 h.p. one at least.

Counsel having been heard in argument on the facts,

Maasdrop, J., said the case was not free from difficulty, because it had been placed before the Court as if all depended upon the credibility of the evidence. He was inclined to think that the case could be disposed of without reflecting upon

any particular witness. The whole case depended upon the finding of the Court as to the height to which the water was to be led. On the one side it was stated to be about 8 feet, and on the other side from 12 to 15 feet. The defendant left the decision of the capacity of the pump wholly to the plaintiff, because defendant had not enough experience to know what was required. He considered that Toucher had not treated the matter in a careful manner, but more in a casual manner. He took it that the men who knew the country would hardly make such a great mistake as 8 feet when everyone else, after a casual observation, saw that it was 15 feet. That he thought must be taken to dispose of the case. He thought he must find that the people represented to Toucher that they wanted something that would certainly lift water more than 12 feet. Toucher did not supply it, whether by mistake or otherwise it did not matter to the defendant. The result was that the defendant purchased certain material, and the material and the engine were not satisfactory. The engine would have to be taken back. That was all the Court could say at present, and he could only hold that the defendant was not liable to pay for the engine and certain other small items because they were not up to the requirements of the contract.

The result is judgment must be given for the plaintiff for the sum of £70 11s. 2d. on the claim in convention, and for £14 for the claim in reconvention. As to the question of costs, under the circumstances both parties must pay their own.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendants Attorneys: Herold and Gie.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSES.

COLONIAL GOVERNMENT V. } 1904.
BAILEY. } Nov. 2nd.

In this matter, Mr. Schreiner, K.C. (with him Mr. Howel Jones), was for the plaintiffs; Mr. J. E. R. de Villiers was for the defendant, Hyman Bailey.

Mr. Schreiner said that a consent paper had been signed, in terms of which he now moved for judgment. The case

was one in which the Government was suing Bailey, who was convicted of theft some time ago at the Paarl Circuit Court, of certain goods which had been taken by him, under circumstances he (counsel) need not detail, from Lady Grey Bridge Station. A large quantity of goods were, after search had been made, seized, certain of them had been immediately identified as stolen, and a very large number of indictments were preferred against Bailey, and upon certain counts he was convicted, and on other counts he was not convicted. He was at present serving his sentence. The action was brought by the Government for the whole of the goods in relation to which they had paid claims amounting to £600, and they claimed also the sum of £130 odd for the expenses connected with the identification of goods. It was a large seizure, and a long criminal inquiry took place. To the claim of the plaintiffs, the defendant pleaded an admission of his liability in relation to those goods represented by the counts of the indictment upon which he had been convicted, and which he said amounted to £423. He did not admit liability for the costs and expenses involved by identification, and he pleaded that the Government must deduct the whole of the costs in relation to which he had been convicted before claiming against him for the money they had paid to persons who had lost their goods. In his plea he made a tender of £450, with taxed costs to that date. He then claimed in reconvention that amongst the goods seized by the Government were a quantity belonging to him, and of the value of £800, and that these goods had been withheld, and he claimed return of the goods, or their value, £800, and damages in the sum of £150 for wrongful seizure of the goods. The Magistrate at the Paarl had been interdicted from parting with the goods of the defendant, pending the present proceedings, the defendant having desired to get back the goods on which he had not been convicted. The goods were still in the hands of the Government. The basis of the present settlement was embodied in a consent paper in the following terms: "That judgment be entered for the plaintiffs in the sum of £500, with taxed costs, such costs not to exceed £100, upon the understanding that such of the goods removed from the defendant's premises as are now in the possession of the Railway Department be returned to the defendant upon payment of the said sum of £500 and costs." Counsel added that it was quite understood that though no special reference was made to the claim in reconvention, this was a settlement of the whole case, both the claim in convention and the claim in reconvention.

Judgment was entered in terms of the consent paper, the understanding being that this disposed of the whole case.

ELLIS V. KEMP.

This was an action brought by J. D. Ellis and Son, auctioneers, East London, King William's Town, and elsewhere, against John Hilton Kemp, of Cathcart, for the return of certain goats and hameles, or their value, £502 1s. Mr. McGregor (with him Mr. Benjamin) was for the plaintiff; there was no appearance for the defendant.

Hopley, J., said he wished to be quite satisfied as to the reason why the defendant was not present.

Mr. McGregor said he was unable at the moment to produce the service of summons, but would be ready to do so at a later stage.

Hopley, J., pointed out that this was not quite all that was wanted. Here was a comparatively big case. The briefs were voluminous, eminent counsel had been engaged, and at the last moment the defendant was not present.

The defendant was called in each court, but did not answer.

Mr. McGregor said that Sir Henry Juta had been briefed for the defence, and the representative of a firm of attorneys, who was in court, was doubtful whether his firm had or had not the case in hand. He thought they had not, but was not quite sure.

Eventually the case proceeded on Mr. McGregor undertaking to produce the necessary certificate of service.

The declaration set out that on the 30th January last plaintiff sold to defendant by auction at Dohne, district of Stutterheim, certain goats and hameles for £502 1s. The conditions of sale were, purchasers must take possession of their stuff as soon as knocked down at their own risk, and to purchasers up to a certain figure three months' credit would be given. Defendant saw plaintiff before the sale, and plaintiff promised that on an approved bill he would sell to him. After the sale defendant did not give plaintiff an approved bill. Subsequently, defendant sent a bill, or notes, signed only by himself. Thereafter, defendant, in breach of his duty as custodian, had certain of the stock sold by auction, and had the proceeds placed to his credit. Thereafter, defendant, when undergoing preliminary examination on a charge of theft, tendered the sum of £502 1s. by a note signed by him only. The prosecution was subsequently withdrawn. Plaintiff claimed return of the goats and hameles, or their value, £502 1s.

Defendant, in his plea, said the only condition on which he bought, was that he should have three months' credit. He gave plaintiff a promissory note. He was still ready, and tendered to pay the sum of £502 1s. For a claim in reconvention, he said that he suffered damages through the wrongful act of the plaintiff in causing him to be prosecuted and imprisoned, and he claimed £1,000 damages and

return of the promissory note, offering to pay plaintiff the sum of £502 1s.

John David Ellis (the plaintiff) said that on the 13th January he sold some stock under his usual conditions of sale, which were read out at the sale. Defendant saw him about buying stock, and purchased 411 lamels and 125 goats, the price being £502 1s. No part of the money had been paid. The stock was duly handed over to the defendant.

By the Court: He did not properly accept the bill given by the defendant. He had kept the bill, because he thought the defendant was coming down to make a settlement. Witness was away at the time, and on his return from East London, he told his clerk to send back the bill to be endorsed. The bill had not been met. At the preliminary examination cash was offered by the defendant.

[Hopley, J.: I suppose it was not accepted because it would have looked like a malicious prosecution?]

Mr. McGregor: Yes, I take it that that is so.

[Hopley, J.: What about the claim in reconvention?]

Mr. McGregor: We shall apply to your lordship for absolution from the instance on the claim in reconvention. Counsel applied for judgment as prayed on the claim in convention, and absolution from the instance on the claim in reconvention, and for an order for the plaintiff's expenses as a necessary witness.

Judgment was entered for the plaintiff on the claim in convention, as prayed, with costs, and absolution from the instance on the claim in reconvention, with costs, plaintiff to be allowed his personal expenses.

FLEMING V. COMMINS.

Verbal lease—Principal and agent—Pleading—Estoppel.

C. had entered into a lease of certain premises to F. verbally. C. afterwards refused to execute a written lease, embodying the same terms. In an action to compel C. to execute this lease, or for damages, it was argued that F. was merely an agent.

Held (1) That C. was bound by the verbal lease. (2) That F.'s agency should have been specially pleaded, and (3) That this not having been done, C. was now estopped from denying that F. was a principal.

This was an action brought by Charles Henry William Fleming, accountant,

Cape Town, against Michael Commins, property owner, Wynberg, for an order requiring defendant to give possession of certain premises, and to sign and execute a certain lease, and also for damages.

The declaration set out that on or about the 23rd July last the defendant agreed to let him have certain premises situate in Sligo-terrace, Prestwich-street, Cape Town, on lease, and that he agreed to embody the terms in a written lease. Instructions were given to Mr. F. B. Andrews, attorney, to draw up a form of lease. The lease was drafted by Mr. Andrews, but the defendant had failed and neglected to sign and execute the lease. Plaintiff tendered for his part to sign the document. By reason of the defendant's said refusal, plaintiff said he had sustained damages in the sum of £500, which the defendant refused to pay. Plaintiff claimed an order directing the defendant to give him possession of the premises, and to sign and execute the lease, and also judgment for £500 damages. As an alternative, if defendant would not sign and execute the lease, plaintiff prayed for judgment for £2,000 damages.

The defendant, in his plea, said that the agreement was not binding or valid; he denied having instructed Mr. Andrews to prepare a lease, and also said that the draft did not correctly set out the terms to which he was prepared to agree, and that he was justified in refusing to sign the document. He denied that the plaintiff had sustained damage, and prayed that the claim may be dismissed, with costs.

Mr. Gardiner was for the plaintiff; Mr. D. Buchanan (in the absence of his leader, Mr. Upington) was for the defendant.

Evidence was called in support of the claim.

Charles Henry William Fleming (the plaintiff) said that in July of this year he was approached by the Federal Cold Storage Company, and in consequence went to the defendant and saw him at his house. Witness asked Mr. Commins for a lease of the corner shop in Sligo-terrace. Commins said he had entered into a lease from the 1st September last; Commins said he was sorry that he had let the shop to Violet, because he would have liked the Federal Company as tenants. Violet, witness believed, was a compositor in the employ of the "Cape Times," and was proposing to carry on a butchery business. Commins agreed to let him the shop near by, which had been occupied by Logan Bros. Witness gave instructions to Mr. Andrews to prepare the lease. Defendant was present. Mr. Andrews took a note of the points of the proposed lease. It was arranged that they should again attend before Mr. Andrews on the following Monday. Mr. Commins then went to see his

attorney, Mr. T. J. O'Reilly, who said that he would not permit Mr. Commins to let his place, because he could not legally do so, owing to his having already let the corner shop to a butcher. Mr. O'Reilly said that he would be agreeable to the defendant signing, if witness would become responsible for both shops in the event of one becoming vacant. Witness saw Mr. Verster, managing director of the Federal Co., who insisted on the lease being adhered to. Commins afterwards told witness that he would let witness have the shop as he had originally agreed. Upon witness calling at Mr. O'Reilly's office, Mr. O'Reilly refused to give up the key, and the defendant then returned to his old contention that witness should become responsible for both shops in case the corner shop should become vacant. Witness still desired the lease, so that he could transfer it to the Federal Co., for whom he was acting. He was to be paid £30, plus out-of-pocket expenses for preparation of lease, if the transaction had gone through. He had been verbally notified by the Federal Co. that they claimed damages against him; they looked to witness for damages in the sum of £2,500.

By the Court: Witness would have received £30 from the Cold Storage Co. The Cold Storage had threatened to claim damages against him.

[Hopley, J.: How can they claim damages against you when you were simply their agent? Your taking the lease was simply a subterfuge or a blind for the Federal?]

Witness did not reply.

Mr. Gardiner said that the plaintiff was the principal on the form of the lease, and he had undertaken to transfer to the Federal.

Witness (in answer to the Court) said that the Federal subsequently took a shop in the same neighbourhood.

[Hopley, J.: How did the Federal suffer? Did their meat go bad?]

Witness said that the Federal did not obtain another shop until some time afterwards, and that was given up, because it was found to be beyond the region of trade. Continuing, he said that the defendant then saw the difficulty of having two shops in the same business. Commins saw Mr. Verster upon witness's introduction, and it was agreed that the Federal should be given a lease of the shop, the lease to be in witness's name. Witness prepared a memo., to which Commins agreed. This memo. set out that the lease should be for two years, with option of renewal for a further two years, at £12 a month, and if at any time desired, dwelling at an additional £5 per month, Fleming to have power to transfer lease or sub-let at his discretion, in the event of the corner shop occupied by Violet becoming vacant. Fleming was to have the

right to transfer his tenancy on payment of an extra £1 per month.

Cross-examined: Witness took the second shop on behalf of the Federal. He was paid one guinea commission for obtaining that shop. He supposed the difference in the fees was due to the fact that the shops were of a very different character.

By the Court: The Federal were particularly anxious to have one of the shops in Sligo-terrace. Witness had no written instructions; he was given instructions verbally by Mr. Verster, the managing director of the Federal. It was usual to engage an agent to obtain leases in this way. Mr. Verster offered him a sum of £30 if he would obtain a lease of the shop.

Further cross-examined: Mr. Commins did not tell him before the lease was agreed upon that his agent was Mr. O'Reilly. He did not say that he would have to see Mr. O'Reilly before he let the shop. The conditions of the proposed lease were read over by Mr. Andrews to the defendant, who signified his assent.

By the Court: The shop in Sligo-terrace would have been valuable to the Federal, because it was near the Docks.

Re-examined: Commins actually agreed to give a lease in the terms embodied in the written lease. The lease in Napier-street was only for two months.

Frederick B. Andrews, attorney, said that on Saturday morning, the 23rd July, the plaintiff and defendant came to his office, and said they wished to have a lease drawn. Witness prepared notes; both men were present, and he supposed they both spoke.

R. J. Verster, a director of the Federal, said that the first tenant of the shop had been a customer of the company, and when he left, witness instructed the plaintiff to obtain the shop for the company, or get the other shop at once, to enable him to get a start of Violet, who was opening the corner shop. Witness had informed the plaintiff that the company would want damages from him.

Hopley, J., said that the company could not obtain damages against their agent for doing his best in their interests.

Mr. Gardiner closed his case.

Michael Commins (the defendant) said that the hitch in the negotiations in regard to one of the clauses in the lease prevented him from going forward with it. He did not like to let the shop to a butcher, when he had already let the corner shop to another butcher.

Cross-examined: He was agreeable to sign the lease on the terms as he understood them to be jotted down by the plaintiff. The shop was still untenanted, and if the Court decided that he must give a lease, he would be prepared to do so immediately.

Thomas Joseph O'Reilly, agent for the defendant, said that Verster called to see him prior to any negotiations with Violet, and asked witness if he could let the shop to him, or give him the refusal. On the Saturday morning in question he saw the defendant, who informed him that he had let the shop to the Federal. Witness told him he should not have let the shop for a similar class of business to that for which Violet had taken the corner shop. On the following Monday Mr. Commins told the plaintiff that he would not let the shop to him unless the plaintiff would be responsible for both shops in case he transferred the tenancy. Witness claimed the right of drawing up the lease, as the agent of Mr. Commins. Mr. Fleming agreed to this.

Cross-examined: He had no knowledge that Mr. Andrews had already been instructed to draw up the lease.

Mr. Gardiner intimated that the charge for the preparation of the lease was erroneously stated to be £3 11s. 6d. The correct charge was £1 11s. 6d.

Mr. Verster (re-called by the Court) said that the Federal were still prepared to take the premises, and to pay the plaintiff £30 if they got possession, though he thought there should be some reduction, inasmuch as the company had suffered damage through not getting the premises at the time.

Counsel having been heard in argument on the facts,

Hopley, J., said it seemed perfectly clear that the contract was entered into by the parties, and that there was no misunderstanding in the matter. The parties seemed to have agreed on the Friday, when they first met; it did not need any writing or anything else to make it a completed contract. He thought there was no doubt, when one had heard the evidence of the plaintiff, that Mr. Commins perfectly well understood what he was doing, and that he agreed with the plaintiff, before he consulted Mr. O'Reilly, to let these premises. They had the written notes, taken at the time, of what that agreement was, and the agreement had been correctly set forth in the document attached to the declaration which the plaintiff now claimed that the defendant should sign and give effect to. But it had been argued for the defendant that Fleming was merely an agent, and could not now be suing as the principal. But for purposes of their own and to save appearances the parties agreed that the plaintiff should appear as the principal, and the defendant not wanting it to appear on the lease that he was letting his shop to a rival butcher, treated the plaintiff as the principal. He must hold that the plaintiff must now be treated as the principal. Furthermore, if this point was to be taken, it should have been raised on a special plea in which case

there might have been an answer that defendant was estopped by his own conduct from setting up such a plea—but though there had been no pleadings on the point it must be held that the defendant was now estopped from setting up such a defence. In regard to the question of damages, he did not see how the plaintiff had sustained any special damages. The Federal Company were still prepared to pay him £30 if the lease were secured. The order of the Court would be judgment for the plaintiff, that the defendant execute the lease annexed to the declaration and forthwith give possession of the premises to the plaintiff, and that the defendant bear the costs of suit. There would be no order as to damages. Judgment would be for the plaintiff in terms of prayers (a) and (b), and costs of suit.

GENERAL MOTIONS.

KUILS V. UNION-CASTLE STEAMSHIP COMPANY.

Mr. Upington (for the defendants) applied for leave to have the evidence of certain officers and others of the steamship German taken on commission. The action (he said) was for damages, through the plaintiff having been bitten on the nose by a boardhound which was being brought out here in the German.

Mr. Gardiner (for the plaintiff) assented to the application, subject to the Commission being extended to the plaintiff's witnesses. The steamer (he said) was not due here until the 28th inst., and the case was not likely to be reached until next term. The plaintiff was suing *in forma pauperis*.

An order was granted empowering Mr. Giddy to sit as commissioner to take the evidence of such witnesses as the parties may desire to be examined, failing Mr. Giddy, Mr. Lewis to act as commissioner.

VAN DRIEL V. VENTER AND NIEBERG.

Mr. D. Buchanan moved for leave to sue *in forma pauperis*. He reported that he had gone into the papers, and he certified in favour of the application.

The Court granted a rule *nisi*, calling on the respondents to show cause, on the 14th inst., why the petitioner should not be granted leave, as prayed.

Ex parte THE EXECUTORS OF THE ESTATE OOSTHUIZEN.

Mr. De Waal moved for confirmation of the sale of certain property in the division of Colesberg, subject to the pur-

chase of certain property in the Cape Peninsula.

Order granted.

Ex parte TRUSTEES PERSEVERANCE BUILDING SOCIETY OF PORT ELIZABETH V. DAVIS.

Mr. Rainsford moved for leave to attach certain property to found jurisdiction, and for leave to sue defendant by edictal citation, for provisional sentence on certain mortgage bonds, due by reason of the non-payment of interest. Plaintiffs were unable to trace the whereabouts of the defendant, who left Port Elizabeth some twenty-one years ago.

Order granted as prayed, rule to be returnable on the 1st February, personal service, failing which, rule to be published twice in each Port Elizabeth paper, and twice in the "Gazette," rule to operate in the meantime as an interdict.

Order granted as prayed.

Ex parte WHITE.

Mr. M. Bisset moved for the confirmation of a certain sale by public auction of property at Heidelberg, in the estate of his late father, Albert White, the petitioner, an executor in the estate, being the purchaser.

Order granted as prayed.

DIMDORE V. DIMDORE.

Mr. Alexander (for the plaintiff, Mrs. Dimdore) moved for the appointment of a *curator bonis*, pending certain action for judicial separation.

Mr. Upington (for the defendant) said that the transaction was an extraordinary one. The defendant was a clothier, carrying on business at Claremont. The parties were married in community, and yet they entered into a deed of partnership in this business. He consented to the present application.

Order granted, appointing Mr. Alfred Newton Foot as *curator bonis* in the joint estate, with power to carry on the shop business, pending the result of the action, costs to be costs in the cause.

Counsel stated that there was also a motion in the list respecting the payment of certain money to enable plaintiff to proceed with her action, but this was opposed, and would have to be taken on some other day.

SIMCOCKS V. WYNBERG { 194.
LICENSING COURT. { Nov. 2nd.
" 3rd.

Licensing Court—Right of unsuccessful applicant to be heard.

The applicant having been refused a club licence without

having had an opportunity of replying to objections: the Court (on review) ordered the Licensing Board to sit again and hear the application on its merits.

Mr. Alexander mentioned this matter, which was an application for the review of certain proceedings of the Wynberg Licensing Court, in refusing to renew the licence of a certain club. The Licensing Court had refused to hear evidence in support of the application for renewal, although the applicant was quite prepared to tender such evidence. Counsel submitted that there were authorities for the procedure now adopted in bringing forward this matter by way of notice of motion. He cited the case of the Cafe Royal, and the petition of Mr. Gother Mann, trustee in the insolvent estate Moss, for an order directing the Cape Town Licensing Court to sit again, and hear an application for renewal of licence.

Hopley, J., said it was alleged that there had been a gross irregularity, and it seemed to him that the procedure adopted by the present petitioner was not correct. It seemed to him to be a matter to which the 190th rule of Court applied.

Counsel having been heard further, Hopley, J., consented to hear the petition.

Mr. Alexander read an affidavit by the secretary of the Union Club, Observatory, who said that the petitioner was the curator, and was authorised to institute the appeal. The inspector of police condemned the club as simply a drinking place, run under the auspices of a wholesale firm of liquor dealers. The Licensing Court declined to hear evidence, and refused to renew the licence. The present application was for a revision of the resolution of the Licensing Court, and a direction that they should sit again, and hear the evidence of the petitioner.

Cur. Adv. Fult.

Postea (November 3).

Hopley, J., said this was a matter in which there was an application for the renewal of a club licence at Observatory. It came before the Licensing Court for the division of Wynberg, and he had before him the records of what happened. All that happened was that the agent for the applicant, who was manager of the club, applied for the renewal. Mr. Advocate Russell opposed, and tendered evidence. The Court decided to hear no evidence, and the application was refused. Apparently the only thing the Licensing Court went on was a document conveying the opinion of one Inspector Wynne, who said that in his

opinion it was not a club at all, but a drinking place run under the auspices of a wholesale firm of liquor dealers. It was stated in the petition that the applicant was perfectly ready with his evidence to refute this statement, but apparently was not allowed to lead any evidence. Act 28 of 1883, and the 53rd section, stated that if there was opposition to the renewal of the licence the person objecting should give notice at least two clear days before it came before the Licensing Court. It was clearly intended that the person should not be deprived of a licence without having an opportunity of refuting the statements or objections. In the present case the Licensing Court did not appear to have done this. They disposed of the whole matter without hearing evidence, which was a most improper thing to do. In the present application all the members of the Licensing Board had had notice of it, but none of them had come forward to oppose it. The Act empowered the Court to order them to sit again, and hear the case on its merits. That was the course followed in the case of Moss's Insolvent Estate, and that was the order he felt disposed to make in this case.

Mr. Alexander asked the Court to fix some date for the Court to sit.

His Lordship fixed the date on or before the end of the year.

for him, by contract, on part of an estate acquired by him at K. There was another house on this estate which, at the time of his death, had for two years been and still was in the occupation of a lessee.

Held, in an action by the testator's wife against his executors for a declaration of rights, that the plaintiff was entitled to the free occupation of the estate at K., including the newly-built residence, but not the house occupied by the lessee.

Held further, that the plaintiff was not entitled to claim exemption from the payment of water rates or electric light charges or municipal tenants' rates, but that the estate was liable to pay the Divisional Council rates and the Municipal owners' rates and the necessary expenses to keep the residence in a habitable state of repair and was not entitled to demand from her payment of any rent.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

CROSBIE V. CROSBIE'S EXECUTOR AND ANOTHER. 1904. (Nov. 3rd.)

Will—Construction—Occupation—Legacy—Habitation—Rates and taxes—Rent.

A testator by his will directed as follows: My wife shall, so long as she shall decide to live in and occupy my house and grounds in my occupation at the time of my death, have the right of free occupation of the same." At the time of his death he was living in a hired house at R., but a residence was in course of construction

This was an action arising out of the will of the late Mr. Robert Crosbie, M.L.A., and concerned the rights of the widow in reference to property at Kenilworth left by the testator. The plaintiff was Elizabeth Charlotte Crosbie, the widow, and the defendants were George William Steytler, in his capacity as secretary of the Colonial Orphan Chamber and Trust Company, as executor testamentary in the estate of the late Robert Crosbie, and Advocate Frederick George Gardiner, in his capacity as curator ad litem to minor Robert Boyd Crosbie, and other minor heirs and legatees under the will of the said Robert Crosbie.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Kenilworth, and is the surviving spouse of the late Robert Crosbie, to whom she was married without community of goods.

2. The first defendant, in his capacity as secretary of the Colonial Orphan Chamber and Trust Company, is the executor testamentary of the estate of the late Robert Crosbie.

3. The second defendant is the curator ad litem appointed by this honourable Court on the 18th May, 1904, to represent the minor Robert Crosbie, who is the sole issue of the aforesaid marriage, and certain other minor children having contingent in-

terests under the will or codicil herein-after referred to.

4. On the 4th December, 1902, the late Robert Crosbie, at Graham's Town, duly executed his last will, and on the 5th May, 1903, at Cape Town, he duly executed a codicil thereto, and he died at Graham's Town on the 16th October, 1903.

5. Copies of the said will and codicil are annexed hereunto, and marked "A" and "B," to which the plaintiff begs to refer.

6. In terms of the said will the testator *inter alia* directed that the plaintiff should, so long as she should decide to live in and occupy his house and grounds in his occupation at the time of his death, have the right of free occupation of the same, and the use of the enjoyment of the furniture, plate, house linen, pictures, vehicles, horses, and generally all movable effects in and upon the said premises at the time of his death, and that should she at any time decide to leave the said property and live elsewhere, then his executor should take possession thereof and of the said movable effects, and the plaintiff should have no further rights or claims therein or thereto.

7. Before the said 4th December, 1902, the testator acquired certain landed property by certain deeds of transfer, dated 25th April, 1901; 7th May, 1901; 6th February, 1902; 7th February, 1902; 11th March, 1902; and 24th June, 1902, which together formed one continuous estate known as Braehead, situated at Kenilworth, in the Cape Division, and the testator intended to constitute his residence there, and entered into contract for the construction thereon of a house and outbuildings, which were to be completed on or before the 30th July, 1903, and the said house and outbuildings were in course of construction and far advanced towards completion at the date of his death, though not finally completed, and the said landed property with the said house and outbuildings were in the testator's occupation at the time of his death, and constitute, according to the true intent and meaning of his said will, the "house and grounds" mentioned in paragraph 6.

8. At the date of his will and thereafter till his death, the late Robert Crosbie had his home, and together with his said son lived with the plaintiff in a house known as Oak Villa, at Rondebosch, which was not his property, but the plaintiff was the lessee and occupier, and paid rent for the said Oak Villa.

9. At the dates of his will and of his death the testator owned the farm Yarrow mentioned in the will, certain other farms in Bechuanaland, and owned no other landed property save and except Braehead aforesaid.

10. At the said dates the testator had certain furniture and plate, according to

an inventory whereof a copy is attached, which was stored by him in a certain coach-house then and still existing on the property known as Braehead, which furniture and plate were procured by him for use in his house there when completed, and is, according to the true intent and meaning of his said will, included in the special directions set forth in paragraph 6 hereof.

11. At the said dates the testator contemplated installing electric light in his house at Braehead when completed.

12. The plaintiff is entitled, according to the true intent and meaning of the testator's will, to claim that she shall be free from all rent, rates (including water rates), or taxes due at any time in respect of the said house and grounds, and from all expenses of repair inside and outside of the said house, and from all expenses of insurance of the house and buildings thereon, and of installing electric light, and from all expenses of upkeep of the said house, buildings, and grounds, and that the said rates, taxes, and expenses shall be borne by the testator's estate, and paid by the first defendant from time to time.

Wherefore the plaintiff prays:

(a) Generally for a declaration of her rights under the said will; and more particularly

(b) For a declaration that the landed property transferred as aforesaid to the late Robert Crosbie constitutes the house and grounds mentioned by him in his will as set forth in paragraph 6 hereof.

(c) For a declaration that, so long as she shall decide to live in and occupy the said house and grounds, the rates, taxes, and expenses referred to in paragraph 12 hereof shall be borne by the testator's estate.

(d) For a declaration that the furniture and plate referred to in paragraph 10 are included in the special directions contained in the will and set forth in paragraph 6 hereof; or that she may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

The plea of the first-named defendant in his capacity as aforesaid, was:

1. The allegations in paragraphs 1, 2, 3, 4, 5, and 8 are admitted.

2. As to paragraph 6 defendant craves leave to refer to the terms of the will attached to the declaration, for the true meaning or effect of such will.

3. As to paragraph 7: (a) Defendant admits that the said testator acquired certain lots or parcels of land situate at Kenilworth in the Cape Division by the several deeds of transfer enumerated in the said paragraph and that he intended to constitute his residence on a parcel, hereinafter more particularly specified, of the said land, and entered into a contract for the construction thereon of a house and outbuildings to

be completed on or before 30th July, 1903, and that the said house and out-buildings were in construction and far advanced towards completion at the date of his death, though not finally completed. Save as above, he denies the allegations in paragraph 7. (b) Defendant, with further reference to paragraph 7, craves leave to refer to a plan of the said lots of land, copy of which is hereto annexed marked "A," and says that the house and outbuildings constructed or to be constructed as aforesaid were to have been and were built on the spot marked "Braehead Residence" and not on that marked "Hillbrow Residence," situate on lot "B," on the said plan, on which latter spot certain buildings had already even before the testator's death been erected and still stand, which buildings with the ground belonging and appurtenant thereto were in existence at the time of the purchase by the testator of the lots or parcels of land aforesaid, and were then and at the date of the said will and prior to the testator's death, and still are, occupied by one Dr. Robertson.

4. In case this Honourable Court should find that the said Braehead residence, with certain ground belonging and appurtenant thereto and used therewith, constitute the house and ground mentioned in paragraph 6 of the declaration, then he respectfully contends that such house and ground does not include the said Hillbrow residence, or lots B and C and 6 and 7 as marked on the said plan, the said ground belonging and being appurtenant to the aforesaid Hillbrow residence and being separated and cut off from the remainder of the aforesaid lots or parcels of land.

5. As to paragraph 9, defendant admits that at the dates of the testator's will and of his death he owned the said farm Yarrow and certain farms in Pechuanaland, and he has no knowledge of any further property owned by the testator, other than the parcels of land described in paragraph 3 (a) hereof.

6. Defendant admits, as to paragraph 10, that at the aforesaid dates the testator had certain furniture and plate, according to the inventory, copy of which is attached to the declaration, but he says that the said furniture and plate was stored in the coach-house attached appurtenant, and belonged to the said Hillbrow residence, occupied as aforesaid, and not to the house now termed "Braehead Residence"; he also admits that the said furniture and plate had been procured by the testator for use in the said Braehead residence when completed. Save as above, paragraph 10 is denied.

7. Defendant has no knowledge of the allegations in paragraph 11, and does not admit them.

8. Should this Honourable Court find that plaintiff is entitled to live in and occupy the said

Braehead residence, and any portion of the aforesaid lots of land, as to which he craves leave to refer to paragraphs 3 and 4 hereof, then defendant respectfully contends that, according to the true meaning and intent of the said will, she is only entitled to claim exemption from the payment of any rent for such use and occupation. Save as above, he denies that plaintiff is in law entitled to claim the several exemptions or to make the several claims specified in paragraph 12, or any of them, or that the testator's estate is liable to pay or provide for the same or any one of them.

Wherefore defendant prays that the plaintiff's claim be throughout dismissed, with costs, and for a claim in reconvention the defendant (now plaintiff) says:

9. He craves leave to refer to the matters and things set out in his plea, and specially to paragraphs 7 and 8 thereof.

10. Should this Honourable Court find that the plaintiff (now defendant) is entitled to live in and occupy any portion of the lots of land referred to in the declaration and the plea (as to which he refers respectfully to paragraph 4 of his plea), he says that, by reason of the premises, he is entitled to a declaration that, save as to the aforementioned exemption from payment of rent in favour of the plaintiff (now defendant), as set out in paragraph 8 of the plea, all rates, taxes, and expenses referred to in paragraph 12 of the declaration and paragraphs 7 and 8 of the plea, in so far as they attach or relate to are connected with or arise out of the aforesaid portion, with the buildings thereon, shall be borne by the plaintiff (now defendant) so long as she shall decide to live in or occupy, or does live in or occupy, the said land and buildings.

Wherefore the first defendant (now plaintiff) claims:

(a) A declaration that all rates, taxes, and expenses referred to in paragraph 10 hereof shall be borne by the plaintiff (now defendant), so long as she shall decide to live in or occupy, or does live in or occupy, the said land and buildings.

(b) Alternative relief.

(c) Costs of suit.

The second defendant filed a similar plea.

The plaintiff in her replication said that it was the intention of the testator to resume possession of Hillbrow, with the coachhouse and grounds as part of Braehead when completed, and it was not his intention to allow any tenancy of Hillbrow to continue after such completion.

Mr. Schreiner (with him Mr. Joubert) for the plaintiff; Mr. McGregor for the first defendant, Mr. Gardiner for the second defendant.

James Jarvis Bisset, surveyor, gave evidence as to the preparation on behalf of the estate of the plan of the Kenilworth property, annexed to the plan. Witnesses described the limits of the estate.

Mr. Schreiner was about to put a question to witness as to whether Dr. Crosbie had told him what his object was in buying other properties abutting on Braehead, when

Mr. McGregor interposed, and objected that such evidence was inadmissible.

Mr. Schreiner said that certain evidence was taken on commission, and a similar objection was then raised by the other side. Counsel submitted that it was of importance that this evidence should be admitted, so that the Court could determine what "my house and grounds" really embraced. Counsel went on to point out that the defendant contended that the words "in occupation at the time of my death" were governing words, and they said that in point of fact Mr. Crosbie, the house not having been completed, was not in occupation. The plaintiff's contention was that, although the contractor was engaged upon the building, Mr. Crosbie was in legal occupation. The contention of the other side was that "occupation" meant residence. Counsel proceeded to quote Bird on the admissibility of evidence, and also quoted the decision of this Court in *re Herald ex parte Rademeyer* (1 Juta, 158).

[Maasdorp, J., asked counsel whether the argument he was now addressing to the Court also referred to the evidence of Mr. Hutton, taken on commission?]

Mr. Schreiner said that his contention was that the argument applied to both witnesses. Counsel urged that evidence was surely admissible to show what were the testator's grounds, seeing that he used the terms "my house and grounds." He called their lordships' attention to the admission of extrinsic evidence in the case of *Breda v. Town Council* (9 Juta, 415). He submitted that here they had an ambiguity, and the Court should admit evidence to show the real limits of the property Braehead. Counsel also quoted Maasdorp's Institutes of Cape Law, book 1, cap. 30, p. 195, on the admissibility of extrinsic evidence, and from *Voet* (35, 1, 4, and 35, 1, 6). He submitted that he was entitled to put to the witness the question: "What was Mr. Crosbie's object, expressed to you, in acquiring that property?" Counsel also referred to the judgment of Lord Cairns in *Charter v. Charter* (Law Reports 7, House of Lords, p. 364).

[De Villiers, C.J., said that the words of the will were: "I do direct that my wife, Elizabeth Charlotte Crosbie, shall, so long as she shall decide to live in and occupy my house and grounds in my occupation at the time of my death, have the free occupation of the same." At

present it had not been shown that there was such a latent ambiguity as to justify the Court in allowing evidence as to statements made by the deceased, more especially statements made in answer to a question as to testator's object in purchasing the property. It was very possible at a later stage that the Court might find it necessary to take some evidence of that kind; but at present he was not satisfied that such evidence was admissible.]

Mr. Schreiner: Then I have no further question to put to the witness.

[De Villiers, C.J., said it seemed to him that the main dispute, after all, was in regard to Braehead. If the plaintiff got Braehead she would have got all that she could really occupy. The plaintiff, of course, would not want to occupy two houses.]

Mr. Schreiner said that it might be the desire of the plaintiff that Hillbrow should be demolished unless it were considered part of Braehead grounds. He admitted that the plaintiff's own interests did not make her anxious to get Hillbrow, but it was important to her that it should not be possible that it might become a trouble or a nuisance to her residing at Braehead. Hillbrow was a cottage that might become an annexe to Braehead, if she so required it.

[De Villiers, C.J.: Does she wish to occupy it?]

Mr. Schreiner: No; she wishes to reside at Braehead. She is at present in England.

Mr. McGregor informed their lordships that he did not intend to labour the point as to whether the whole of the property was excluded from the plaintiff's occupation. What the executor desired was a judgment of the Court, so that he might know what his duty was.

Witness, in answer to the Court, said that Hillbrow was a small place, and was situated about 20 yards from Braehead. There was at present a low iron fence between the two. He conceived that it might be a very great inconvenience to the occupier of Braehead to have a stranger residing at Hillbrow. He would not say that Braehead would require Hillbrow for the use of servants, but it might be a convenience to have it. He did not think it would have been convenient to the testator, if he had had Hillbrow as an appurtenance to Braehead to have had the stables and coachhouse at Braehead.

Dr. George Watson Robertson stated that he occupied Hillbrow two and a half years ago on a verbal agreement with Mr. Crosbie on a monthly rental. On the 9th July, 1904, he had a letter from the executor of the estate giving him what was practically a yearly lease. When the furniture was stored in the coachhouse he was already in occupation of the house. Witness took a great interest in the building, as he was on very

friendly terms with Mr. Crosbie. Witness did not pay tenant rate.

Cross-examined by Mr. McGregor: The storing of the furniture was a special arrangement.

Mr. Schreiner closed his case.

Mr. McGregor called,

George Wm. Steytler, executor in the estate, who stated that the Divisional Council rates on the whole property, taking 1904 as a basis, would be £39 0s. 3d. If Hillbrow property was excluded the rates would be £24 odd. Wynberg Municipal rates for the whole property would be £118 11s. 6d., and excluding Hillbrow, £93 11s. 6d. The tenant's rate on Hillbrow would amount to £7 6s. 8d., and the cost of repairs on the whole property after some years would be £50 per annum. The upkeep of Braehead, without ornamental gardening, would amount to £150 per annum.

Mr. McGregor closed his case.

Mr. Schreiner submitted that what was in Mr. Crosbie's mind when he made his will in 1902 was not Braehead only when he said, "my house and grounds." The mere fact that the house was occupied did not justify his learned friend taking the view that Mr. Crosbie really did not intend to take out Hillbrow, or any portion of the grounds, from his bequest. It was a most extraordinary circumstance that the furniture was stored in the coachhouse if Mr. Crosbie intended to separate Hillbrow from the rest of the property. Mrs. Crosbie might be said to be under an obligation to the estate to maintain and repair it, but counsel submitted the word "free" in the will released her from that, and that while she was not obliged to make repairs she was at liberty to make improvements.

De Villiers, C.J., intimated that counsel for the defendants should confine himself to these questions: First of all, whether the whole of the property should not be included, and as to rent, Divisional Council rate, Municipal landlord rate, and such expenses as would be incurred by keeping the house in a habitable state of repair. As to tenants' rates, water rates, etc., counsel need say nothing at all, because, as at present advised, the Court were of opinion that the tenants' rates should be paid by Mrs. Crosbie. That also referred to the electric light. The Court were distinctly of opinion that she should bear that, if she wanted the electric light.

Mr. McGregor, at the outset of his argument, quoted a body of authorities on the question as to whether the occupation of the whole of the property passed to the plaintiff. The point arose whether there was occupation by Mr. Crosbie at the time of his death. There was no specific description, and if the Court were pleased to allow anything to the plaintiff at all it would only be, he submitted, because the

Court were satisfied that it was proved as a fact that Mr. Crosbie was in occupation at the time of his death. Then, if that were so, they had to see how far the occupation of Hillbrow by Dr. Robertson affected the question as to whether Hillbrow was included. He submitted that Hillbrow was excluded, because of the very fact of there being a man in occupation at the time. That was important, because occupation alone was what the plaintiff was founding upon.

[Maasdorp, J.: There was occupation of the house.]

Yes and also of the grounds.

[Maasdorp, J.: The witness said that he had no rights in the grounds.]

I did not understand that. Proceeding, counsel said that there was a coachhouse at Brownhead, and the other coachhouse at Hillbrow was not utilised. Nothing could have been simpler than to have stipulated in the contract the breaking down of the cottage if the testator had wished it. There may not have been a definite apportionment of ground, but there was nothing to the contrary. There was no shutting-off of Dr. Robertson from the ground. Again, as far as the will was concerned there was no such place as Braehead. What they had were certain lots of land, not known by any generic name or by any name, as far as they were aware, not known to the locality or to the books of the local bodies. He submitted that occupation must be rigorously construed by the Court. If the Court found for defendants on the section B indicated on the plan on which Hillbrow stood, then they must find for the land marked C 6 and 7. Counsel submitted that the occupation of the coachhouse by Dr. Robertson supported his contention in regard to the occupation.

[Maasdorp, J.: Who was in occupation of the coachhouse at Hillbrow?]

Mr. McGregor: Dr. Robertson. There was an agreement with Dr. Robertson for the storage of furniture. Counsel submitted that the fact of Dr. Robertson being in occupation of the coachhouse supported his contention. He reminded the Court that it was a maxim of law that a man was not presumed to donate. He called attention to the express character of the terms of the will, and urged that it was a fair argument and a proper argument that those facts set out definitely in the will exhausted the extent of the testator's liberality, and that was enough in plain English to satisfy the meaning of those words.

[De Villiers, C.J.: Very well, now; rent surely you cannot claim?]

No.

[De Villiers, C.J.: Then as to the Divisional Council rates?]

Mr. McGregor urged that the will was explicit in its terms, and that if it had been intended that the plaintiff's rates for this property should have been borne by the estate then the will would have contained an express direction.

De Villiers, C.J., said he gathered from the defendants' counsel that he contended that this was an *habitatio* rather than usufruct.

Mr. McGregor said that was so. In regard to the Municipal rates, he submitted that the owner's rate would fall, roughly speaking, under the same category as the Divisional Council's rates. As to the repair of the property, he admitted that this was a point of difficulty. The important point, he took it, for the executor was to look after the interests of the estate and the minor. He took it that the executor had two principal duties—firstly, that the property should be kept in its present condition, and secondly, that he should not be called upon, to the injury of the estate, unduly to pay money for the upkeep of the property.

De Villiers, C.J., said that the Court had used the term "habitable state of repair. Should not the property be kept in a habitable condition?"

Mr. McGregor: The executor quite accepts that.

Mr. Gardiner said that on behalf of the minors he had no further argument to advance. He submitted, however, that under clause 19 of the building contract it was laid down that until the building contract had been completed and the works handed over—until Mr. Crosbie took over the land from the builder—the builder was in occupation of the land.

De Villiers, C.J., pointed out to Mr. Schreiner that a new point had been raised by Mr. McGregor in regard to whether Hillbrow was in the occupation of Dr. Robertson, and if so, whether Hillbrow was not excluded.

Mr. Schreiner submitted that the words "in my occupation at the time of my death" covered occupation of Hillbrow. Dr. Robertson was only in temporary occupation, under a light notice of three months; the testator could not have meant to give real occupation to Dr. Robertson and detach Hillbrow from Braehed. The occupation was really in Mr. Crosbie; he had his furniture stored in the coachhouse at Hillbrow. It was a condition of the tenancy that the use of the coachhouse was to be in Mr. Crosbie, but was part of the arrangement between Mr. Crosbie and Dr. Robertson when the latter came in. He had understood Dr. Robertson that the coachhouse was open to Mr. Crosbie's use all along.

De Villiers, C.J., said that the shorthand writer's notes showed that Dr.

Robertson had stated that the furniture was stored in the Hillbrow coachhouse by special arrangement, but no indication was given as to when that arrangement was entered into.

Dr. Robertson (recalled) said that the furniture was placed in the coachhouse when he had been in the house some nine or ten months. A prior arrangement was entered into when he first saw Mr. Crosbie about taking the house. Mr. Crosbie said to witness that he supposed he would have no objection to his (testator) using the coachhouse. Mr. Crosbie had seemed to keep the coachhouse out of the hiring, and had kept the key. Until the furniture was removed from the coachhouse, witness had no use of the coachhouse.

Mr. Schreiner (resuming his argument) said that the whole of the circumstances pointed to the improbability of Mr. Crosbie having contemplated exclusion of the cottage. On the question of rating, counsel quoted Maasdorp's *Institutes of Cape Law* (Book 2, cap. 21, pp. 165 and 166), and also *Vinnius and Voet*. As to rating, he called their lordships' attention to the Municipal Act and the Divisional Council Act of 1889.

De Villiers, C.J.: The main question to be decided in this case is the true meaning of the following words in the will of the testator: "I do direct that my wife, Elizabeth Charlotte Crosbie, shall, so long as she shall decide to live in and occupy my house and grounds in my occupation at the time of my death, have the right of free occupation of the same, and the use and enjoyment of the furniture, plate, house linen, pictures, vehicles, horses, and generally all movable effects in and upon the said premises at the time of my death." At the time of the testator's death, he was living in a hired house, at Rondebosch; but he had entered into a contract for the building of a substantial residence on a property which he had acquired at Kenilworth, and it is now contended, on behalf of the plaintiff, that under this bequest she is entitled to live in and occupy that house and the ground adjoining it. In my opinion, this must be held to be the true intention of the testator, because, unless the house and grounds at Kenilworth are considered to be so intended, the bequest would fall to the ground altogether. The testator at the time was not living in the house at Kenilworth; he died after the date upon which, under the contract, the house had to be completed; but, in point of fact, the house was not completed before the testator's death. It was only completed after his death, and I am clearly of opinion that it was his intention that his wife should have the right to live in and occupy that house,

which was in process of being built, and the grounds adjoining. That house and the grounds immediately adjoining may fairly be held to have been in the occupation of the testator at the time of his death. He was not there personally, but he had made a contract for the building of this house, and, through the contractor and his men, the testator was in legal occupation of the house and grounds. But the plaintiff's counsel goes further, and claims that she is also entitled to live in and occupy the house and grounds, which, at the time of the testator's death, were in the occupation of Dr. Robertson. In my opinion, that would be a stretching of the language used by the testator beyond what would be justified by the words actually used. The testator speaks of "my house," and not "my houses"; it is a single house that he refers to. If the plaintiff's contention be correct, the testator would have used the words "my houses and grounds in my occupation." But, even if he had used the words "my houses and my grounds," then there would be the further difficulty that the house occupied by Dr. Robertson was not in the occupation of the testator. In my opinion, that cannot be included. It is said that it would be a great inconvenience to Mrs. Crobie if somebody else should be occupying this house. Well, I do not perceive the great inconvenience, nor do I see that there is anything very extraordinary in it, that the testator should have reserved a rent-producing property from his Kenilworth estate. It is not quite clear what proportion of the property was actually in the occupation of Dr. Robertson. He seems to have considered that he was only in occupation of the house. If that be so, then it is only that portion that should be excluded, besides, of course, access to the house. The doctor has access to the house, and that access he must continue to have, but it seems quite a reasonable construction that the testator intended that a rent-producing property, although next the property of which he gives occupation to his wife, should be excluded from the property which she was to live in and occupy. He could hardly have wished her to occupy two houses at the same time, and the house occupied by Dr. Robertson does not seem to be so small and insignificant as to be capable of being regarded as a mere appurtenance for labourers and servants of the plaintiff to live in. I consider, therefore, that the declaration upon this point should be: "That the testator is entitled to the occupation of the land belonging to the testator and situate at Kenilworth, with the exception of the portion in the occupation of Dr. Robertson at the date of the testator's death." Then, as to the furniture and effects, there seems to be no real dispute. The further declaration

would be: "That the plaintiff is entitled to the use and enjoyment of the furniture and plate mentioned in the 10th paragraph of the declaration." The next point upon which there is a dispute is as to what proportion of the rates and taxes and other costs of keeping up the premises should be borne by the plaintiff, and what proportion should be borne by the executor. In my opinion, for the reasons which I have stated during the argument, the plaintiff should bear those expenses which, as occupier, she is liable to bear. It is true that she has "free occupation" under the will, that "free occupation" is as between her and the executor, that she is not to be called upon by the executor to bear any part of the costs in keeping up this property—she is not to be called upon to do that, but any charges to which she, as occupier, is legally liable, quite independently of her relations to the executor, she is bound to continue to pay, for instance, the tenant's rate, the Municipal tenant's rate. The water rate she must pay, but, on the other hand, the Divisional Council's rates form a charge which the owner must pay, and the Municipal owner's rates also form a charge which the owners must pay. These, I am clearly of opinion that the defendants should be ordered to pay. Then, as to the costs of repair, what is bequeathed to the plaintiff is the right of "free occupation of the house and grounds." Well, she could not have a "free occupation" if the house is allowed to fall into such a state of repair as to make it uninhabitable, and, therefore, in my opinion, the costs of necessary repairs to maintain the house in a habitable condition should also be a charge upon the testator's estate. The Court will, therefore, order that as long as the plaintiff shall continue to live in and occupy the said house and grounds the Divisional Council rates and the Municipal owner's rates and costs of necessary repairs to maintain the house in a habitable condition, should be borne by the testator's estate. There is a claim in reconvention for a declaration as to what the plaintiff should pay, but I do not know whether the defendants press for such a declaration, because it follows from the judgment of the Court that if the defendants are not bound to pay the tenant's rate and the water rate, she must pay them herself. So that I do not think there is any necessity for any further declaration. As to the costs, I think they may fairly come out of the estate.

Mr. Schreiner said that the Court had given no direction with regard to the insurance of the property. The plaintiff wished it to be quite clear that there was no duty upon her to insure the property.

De Villiers, C.J.: If you wish an expression of opinion, I should certainly say that it is clear that there can be no obligation on the plaintiff to insure. His lordship, in reply to counsel, said that the

costs would include costs of commission to take Mr. Hutton's evidence.

Maasdorp, J., concurren.

[Plaintiff's Attorneys: Herold and Cie; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ADMISSIONS.

Ex parte DAVIDSON. { 1904.
 { Nov. 3rd.

Attorney—Scots Law—Agent in
Sheriff Court—Admission.

Mr. W. P. Buchanan applied for the admission of Arthur Hallam Davidson as an attorney and notary.

Sir H. Juta opposed the application on behalf of the Incorporated Law Society.

Mr. Buchanan explained that the case was adjourned from last term to call on the respondents to say why he should not be admitted as an attorney of the Court.

The petitioner's affidavit stated that he was a law agent, or solicitor, in Scotland, and was also a solicitor in the Supreme Court of the Transvaal. He submitted certificates of enrolment. Petitioner's name was still on the roll of law agents in Scotland, and attorneys of the Transvaal. Petitioner was desirous of being admitted as a notary public in this country. Therefore he prayed for (a) an order for his admission as an attorney of the Court, and (b) to grant an order for the examination of petitioner as a conveyancer and notary public.

Mr. Buchanan said that, of course, the prayers all depended on the decision of the Court on the petitioner's application. If he was admitted then he could try and pass the examination for conveyancer and notary public, but if the application was refused then he would have to give it up. The applicant's petition states that he is a Scots law agent, and an attorney of the Supreme Court of the Transvaal. He asks to be admitted as an attorney of this Court, and to be examined with a view to admission as a notary and conveyancer.

[Hopley, J.: What right has he to admission?]

Sec 36 and 37 Vict., cap. 63, sec. 1, and compare with sec. 6 of Act 11 of 1903. The affidavits show that the applicant is an agent in the Sheriff Court in Scotland.

[Scots certificates and one certificate from the Transvaal H.C. were put in.]

Sir H. Juta (for the Law Society) read the affidavit of R. J. McCallum (secretary to the Society) pointing out that the applicant had only been admitted in Scotland to practise in the Sheriff Court, that he had lent his name to an unqualified man, and has been carrying on business as an attorney and notary.

Applicant's replying affidavit denied that he had practised as an attorney and notary or had held himself out as such.

[Hopley, J.: How is the case affected by his being an attorney of the Transvaal?]

Mr. Buchanan: See sec. 2 of Act 30 of 1892, though I am not sure that this will apply. He was admitted in the Transvaal on his Scots qualification. It is on that that he relies. Mr. McCallum denies that he has been admitted to practice in the Court of Session; but his certificate shows that he was so admitted, though, possibly, he may not have been enrolled. Sec. 19 of the Charter of Justice refers to Writers to the Signet. Sec. 6 of Act 11 of 1903 admits Scots Law Agents. See Rule of Court 293. The applicant applies as a solicitor who is qualified to practice in the Supreme Court in Scotland. Our law says nothing about enrolment.

[Hopley, J.: But in point of fact he has not been enrolled?]

No. The question came up in *ex parte Milligan* (11 S.C.R.). That was before the Act 11 of 1903 was passed, but I would ask that he be at all events admitted to practise in the Circuit Court. See *Re Milligan* (4 C.T.R., 114).

[Hopley, J.: If you confine your application to that, perhaps the Law Society may not object.]

All I can urge is that under Rule 293 enrolment is not necessary.

Sir H. Juta: The Law Society does not consider the applicant's explanation satisfactory as to the terms of the advertisement on his sign-board. Smith, the clerk, says that the exhibition of this signboard was contrary to instructions. But what instructions? Some further explanation is necessary.

Hopley, J., said that the applicant asked to be admitted an attorney of that Court. He seemed to found his application on two grounds, one of which was that he had been admitted an attorney of the High Court of the Transvaal, and the other that he was a legal practitioner of some sort or other from Scotland. As to the Transvaal qualification, it did not seem that that would help him at all in the court, because he had not passed the requisite examinations set down by Act of Parliament to enable him to practise in this colony, and there was no Act of Parliament authorising the judges

to accept people because they practised in the Transvaal. With regard to the ground that he had been a law agent in Scotland, he (his lordship) considered that he had not the qualifications sufficient for the position of attorney, but there would be some chance of his being admitted to the Circuit Court to practise as he had been in the Sheriff's Court, if he had conducted himself as he should have done; but there had been allegations made against him that he had been guilty of unprofessional conduct. The applicant denied that. The Court could not see its way to grant the present application, but it would give him power to apply again on January 12 for admission to the Circuit Court, when he would be expected to give a full explanation of the allegations made against him.

Mr. W. P. Buchanan applied for the admission of Claude Merrington as an attorney and notary.

The application was granted.

PROVISIONAL ROLL.

GREENBERG AND CO. V. { 1904.
LEWIS. { Nov. 3rd.

Mr. Lewis moved for provisional sentence on a dishonoured cheque for £6 12s. 6d. and interest, and also for provisional sentence, under Rule 329d. on a sum of £20 19s. 6d., for goods sold and delivered.

The application was granted.

STRUBEN V. PITT.

Mr. Struben moved for provisional sentence on a mortgage bond for £1,200, less £450 paid on account, together with interest at 6 per cent. from 1st January, 1904, and also that the property specially hypothecated be declared executable.

The application was granted.

ZIETSMAN V. CLIFFORD.

Mr. Le Roux moved for provisional sentence on a mortgage bond for £350, together with interest at 10 per cent. from 1st January, 1904, and also £10 insurance money, paid by plaintiff on behalf of defendant.

The application was granted.

BEBMAN V. TIMBIE.

Mr. M. de Villiers moved for provisional sentence on three sums of £75, £45, and £15 respectively, in accordance with certain conditions of sale of land sold to defendant at Kraaifontein.

The application was granted.

HILL AND CO. V. CATTO.

Mr. Sutton applied for the final adjudication of defendant's estate.

The application was granted.

CLEGHORN AND HARRIS V. CORBALLIS.

Mr. W. P. Buchanan moved for the final adjudication of defendant's estate. The provisional order was granted on October 2.

The application was granted.

LAWRENCE AND CO. V. BAILEY AND CO.

Mr. Benjamin applied for a final order of sequestration of the defendant's estate. The provisional order was granted on October 6.

The application was granted.

SWANEPOOL V. WENTZEL.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £600, with interest at 6 per cent. from October, 1903.

The application was granted.

WEINTRAUB AND CO. V. VOESE.

Mr. D. P. Buchanan moved for an order of civil imprisonment against the defendant for non-compliance with an order of the Court directing him to pay to plaintiff £18 12s. 6d. and £14 14s. 1d., taxed costs.

His Lordship inquired if plaintiffs would be satisfied with a stay of execution if the defendant paid a certain amount each month.

Mr. Buchanan said the defendant had promised to pay the debt on or about November 20.

The application was granted, the execution of which was suspended to November 25.

WALLIS V. MICHELSON.

Dr. Greer moved for the final adjudication of defendant's estate. The provisional order was granted on October 18.

The application was granted.

GOURLAY, CAVANAGH AND CO. V. MEYERS.

Mr. Bisset moved for provisional sentence on three promissory notes for £750, £250, and £300, together with 7 per cent. on the first two, and 6 per cent. on the third, from July, 1904, and judgment, under Rule 329d, for £53 for goods sold and delivered.

The application was granted.

SELLAR BROS. V. HIGGO.

Mr. Sutton moved for the final adjudication of the defendant's estate. The provisional order granted on September 26.

The application was granted.

ILLIQUID ROLL.

CAVANAGH V. SHARPE } 1904.
} Nov. 3rd.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d. for £23 3s. 11d., amount of rent due.

The application was granted.

COHEN AND KAPLEN V. SAED AND CO.

Mr. D. Buchanan moved, under Rule 329d. for judgment for a sum of £34, arrears of rent due.

The application was granted.

COLLINS AND CO. V. MEYERS.

Mr. Close moved, under Rule 329d. for judgment for a sum of £29 1s. 3d. due for goods sold and delivered.

The application was granted.

PURCELL, YALLOP AND EVERETT V. PENTZ.

Mr. Close moved, under Rule 329d. for judgment for £77 12s. 5d., amount due for goods sold and labour done.

The application was granted.

REID AND CO. V. MCGREGOR.

Mr. Gutsche moved, under Rule 329d. for judgment for the sum of £549 15s. 6d., amount due for goods supplied and work done, and £12, value of a horse sold.

The application was granted.

SANDERSON V. RUGG.

Mr. W. P. Buchanan moved for judgment under Rule 329d., on a sum of £23 6s. 6d., for work and labour done and goods supplied.

In reply to His Lordship, Mr. Buchanan said the summons was left at the White House Hotel, Somerset Strand for the defendant, where he was supposed to be living.

[Hopley, J.: But the question arises as to whether the defendant knows anything of these proceedings or not.]

Mr. Buchanan: Of course the real point is as to whether the White House Hotel was his residence or not.

Hopley, J., said he would like to know if the summons had been served or not. He would like to have the evidence of the hotel proprietor.

Mr. Buchanan: He appears to have received it without any comment.

[Hopley, J.: Hotel proprietors will accept almost anything for anybody stopping with them.]

The matter was allowed to stand over for proof of the service of the summons.

ADMISSIONS.

Mr. Benjamin applied on behalf of Jacobus Adrian Nelson for his discharge as an insolvent.

The Master's report stated that the estate was surrendered on August 11, 1902, and on the 12th August a final meeting of creditors was held, but no debts were filed, and the matter had been settled.

The application was granted.

Mr. W. P. Buchanan asked permission to be allowed to mention the application of S. Lewis to be rehabilitated. [Hopley, J.: How is it that it is not down on the cause list?]

Mr. Buchanan: I have only just been briefed. I understand that as the applicant was rather slow in bringing in his fees the attorney did not present it.

The applicant's petition was read by Mr. Buchanan, and stated that in 1894, when only 18 years of age he went into partnership with one Margolius at Beaufort West. They surrendered their estate, and deponent as a result received two years' for fraudulent insolvency, which sentence he had served. He was then very young and easily led, but since then his business abilities had greatly increased.

Hopley, J., said it was impossible to rehabilitate a person who had been guilty of fraudulent insolvency. The application would be refused.

GENERAL MOTIONS.

MCKILLOP V. MCKILLOP } 1904.
} Nov. 3rd

Mr. Van Zyl moved to have a *rule nisi* making the respondent a prodigal declared absolute.

The application was granted.

JACKSON AND SPENCE V. COLONIAL GOVERNMENT.

Mr. Lewis applied to have an award of arbitrators put in, made a rule of Court in terms of a consent paper put in.

The application was granted.

ESTATE LATE VORSTER.

Mr. Benjamin applied for the appointment of a *curator ad litem*. The application was partly a formal matter, but it had to be done.

The application was granted, Mr. S. Peter Potgieter being appointed.

RAPHAEL V. MAY.

Dr. Groer applied to have a date fixed for the trial of this case, which was an action for damages for wrongful imprisonment.

Hopley, J., directed counsel to ascertain if there was a convenient day open for the trial. It would be well to mention it later on.

Subsequently Dr. Greer moved to fix a day for trial in the above case, in which the plaintiff sued for damages for wrongful imprisonment and malicious arrest.

Case set down for trial on the 24th November.

Ex parte THE EXECUTRIX ESTATE ALBERTYN.

Mr. Upington moved to make absolute a rule *nisi*, granted a fortnight ago, calling on all persons concerned to show cause why an eighth share in favour of George Curston should not be transferred to the petitioner. Unfortunately, there was a slight error in the publication in "Ons Land."

Hopley, J., ordered an amended publication in "Ons Land," and the matter to be mentioned again on the last day of term.

BOSMAN AND ARDERNE V. WINNITZKY.

Mr. Roux moved to have the provisional order of sequestration discharged.

Granted.

Ex parte ESTATE HARNES.

Mr. Benjamin moved for confirmation of the sale of certain property in favour of the executor.

Granted.

Ex parte TRACHET.

Mr. P. Jones moved to have a certain ante-nuptial contract amended. The name of the petitioner was erroneously entered on the contract as "Adolph Louis."

Granted.

Ex parte THE EXECUTORS ESTATE VENTER.

Mr. Burton moved for the appointment of a curator to certain children

in the estate of the late Hermanus Venter, for the purpose of defending an action.

Order granted, Mr. Roux appointed as *curator ad litem*.

Ex parte COURTENAY.

Mr. Sutton moved for an order authorising the Registrar of Deeds to remove a certain road from the plan of the petitioner's property at Elsie's River Halt.

A rule *nisi* was granted calling on all parties interested to show cause why the rule should not issue calling on the Registry Surveyor of Deeds to remove the road, one publication in the "Cape Times" and "South African News," and the rule to be affixed to some public place, returnable 12th January.

Ex parte MULVIHAL AND OTHERS.

Mr. Roux moved for the appointment of a liquidator of the National Sporting Club, which was being voluntarily wound up. The petitioners were in favour of John C. Valentine as liquidator.

Granted.

Ex parte LUCKHOFF.

Mr. Sutton moved for the amendment of an order of Court, in which the petitioner obtained an order attaching property under the wrong names of the holders.

Granted.

HAAKENSEN V. HAAKENSEN.

Mr. Russell moved for an extension of the return day of the edictal citation. In November last petitioner was granted leave to sue his wife, who was at Hove, Brighton, for restitution of conjugal rights. Cable information had stated the defendant had left Hove. The prayer was for extension of return day, and for substituted service, but counsel had been able to obtain defendant's real address, and asked for authority to change by cable the date of the return day.

Order granted, return day extended until December 20, the Registrar having leave to cable an amendment of the citation.

WARNER AND CO. V. IMPEY.

Accommodation note.

This was an application for provisional sentence on a promissory note for £200, dated January 23, and payable at the Standard Bank, Stellenbosch, on the 28th April.

The affidavit of the defendant set out that the note was an accommodation one. He had never received value for the same. He had never been applied to for due payment of the same, and he had always been of the belief that payment of the note was made by Messrs. Rapley and Company.

The affidavit of Robert Warner set out that never until early this year did he know that the defendants' note was an accommodation one. Had he been so informed he most certainly would not have taken the promissory note. Further affidavits set out that the note did not appear to be an accommodation one.

Sir H. Juta, K.C., was for the plaintiff, and Mr. Burton for the defendant.

After hearing counsel in argument on the facts,

Hopley, J., said this case disclosed a rather complicated set of circumstances, in which there was a considerable amount of conflict of evidence as to the relative rights of the parties as to the fate of various moneys, and as to the agreements between the parties. All that made it very difficult for the Court to decide the case, on a motion for provisional sentence. There was besides the complication of facts a good deal to be said on the legal aspect of the case as to whether Dr. Impey could or could not claim any rights to the payments made by the people he accommodated. He admitted he was liable for £116 2s. 4d., and had made a tender of that amount. It seemed to his lordship that the proper judgment was to give provisional sentence for that amount, with costs to date of tender. Plaintiff to go into the principal case for the balance, in which case the costs incurred subsequent to the date of tender, including the costs of the present application, were to abide the result. Should the plaintiff fail to proceed with the principal case he should pay all costs after tender.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

MULVEY V. CAPE GOVERN- { 1904.
MENT RAILWAYS. { Nov. 4th.

Personal injury — Negligence —
Orders of superior officers.

This was an action brought by Ernest Albert Mulvey, signal fitter, of

Clarens-road, Wynberg, against the Cape Government Railways, for £2,000 damages, for personal injuries, alleged to have been received owing to the negligence of the defendants' servants.

The declaration set out that the defendants constructed, owned, and worked a line of railway, leading from Cape Town to Simon's Town, and passing through Wynberg. On or about the 28th March, 1904, at or near Wynberg Station, plaintiff, in the ordinary course of his employment, was engaged in drilling a crank at a stop-block at a portion of the above-mentioned line of railway, when certain agents or servants of the defendants, in the course of necessary operations, at the said station, did so carelessly shunt and move a railway truck along the line that the said truck struck the plaintiff, causing him severe injuries. In consequence of the aforesaid negligence and careless control, plaintiff had been paralysed as to the muscles of his hip and leg, and had sustained other personal injuries of a permanent nature, which rendered it impossible for him to pursue his trade and calling in the future. He had incurred hospital, medical, and other expenses, and had been unable to follow his employment. By reason thereof, he had suffered damages in the sum of £2,000, to which the defendant was liable. He prayed for judgment for £2,000, and costs of suit.

The defendants, in their plea, admitted the formal allegations, and that the injuries were sustained by the plaintiff while he was drilling a crank at a stop-block. The defendants specially denied that the truck was carelessly and negligently shunted. The plaintiff, at the time he sustained the injuries, was unnecessarily, improperly, negligently, and unlawfully at the place at which he received the said injuries, and the said injuries were due to and caused by his own negligence and carelessness. The defendants prayed that the claim may be dismissed, with costs.

Mr. Alexander was for the plaintiff; Mr. Howel Jones (with him Mr. Nightingale) was for the Government.

Ernest Albert Mulvey (the plaintiff), who had to be accommodated with a chair owing to his injuries, said that he had been in the employ of the C.G.R. as a signal fitter at a wage of three guineas a week. On the 27th March he took his orders from a foreman named Griffiths. He had been connecting rods for the new signal-box; in order to do this work two cranks had to be drilled. He received orders from Griffiths on the 26th or 28th to drill the cranks. When witness received the orders on the 26th he remarked that he supposed he would have to go to the stop-block; this was the only suitable and convenient place. Griffiths said, "Aye, that will do." Witness went to the stop-block, and finished

the crank. The proper thing to have had would have been a drilling post, but they had no such convenience at Wynberg Station at that time, and the stop-block was the most suitable place. On the following Monday, March 28, he went to the stop-block on instructions from Griffiths that he was to drill the second crank. The stop-block he went to was, in his opinion, the safest one, inasmuch as he had seen trucks standing there two or three days. Witness was accompanied by a labourer named Davis, who would have to drill the crank when it had been hammered and fixed by witness. Witness was now unable to find Davis, who, he believed, had left the service of the C.G.R. There were two trucks standing in this particular siding when witness went to the stop-block; he was working at the crank, and had his back turned to the trucks, which were about four or five yards away from the place where he was standing. While he was hammering, he was struck by a truck, and he jumped out of the line and dropped to the ground. He was afterwards removed to the Wynberg Cottage Hospital, where he remained a fortnight. He was then taken to his home. Before he was knocked down, he received no warning of any kind of the truck being in motion. Witness had suffered very much bodily; he seemed to have no power over his right leg, and he could not continue his usual work. He had had nothing from the Government since the 15th June, and had had to live upon charity. He had received 16 guineas from the Railway Sick Fund during a period of three months, and the Government had paid him two-thirds of his wages for 69 days, and had then stopped payment on the 15th June. Witness was married and was without employment. He was told by his medical attendant that he would be incapacitated during the rest of his life from doing hard work. Witness had paid for extra nourishment and medicine, and his claim was based principally on what would secure for him a reasonable remuneration for the future.

Cross-examined by Mr. Jones: He had not asked the Government for employment since the accident. It was not his place to write to the Government. He had not tried to obtain employment elsewhere. He did not think he was yet fit for employment, even of a light character. Witness did not know that there was a carpenter's bench in the steam shed. He would have been dismissed from the service if he had gone to look for a carpenter's bench. He could have done the job on a carpenter's bench. He did not ask Griffiths for a drilling post; he did not know whether he could have got a drilling post from Salt River Works. They had only two drilling posts at Salt River, among thirty

fitters. Witness had been in the service seventeen months when the accident happened. He knew it was dangerous to work at the stop-block. He was unable to work at the back of the stop-block, because it was full of rubbish. He could not remove the rubbish, because it was not his duty. If his foreman had seen him clearing away the rubbish, he would have been dismissed from the service. This would have happened, in all probability; in any case, he would have been reprimanded.

Witness had no authority to order the labourer Davis to remove the rubbish. The rubbish consisted of timber, cement, and so on. The wagon struck him at the back of his right hip.

Witness thought he should have been warned about the shunting operations. The shunter's duty, he considered, was to see that the road was clear before he commenced operations. He did not hear the engine-driver sound his whistle; at the same time, he would not say that the driver did not do so.

Arthur John Lilley, signalman at Wynberg Station, described the operations, as a result of which the plaintiff was struck and knocked down. It appeared that a train was being moved from the down suburban line into the goods siding. He did not hear the engine-driver sound his whistle. Witness also produced a copy of the rules and regulations of the Railway Department, and said that rule 526 contained a direction that engine-drivers should whistle when moving trucks from sidings.

Cross-examined: The rules were dated July, 1904.

Arthur Wakelin, a signal fitter, formerly in the employ of the C.G.R., said that on the 28th March he was employed at Salt River, and was ordered in the evening to proceed to Wynberg under the directions of Griffiths. On the 29th March, about 10 a.m., he was sent to finish the crank that Mulvey had commenced. He completed the job on the stop block. It was customary to work at stop blocks when there was no drilling post available. Witness agreed with the plaintiff that if there was no drilling post at the station, the stop block was the most suitable thing to use. The rubbish behind the stop block was removed after witness had been there a little while, so that he could go behind the block to do his work.

By the Court: When he had heard how the accident happened, he got a coloured man to remove the rubbish from behind the stop block.

Further evidence having been led, Mr. Alexander closed his case.

Henry Crocker, station master, Wynberg, said that the plaintiff had no right to be where he was when the accident happened, without the authority of wit-

ness, and that he gave no one any authority to be there.

Cross-examined: It was a rule that his authority had to be got for anything connected with safe working at the station. If any one had been working at the stop block, witness should have been acquainted with it. He did not think that rule 526 was in the old book of regulations. He thought a driver would be negligent if he did not whistle when he was commencing shunting operations. Griffiths had been recognised by the workmen as a foreman. If the road was being interfered with, witness should have been notified; in the ordinary way he would have expected Griffiths to notify him. He should expect a shunter to look down the side of the trucks to see if all was clear; he would not regard it as a shunter's duty to go round to the end of the trucks to see if anybody was working at the centre of the stop block.

Perry Anderson, signal inspector of the Railway Department, said that after the accident the plaintiff was placed on full pay until some time in July. Witness had charge of the erection of the new signal box at Wynberg Station. In witness's absence, Griffiths would be in charge of the work. He did not regard the stop block as a proper place where the work could be done; it was just a matter of convenience. The work could have been done at a carpenter's bench that was close to the steam shed. Mulvey could have obtained a drilling post by asking the blacksmith to bend a piece of iron. Such a drill post could have been prepared in ten minutes or a quarter of an hour. Witness gave an oral demonstration of the operation the plaintiff was performing when the accident occurred. Continuing, he said that Mulvey could have directed the labourer who was working with him to remove the rubbish from behind the stop block. The Government could provide the plaintiff with light work at between 7s. 6d. and 8s. per diem.

Cross-examined: The Government had not offered work to the plaintiff, nor had the plaintiff made an application.

Thomas Griffiths, signal fitter, C.G.R., denied that he instructed Mulvey to drill the crank at the stop block. The crank was needed to connect up the points to the new signal block. He told Mulvey to drill the crank, but not where he should do it, as far as he remembered. There were only two cranks drilled during the whole of the work. The stop block would be the most convenient place for the plaintiff to use for the drilling.

Cross-examined: If the plaintiff had said he was going to the stop block, witness would not have stopped him. He had seen the stop block used for this purpose at Wynberg, but not elsewhere. If there was no drilling post or bench, the stop block would have been most convenient. If witness had had the

drilling to do, in all probability he would have gone to the same place.

Re-examined: Witness exercised no authority over the fitters.

By the Court: The plaintiff could have done the work at the side of the stop block, instead of being in the centre; or, if he had removed the rubbish, he could have worked at the back of the block, where it would have been quite safe.

John Thomas Sasman, shunter, Wynberg Station, also gave evidence as to the operations which were responsible for the accident to the plaintiff. He said that he had not seen plaintiff before the operations. A short train was brought up to his two trucks that were standing in the siding. Witness was on the cow-catcher of the engine, and was proceeding to couple up to the larger truck, when the concussion drove back to the dead-end the small truck, which caught the plaintiff. The trucks were not coupled together when standing in the siding. The brakes were not on the trucks.

Cross-examined: If the brake had been on the trucks they would not have moved more than a foot or two. The driver should whistle as a rule before he moved trucks. Witness's duty was to see that the road was clear before the shunting was begun. He went and looked at the siding half an hour before the train came in from Cape Town. He did not see anybody working at the stop block at that time. When the train came in and was moving to the goods siding, witness rode on the footplate and the cow-catcher.

Frederick Dunn, engine driver, C.G.R., said he drove the engine that caused the mischief, but he did not see the plaintiff before the accident, and, as far as he could see, the siding was clear. The nearer truck had been coupled to the engine, and they were proceeding to couple up to the second truck when this second truck ran back from the impact and caught the plaintiff.

Cross-examined: Witness did not sound his whistle when he turned into the siding for shunting purposes.

Dr. Kruger, railway medical officer, of Wynberg, gave evidence as to the condition of the plaintiff. He said he thought an operation would tend to ease the plaintiff's injury; this would involve plaintiff in no expense. Witness considered that he was perfectly fit to do light work.

Mr. Jones closed his case.

Counsel having been heard in argument on the facts,

Maasdorp, J., said that it might have made a difference in the legal position of the plaintiff if he had received direct orders from his superior officer as to the place where the work was to be done, but, by disposing at once of the issue of fact upon that point, it would obviate the necessity of going into what might

have been his legal position. He thought it had been satisfactorily proved that all that had been done by Griffiths on this occasion was to instruct the plaintiff to drill a couple of holes in the crank, and that he gave the plaintiff no special orders to proceed to the stop-block, and perform the work there. That being so, the conduct of the plaintiff, in proceeding to this stop block, was not brought about by any orders from Griffiths. The question now arose whether the plaintiff was guilty of negligence in going to this stop-block, and, further, whether, after he arrived at this spot, he might have avoided danger by taking proper precautions? He himself admitted in the declaration that, at the time he was doing the work, he was upon the line of the railway. Now, there was no necessity for going upon the line of railway to do this work. It was convenient to the plaintiff to go there, but it was a place of danger, and he might have refused to go there unless proper precautions were taken for his safety. He (the learned Judge) thought it was satisfactorily proved that the work might have been done in some other way, and at another place, if the plaintiff had pointed out the difficulties which existed in not having proper means at his disposal just then. It was quite clear that, in standing upon the line in this siding, at a place which was used daily by trucks, he was guilty of putting himself in a place of danger. That in itself, unless he used proper precautions to prevent the danger he was exposing himself to, would amount to gross negligence. It would appear that, when he took up his position upon the line for the purpose of performing his work, he turned his back to the quarter from which the danger might come, and, consequently, was not on the look-out. Not only that, but when he proceeded to do the work on the stop-block he chose the most dangerous position to do it when, with a little trouble, he might have performed it in another way, and, here again, there was an element of carelessness. Without any warning from anybody else, the plaintiff ought to have known that he was in a position of danger, and, rather than risk the injuries which he afterwards suffered, he should have taken a little trouble, which would have consisted in asking his assistant to remove the lumber from behind the stop-block, and so have enabled him to work from behind the stop-block. Under these circumstances, he (the learned Judge) must come to the conclusion that the plaintiff, in going to that spot to perform the work, was guilty of negligence, and that he was guilty of negligence in the manner in which he performed the work when he arrived there. Touching on the conduct of the defendants' servants, his lordship said that he thought both the driver and shunter used ordinary

care, and that he did not think they were called upon to use unusual care or precautions. He did not find that it was an absolute necessity that the whistle should have been blown by the driver. The conclusion he had come to was that the accident was the result of gross negligence on the part of the plaintiff himself, and was not owing to any negligence on the part of the defendants' servants. There must, therefore, be judgment for the defendants, with costs.

[Plaintiff's Attorney: C. Brady; Defendants' Attorneys: Reid and Nephew.]

GENERAL MOTION.

Ex parte LAWRENCE AND { 1904.
OTHERS. { Nov. 4th.

Mr. Benjamin moved, as a matter of urgency, for the appointment of a provisional trustee in the insolvent estate of Williams Durban Mossman, trading as Bailey and Co. Counsel pointed out that as it was a going concern, it would be a great advantage to the creditors to have the shop opened, and the names of A. N. Foote and H. Lewis were suggested as fit and proper persons to act as provisional trustees, with power to carry on the business.

Order granted.

TRIAL CAUSES.

DAMONS V. DAMONS.

This was an action for restitution of conjugal rights, failing which a decree of divorce. Mr. Rainsford was for the plaintiff, and the defendant was in default.

Martha Damons stated that about June, 1897, her husband sent her to Knysna, to her parents, and when she wrote for money the defendant refused to give her any. About a year ago she saw him, for the first time since the separation.

By Hopley, J.: She never made him angry. When she asked him to take her back, he said: "You can get married again."

By Mr. Rainsford: Two months ago the defendant passed her on the street, and took no notice of her.

The defendant was ordered to restore conjugal rights to the plaintiff by the 25th December, failing which to show cause, on the 20th January, 1906, why the plaintiff should not have a decree of divorce.

GEP V. GEP AND ANOTHER.

This was an action of divorce, by reason of the defendant's adultery with the co-respondent, one Kieswetter.

The certificate of the marriage not having been forthcoming. His Lordship decided to hear the evidence.

Mr. Burton for plaintiff. Defendant in default.

Roland Wilkinson, clerk in the office of Mr. Andrews, who was acting as attorney for the defendants in the matter until he received notice of bar, stated that Mr. Andrews was still the attorney when he received notice of the case having been set down.

Arthur Gep, plaintiff, stated that he was married to the first defendant on the 7th September, 1902, at St. Luke's Church, Upton Park, London. His wife had the certificate of marriage. Immediately after his marriage he came out to South Africa, to take up business at Somerset West. The second defendant was his brother's brother-in-law. In March, 1903, he came home one evening to find a letter from his wife, in which she said he need not trouble to come to town to fetch her. In the course of the letter she said she would never be happy in her life again, and that the best thing was to end her life, and that he would find her dead body in the river, finishing the epistle with "Good-bye for ever." Witness scarched the river, but subsequently found her living with the second defendant, at Salt River. After negotiations, he induced his wife to return, and at her request he took a house for her at Salt River. Finally, at the end of June, she told him that she did not care about him, and left to take up abode with Kiewetter.

Anna Maria Scholtz gave evidence as to the relationship between the defendants. The first defendant had a baby in June last.

Hopley, J., said there would be no order at present, but the matter might be mentioned again on the production of the marriage certificate.

KONJA V. KONJA.

Mr. M Bisset was for the plaintiff and the defendant was in default. Counsel explained that the papers were not exactly in order, and ultimately his lordship decided to take the evidence *de bene esse*.

August Konja, plaintiff, stated that he married the defendant at Worcester on February 12, 1900. They lived together happily enough for a couple of years, when she ran away with a Kafir to the Maitland Location. Witness pursued her to Maitland, where he found her living as the other Kafir's wife. When witness accosted her on a second occasion she was living with another Kafir named Jameson, who said that while he was sorry for witness there could be no doubt that his wife loved him (Jameson) better than witness.

Further evidence having been called,

His Lordship decided that after proper notice was served on the defendant the matter could be mentioned again.

STRACEY V. ADAMS.

1904.
Nov. 4th.
" 8th.

Personal injury — Negligence —
Responsibility of building
contractor.

This was an action to recover £150 damages from the plaintiff by reason of his negligence in not providing a proper footway in Longmarket-street in May last. The defendant, in walking along the boarding, tripped, and fell into the road, and injured her arm, causing her to stop her business as a boarding-house keeper.

The plea denied that she suffered any special injuries, and that the footway was constructed with the approval of the Municipality.

Mr. Gardiner (with him Mr. P. Jones) was for the plaintiff; and Sir H. Juta, K.C. (with him Mr. Upington), was for the defendant.

Marie Stracey, plaintiff, stated that on the 15th May she was returning from Sea Point, and a little after nine o'clock she was walking along Longmarket-street. Turning round by Hynes, Matthews' corner, her husband walked in front on account of the narrowness of the pavement. It was dark, and the rain had commenced. Her husband called out, "Mind, Marie!" and he had no sooner said so when her toe caught in the wood, and she fell into the road. Her left arm and right thumb were hurt, and next day she saw Dr. Morris, who had her arm put in a sling. Witness herself ran a boarding-house, but up to the present she was unable to go on with her work. Some of the boarders had left, and ultimately she gave up the boarding-house. Mr. Adams came to see her, and advised her to rest her arm and to get a cook in, and he would be responsible for everything. She had spent above £2 at the chemist's for medicines and lotions. She estimated her damages to clothes at about £8. Before the accident she was making a clear profit of from £8 to £10 per month, but after the accident she lost on the house. Finally, she gave up the house.

Cross-examined by Sir Henry Juta: It was a wet night, but she denied that she slipped or fell in stepping off the pavement. The defendant admitted he was at fault several times.

John A. Stracey, husband to the plaintiff, stated that the pavement at the scene of the accident was composed of three planks. After the accident, his wife was unable to get up, and he laid a complaint at the Town House on the Wednesday. The three

planks had been taken away, and the pavement had been levelled with gravel. The defendant offered witness £20 to settle the case. On Monday he did not draw anyone's attention to the boards. On Tuesday the boards were exactly in the same position. He could not give any idea how he passed the planks.

Re-examined by Mr. Gardiner: He could not say whether the light round the corner was burning or not. He did not know the seriousness of the accident on Monday.

Dr. Morris, who attended the plaintiff on the 16th May, stated she was suffering from a sprain of the right thumb and injuries of the left arm. Some of the fibres of the muscles of the arm were ruptured. Later on, he recommended a massage treatment. He paid her something from 20 to 30 visits at 5s. a time.

Cross-examined by Sir H. Juta: It was not a large order to have a seven weeks' massage treatment.

Nellie Stracey, daughter of the plaintiff, stated that she was walking by her mother's side on the night in question. She was present when Mr. Adams said he was sorry about the accident, and that he had taken the boards away.

Cross-examined by Sir H. Juta: There would not be much room for two persons to walk on that sidepath. Witness might have been a little behind. When her mother fell, the first thing she looked to was what she fell over. She was positive there was no light above the first post.

Ernest Shepherd, photographer, boarder at the plaintiff's house, said that he left the place five or six weeks after the accident, on account of the indifferent attendance.

Cross-examined by Sir H. Juta: To have such a palpable thing as that footpath was not an uncommon thing in Cape Town.

Thomas Eade, a boarder in the house, corroborated the last witness as to the great change in the attendance at the house after the accident. Several boarders left on that account. The planks were lying close together, but loose on the pavement.

Cross-examined by Sir H. Juta: The ends of the boards were very irregular, and they looked dangerous.

Mr. Gardiner closed his case.

Alfred Mathew, partner in the firm of Heynes, Mathew and Co., said he knew the position very well, and he passed it many times a day. Before the building began by Adams, the pavement had always been a slope. When the contractor made excavations, deals were placed on the footpath up to the edge of Fletcher's. Previous to the 15th May, the boards had been put down for a considerable time. He was quite clear that the boards did not

project. When he walked over it on the following Monday, he did not notice any change. He could almost swear the light was there on Saturday night.

Cross-examined by Mr. Gardiner: He did not think he would have walked over the boards in a mechanical fashion.

Nicholas Selfe stated that he lit the lamp on the Sunday night in question.

Patrick Power, police-constable, stated that on the night in question he was on duty in Longmarket-street, and passing the hoarding at about 10.15 p.m. he saw the lamp lit. Had it not been lit, he would have reported it. He never noticed anything against which he could trip.

Cross-examined by Mr. Gardiner: Had there been any obstruction, he would have noticed it.

P.C. Michael Fitzpatrick stated that he was on duty on the 16th May from 1 a.m. to 6 a.m., and the light was burning on the morning in question. He noticed no obstruction that morning.

P. W. Hamilton, partner in the firm of Shipley and Co., Longmarket-street, stated that in winter time the pavement was almost soapy. The pavement was still composed of the same stuff. There had been another accident since the one in question. The boards were a decided improvement. The boards were level, as they were embedded in the ground. He did not think it possible for the plaintiff to have fallen from the spot described into the road.

Cross-examined: That pavement had been a veritable death trap until the boards were put down.

James Ingram, cutter, in the employ of John Scott, stated he had frequently used the footway in question. The planks to the best of his belief were embedded in the shingle. Had the planks been over the pavement he would have expected to have noticed them.

Thos. Barratt, night watchman at Seale's jewellery establishment, said that several times he was on the footpath. The light was always lit.

Hugo Emmett stated he had occasion to walk over the spot several times daily, and believed there was no projection of boards whatever.

Cross-examined: He could not say why the boards were taken away after the accident.

Edward Pugh, building inspector of the Cape Town Council, stated that he inspected Fletcher's Retail building in the course of construction. It was a Municipal regulation that a light should be burning to warn people that new work was in the course of construction. The woodwork did not project.

M. J. Adams, defendant, stated that the planks did not project above the pavement. He removed the boards after he received a letter from plaintiff, but

he had no more use for the boards then. He never admitted any liability, and he was suspicious about plaintiff's arm being very bad. In offering £20, he did not admit any liability; it was merely to save the trouble of Court proceedings.

Cross-examined: He removed the boards because he had no licence from the Municipality to put them down. As near as possible, they were flush with the pavement.

David Brown, foreman for the defendant, who put the boards down, said they were as nearly as possible level.

Sir H. Juta closed his case.

Before counsel commenced argument, Hopley, J., said he had inspected the place himself, and he was satisfied that the arc light at Heynes, Mathew's would throw no light on the spot whatever, that the little light put up by Municipal regulations threw no light on that side at all, and that there was probably four or five inches of irregularity in the slope of the footpath. Counsel could therefore condense their arguments.

Counsel having been heard in argument on the facts,

Hopley, J.: The action was one for damages caused by the negligence of the defendant in improperly placing certain boards upon the ordinary footway in Longmarket-street, where he was carrying on building operations. The law of course was perfectly clear as to the placing of the boards there in the first instance. The person who placed them in that position being responsible for whatever damage might result. It would appear that after the defendant had made certain excavations at the site known as Fletcher's Retail, a portion of the pavement fell in, and it became necessary for him to reinstate the footway so as to make it safe for passengers. This he did by partially filling in the excavation with gravel, and by placing three loose boards over such gravel, the ends of which were partially upon a slight slope in the cemented portion of the adjoining pavement. This must have caused a ridge almost at the end of the slope, which left in that condition would have caused a danger to anyone passing. He thought it extremely unlikely that the boards were all flush, because the slope itself was not an even one, and when there was heavy rain it might wash the gravel, which was placed at the end of these boards so as to make the way flush with the pavement, away. People having occasion to walk along there many times a day would get used to the sidepath. It had rained heavily during that week, and what he thought happened on the Saturday and Sunday was that this gravel had been washed away by the rain, and he thought all the evidence of those who passed for weeks before and saw nothing was not as valuable as that of the person who passed at that particular time. From

his inspection he concluded that the street was a well-lighted one, but it was very different under the gantry on which a dark shadow would be thrown over Heynes, Mathew's balcony, and the light put up according to the Municipal regulations, he was certain, did not illumine the particular spot. He did not pay much attention to the daughter's statement as to whether she was exactly abreast of or somewhat behind her mother—it was likely that she was just lagging behind. He was inclined to believe Mrs. Stracey when she said her foot caught in something, and it was possible she might have been mistaken as to which side of the pole she fell. After comparing the conduct of the plaintiff and the defendant after the accident, his Lordship said it was clear that the plaintiff was liable for the negligence, and he thought 100 guineas would be a fair sum to allow. Judgment would be entered for the plaintiff for £105, with costs.

[Plaintiff's Attorneys: G. J. O'Reilly; Defendant's Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

SINDLER V. DE VILLIERS. { 1904.
Nov. 7th

Lien—retention—Title deeds.

The applicant agreed with A. to pass a bond in security of his obligations under a lease executed by A. in favour of the applicant and gave a power to the respondent to pass the bond. The power being found to be defective, the respondent requested the applicant to give another power, but the applicant refused and demanded from the respondent the title deeds which he had given to the respondent for the purpose of passing the bond.

Held, that the respondent was not entitled to retain the title deeds.

This was application on notice of motion calling on the respondent to show cause why he should not be ordered to hand over the transfer deeds of certain property at De Aar.

The affidavit of the applicant, Jacob Sindler, set out that on the 15th August last he handed over to Abraham de Villiers, at Richmond, the transfer deeds of certain property at De Aar for the purpose of passing a bond for £300. Thereafter he decided not to pass the bond, and De Villiers refused to hand over the transfer.

The replying affidavit of Abraham de Villiers set out that he acted as attorney for Adamstein Bros. and Jacob Sindler in the drawing up of a certain contract. The applicant proposed to pass a bond on his property at De Aar for the sum of £300. When a second power of attorney was drawn up the applicant refused to sign it, offering to pledge his deeds of transfer instead. The respondent was prepared to deliver up the deeds of transfer as soon as the bond was passed.

Mr. Upington was for the applicant, and Mr. M. de Villiers was for the respondent.

Mr. Upington, in argument, said it was difficult to understand on what ground the respondent claimed to retain the title deeds. He said he retained these title deeds because there was a stipulation in the document of lease drawn up at the request of both parties that a covering bond of £300 was to be found by the applicant, but counsel submitted that Mr. De Villiers, who was merely an agent, had no title in law to retain the title deeds.

Mr. De Villiers argued that the respondent had acted all along as agent for the parties, and as he had received instructions from his principals, Messrs. Adamstein Bros., not to hand over the lease, it would only be at his own personal risk if he gave them up.

In reply to the Chief Justice, Mr. De Villiers stated an action was being brought by Adamstein Bros., against the applicants for the fulfilment of the contract.

De Villiers, C.J.: It appears to me that the respondent has shown no right to the retention of these documents. He is not the owner of them, and he has not a lien upon them. It is true that there is an understanding on the part of the applicant to pass a bond, but that undertaking does not entitle either the respondent or Adamstein to retain the documents. There is a mere personal contract between the parties, and if that contract is broken there is a claim for damages, but there is no title to the

retention of these documents, which belong to the applicant. If a valid power of attorney had been executed by the applicant, and handed over to De Villiers, then it might fairly have been contemplated that there is an existing power coupled with an interest, which becomes irrevocable, and the respondent would be entitled to act upon that power, and make use of the documents in his possession for the purpose of giving effect to that power. It is admitted by the respondent that that power is not valid, not properly signed, and, therefore, cannot operate on these documents. But it is said that the respondent is really acting for Adamstein. That appears to me not to affect the case, because it is the respondent who is in possession of these documents, and it is from him the applicant is entitled to recover. Supposing Adamstein had been one of the parties I don't consider he would have had any right to the retention of these documents, having no lien or ownership. The fact that the respondent was agent for Adamstein does not affect the case. It appears to me the applicant is entitled to these documents, and that the application should be granted with costs. The application will be granted, with costs, reserving the right to insert a claim for repayment of such costs to Adamstein, in case he should pay these costs, in an action to be brought against the present applicant.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorney: Paul de Villiers.]

FAUDEL AND JAGGER AND CO. V. TRICKEY.

This was an application for the final adjudication of the defendant's estate as insolvent. Mr. P. Jones appeared for the applicants, and Mr. Benjamin was for the respondent.

His Lordship, in giving judgment, said the terms of the addendum clearly expressed a condition, and if the condition was not fulfilled, the assignment came to an end after the 30th September. There was no doubt that the defendant was unable to pay his debts, and the only course open to the Court was to sequestrate the estate.

APPEL AND LIPSCHITZ V. } 1904.
APPEL. } Nov. 7th.

Insolvent—Right of trustee—
Bequest for maintenance of children.

A testator by his will bequeathed a third of a farm to his son C., and directed that

C. should only enjoy the usufruct for the maintenance of C.'s children. After the testator's death, C. became insolvent, and the trustee sold to the applicant all the insolvent's right and title to the farm. The applicant, by motion, applied for ejectment of the insolvent, not even offering to maintain the children.

Held, that the applicant was not entitled to succeed.

The facts of this case sufficiently appear from the judgment.

Mr. Benjamin, for the applicant, moved for an order to eject defendant for a portion of a farm in the district of Oudtshoorn.

Mr. W. P. Buchanan, for the respondent, opposed the application on the ground that ejectment was not granted on a motion unless the rights of the parties were undisputed, and because the proper parties had not been summoned.

De Villiers, C.J.: The Court has no doubt granted orders of ejectment on motion, but that has only been done in cases where the applicant has made out a clear right to the possession of the property. In the present case, the plaintiffs claim as the purchasers from the trustee of the insolvent of all the insolvent's right and title to the farm. It does not appear that any title has been given to the applicants, and it does not appear what position the trustees themselves take up in the matter. The will has been produced, according to which one-third of the share of the property is bequeathed to the insolvent, but upon conditions. It is a conditional bequest. "The share bequeathed to our son Conrad shall after his death go over to his children, and he shall only enjoy the usufruct thereof for their maintenance, and in case he shall refuse or not be able to pay the daughters £600, then our executor shall have the right to sell the lease of one-half of the ground by public auction until the sum is paid." Then, as to the other half, the insolvent shall remain in occupation, but for the benefit of his children. I think, considering that his children would have a claim at his death, and that they could legally claim that he shall devote whatever proceeds he gets out of the property for their benefit, they would have a similar claim against the trustees. It seems that the applicants claim this right independently of the obligation to maintain the children. If they obtain the right, they must share in the obligation. It is not

such a clear case as to justify the Court in granting an order on motion. The applicants, if so advised, can bring their action, but the present application will be refused, with costs.

[Applicants' Attorneys: Syfret, Godlonton and Low; Respondents' Attorneys: Tredgold, McIntyre and Bisset.]

In Re HANSEN.

1904.
Nov. 7th.
" 14th.

Insolvent — Pension — Trustee — Vesting.

The right to a monthly pension granted by a Harbour Board to an insolvent before his insolvency vests in the trustee of his estate for the benefit of his creditors.

This was an application on behalf of the trustee in the insolvent estate of C. M. Hansen for an order directing the second respondents (the Harbour Board) to pay over to the trustee a certain pension of which Hansen is in receipt from the Harbour Board, and was in receipt when his estate was sequestered.

Mr. Gardiner (for the applicant) argued that by the 48th section of the Insolvent Ordinance all the present and future estate of an insolvent which belonged to him at the time of his insolvency, or to which any right of reversion had then vested in him, vested *ipso facto* in the trustee of the insolvent estate. The Court had no discretion in the matter, and the applicant was clearly entitled to the order sought.

Mr. J. E. R. de Villiers (for the first respondent) argued that a pension was given as a matter of grace for the personal support of the pensioner, and was therefore not assignable. In support of this contention he cited the English Bankruptcy Act of 1869, and *Jones v. Matthews* (14 S.C.R., 68).

Curr. Adr. Full.

Posta (Nov. 14).

De Villiers, C.J.: This is an application by the trustee of C. M. Hansen's insolvent estate to have it declared that the right to a certain pension, payable to the insolvent by the Harbour Board, is legally vested in the trustee, and that as such trustee he is entitled to receive from the Harbour Board all instalments of the pension, as they fall due. There is not much information before the Court as to the terms in which the pension was granted. The amount of the pension is £20 6s. per month, and the accounting officer of the Board, on being asked by the trustee for the pay-

ment of the monthly instalments, expressed his willingness to pay the same on receipt of an order of Court, directing him to do so. No question is, therefore, raised as to whether the right to the pension was legally vested in the insolvent at the date of the sequestration, or as to the power of the Court to enforce payment of the pension, and the real question to be decided is whether the right to the pension forms part of the estate, which is vested in the trustee of the insolvent estate, under the 48th section of the Insolvent Ordinance. The estate so vested includes, "all the present and future estate, movable and immovable, personal or real, which shall have belonged or been due to the insolvent at the time when the order for placing his estate under sequestration was made, or as to which any right of reversion shall then be vested in him, or which may thereafter be purchased or acquired by or may revert, descend, or be devised, or come to the insolvent during the continuance of the sequestration, and before the making of the order of Court allowing and confirming the account and plan of distribution, wheresoever the same may be found or known." All money, therefore, to which the insolvent may become entitled during the continuance of the sequestration vests in the trustee for the benefit of the creditors. The right to receive payments of a pension forms part of the property, and, therefore, part of the estate of the insolvent. In the English case of *In re Huggins* (L.R., 21 Ch., Div., 85), it was contended on behalf of the bankrupt, a retired Colonial judge, that a pension awarded to him as such is not assignable, that neither the Colonial Office nor the Government of the Colony could be compelled to pay it, and that it did not vest in the trustee. The Court of Appeal, however, held that the pension, although voted annually by the Legislature of the Colony, was "property" which vested in the trustee. The English Bankruptcy Act of 1869, however, contained a very useful and equitable provision which gave a discretion to the Court to fix how much of the bankrupt's income shall be made available for his creditors. Under that provision, the Court of Appeal sanctioned the payment to the trustee of a part of the pension as it fell due, leaving the remaining part for the support of the bankrupt. Unfortunately, our Insolvent Ordinance does not confer a similar discretion on this Court, and I would take this opportunity of suggesting that the Legislature should confer on the Court the power, in cases like the present, and that of *Hiddingh's Trustee v. Orphan Chamber* (2 Juta, 273), to reserve for the insolvent a portion of any income which was clearly intended to be bestowed on him for his personal support only. In the case

just mentioned, the insolvent was a fiduciary heir under a will which directed that, in case of his insolvency, the inheritance was to devolve on the defendants, who were enjoined to apply the interest to the support and maintenance of such insolvent, but the Court, following the decision in *Zeederberg's case* (2 Juta, 431), held that the annual income vested in the trustees of the insolvent estate. That the Dutch law was equally relentless in the case of a *cessio bonorum* in appropriating all the insolvent's property for the payment of his debts would appear from *Voet* (42, 3, 7), although in a later passage (42, 3, 8), he remarks that where from compassion a monthly or yearly allowance has been left to the debtor for the purpose of aliment, he cannot be disturbed in its enjoyment by the creditors. The context, however, would show that this referred to an allowance left after the *cessio bonorum* had been effected. *Grotius* (Introd. 3, 51, 6), to whom *Voet* refers as his authority in regard to the Dutch law, says: "If a debtor, after *cessio bonorum* has been granted, acquires any property, he is bound to make payment, in so far as such property exceeds his necessary sustenance." But whatever powers the Dutch Courts may have been authorised to exercise in the case of *cessio bonorum*, this Court has no power to deprive creditors of rights conferred upon them by the Insolvent Ordinance. The Case of *Jones v. Matthews* (14 S.C.R., 68), which has been strongly relied upon on behalf of the respondent in the present case, was decided in favour of the insolvent under the express provisions of the Ordinance. He was held to be entitled to a reversion, the right to which only vested in him after the confirmation of the account. The legacy there in question was intended to be conditional upon his surviving his mother, and as she died after the confirmation of the account, no right of reversion was vested in the insolvent at the date of the order of sequestration. In the present case there is no question as to any right of reversion. The right to receive future payments of his pension was vested in the respondent at the date of the sequestration of his estate. The right was, of course, limited to his lifetime, in the same way as an annuity may be limited to the lifetime of an annuitant, but it was a vested right, subject to no conditions. In the absence of any provision in our law divesting such a right of the ordinary legal incidents of property, including the liability for the payment of debts, the Court has no power to withhold the right to the pension from the creditors, however much it might desire to reserve a portion for the insolvent himself. The order must

therefore be granted as prayed, but the costs will be borne by the estate.

[Attorneys for the trustees: Syfret, Godlonton and Low; Attorney for insolvent: V. A. van der Bijl.]

TOOCH V. LE ROUX.

Mr. W. P. Buchanan was for the applicant, and Mr. Close was for the respondent. The application was on notice of motion calling on the respondent to show cause why the applicant, Wm. George Bennett, should not have leave to intervene as co-plaintiff in the above action, in order that he might adduce certain evidence to prove the contention of the parties in a certain lease. Beckett and Le Roux had a lease in the first instance, and then the applicant assigned his rights to Tooch, who, he contended, could take action against him if he did not succeed against Le Roux.

De Villiers, C.J., said he could only deal with the petition on the affidavits before the Court. According to the petition the sole object of the petitioner applying for leave to intervene with the plaintiff was in order to bring evidence in explanation of the document, the construction of which has already been given by the Court. There would be great difficulty in producing such evidence. The object really was to bring an action to rectify the document. That was not stated in the petition upon the present affidavit, and he thought the application should be refused, with costs.

AUSTIN V. MORRELL AND OTHERS.

Mr. W. P. Buchanan moved to have a day fixed for trial by jury. Mr. Upington, who appeared for the first two defendants, said he opposed the application, as an exception had been taken to the declaration, inasmuch as the contractes were illegal and contrary to public morals and policy.

De Villiers, C.J., said the case would be set down for the last Wednesday in next term, and the exceptions could be argued in the meantime, the costs to stand over.

PATERSON, BOYES AND CO. V. HAMILTON.

Sir H. Juta, K.C., was for the applicants, and Mr. Upington was for the respondent. The application was to make absolute a *rule nisi* restraining the respondent from interfering with the free access of the petitioners to certain rooms that had been sublet by them to him.

Mr. Upington, for the respondent, opposed the application. The respondent, he said, was willing to allow access at all reasonable hours, and he submit-

ted that the rule should not be made absolute as regards providing the applicants with a key because it might mean serious loss to his client if the applicant's servants were allowed to pass through the respondent's rooms at all hours of the night.

De Villiers, C.J., said it was contended for the respondent that a formal lease should have been concluded between the parties, but such a lease would have been on the lines of the letter which formed the basis of the contract between the parties, and the terms of the letter were clear: "We further reserve full use of the attic room and the full free right of approach to the room." The respondent, in his reply, accepted the lease on the conditions named. No doubt it was a very great inconvenience, but that should have been thought of before the respondent accepted the condition but once having accepted it he was bound by it. It seemed to his lordship that the arrangement was a very reasonable one, that a duplicate key should be given to the petitioners, and of course the petitioners would be responsible for the conduct of their servants. The rule *nisi* must be made absolute, with costs.

Ex parte DE WAAL AND SCHREIBER.

Mr. Burton appeared for the petitioner De Waal, and Mr. Benjamin for the petitioner Schreiber.

Mr. Burton said there were two petitions from gentlemen who both desired that they should be appointed sole trustee in the estate of J. J. Kritzing, of Uniondale. This was a competition for the trusteeship, and one of the present applicants had a majority in value and the other in numbers, and the Magistrate by an oversight declared Mr. Schreiber to have a majority in value, and declared him elected, but he had since found that this was erroneous, and the only thing to do was to make an application to Court. Mr. De Waal, who was an attorney of this Court, practising at Uniondale and a creditor in the estate for £198, had offered to act jointly with Mr. Schreiber, but Mr. Schreiber declined because he did not think they would agree. Affidavits were put in by both parties, and after hearing argument his lordship said that on the whole he had come to the conclusion that it would be well if the two applicants, Mr. De Waal and Mr. Schreiber, were to act together. He therefore appointed them provisional trustees in the estate, and said if Mr. Schreiber refused to act with Mr. De Waal the latter would be appointed sole provisional trustee.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP
and the Hon. Mr. Justice HOPLEY.]

APPEALS.

REX V. HESS. { 1901.
Nov. 7th.

This was an appeal from a judgment of the Resident Magistrate of Mossel Bay, the appellant having been found guilty in the court below of a contravention of paragraph 2, section 21, of the Municipal regulations, and fined £4, or one month's imprisonment with hard labour. Mr. Gardiner was for the appellant; the respondent did not appear.

Mr. Gardiner said that the notice of appeal had been served upon the Municipality of Mossel Bay and Mr. C. W. Black (the complainant). The charge against the accused was that "upon or about the 2nd September, at or near Mossel Bay, he did wrongfully and unlawfully allow certain goats, his property, to run at large on the property of C. W. Black, Mossel Bay, without permission of the owner of the said property." Mr. Black, in his evidence, said that he assessed the damage done to his land at £10. The defendant said that the complainant Black had accepted trespass money in respect of the 3rd November. The bye-law was in the following terms: "The owner of any wild beast, wild bird, pig, or goat, who shall allow the same to run at large on a public thoroughfare or private property without the permission of the owner shall be liable for such offence to a penalty not exceeding £5 sterling."

The Magistrate, in his reasons for judgment, said he found the defendant guilty of allowing his goats to trespass on the 28th and 30th August and 1st and 2nd September. On these dates the complainant did not avail himself of the provisions of the Pounds and Trespass Act. The complainant now summoned the defendant under the Municipal bye-laws. He (the Magistrate) dismissed the exception taken by the defendant to paragraph 2 on the ground that the bye-laws was *ultra vires*.

Mr. Gardiner, in reply to the Court, said that notice of the appeal had not been served upon the Attorney-General.

Maasdorp, J., said that they had better have that informality rectified before the matter proceeded further. On the face of the record, it appeared that the case was *Rex v. Hess*, and the Crown must therefore be notified.

The matter was ordered to stand over pending service of notice upon the Attorney-General.

REX V. MONTSIOA.

{ 1904.
Nov. 7th.
" 14th.

Divisional Council—Native Reserve—British Bechuanaland Proclamations 29 of 1887, 148 and 432 of 1896—Act 38 of 1899—*Ultra vires*.

The Divisional Council of M. was constituted and its boundaries defined by B.B. Proclamation 29 of 1887, which provided that no Divisional Council should have jurisdiction within any native reserve. Boundaries of the several fiscal divisions of B.B. were fixed by Proclamation 148 of 1896 and the Molopo native reserve, of which the Stad Mafeking forms a part, was thereby included in the division of M. By Proclamation 432 of 1896, the division of M. was divided into six districts, within none of which the Molopo reserve fell. The Magistrate held that the Stad M. nevertheless fell under the jurisdiction of the Divisional Council of M. by Act 38 of 1899, and that the Council had, therefore, power to impose a dog tax within the said Stad.

Held on appeal, that as the Divisional Council of M. depended for its local jurisdiction on Proclamation 432 of 1896, and as the Stad M. does not fall within any one of the six sub-divisions of the division of M., the Council has no jurisdiction within the Stad and the imposition of a dog tax therein was consequently ultra vires of the Council.

This was an appeal brought by the Baralong Chief Montsioa, from a judgment of the Resident Magistrate of Mafeking, who had fined him 20s. and costs for a contravention of the Divisional Council's dog tax regulations.

From the evidence, it appeared that a police trooper went to the stad occupied by the Baralong Chief, and demanded tax upon a dog which he found there. This the Chief refused to pay.

The Magistrate, in his reasons for judgment, said he found that the native reserve fell within the control of the

Divisional Council of Mafeking. The exemption of the native reserve from Divisional Council control was repealed by the Act 38 of 1899, and, therefore, the Divisional Council Act of 1889 was operative throughout the division, and the occupants of the native reserve were subjected to the dog tax regulations of the Divisional Council.

Mr. Schreiner, K.C., was for the appellant; Mr. McGregor was for the respondents, the Mafeking Divisional Council.

Mr. Schreiner: The appellant was charged under No. 40 of 1889 of the Mafeking regulations. Our contention is (1) That Montsioa is not resident within the Division; and (2) That if Proclamations 148 and 432 of 1896 do bring his location within the Division they are *ultra vires*. See Acts 40 of 1889 and 30 of 1895. The Proclamation No. 29 of 1887 establishes a Divisional Council for Mafeking and marks out the limits of the different districts. These boundaries do not include native reserves. Section 2 expressly excludes native reserves from the jurisdiction of the Divisional Council. See also act 40 of 1889, sections 5 and 6. By these sections every division is to be divided into six sub-divisions which must follow the boundaries of a field-cornetcy. Hence, if land is out of a field-cornetcy it cannot be in a fiscal division. Act 41 of 1895, section 12, gives the Governor power to alter the limits of certain divisions but not to alter electoral divisions and the electoral division of Mafeking was co-terminous with the fiscal division. See Proclamation 62 of 1889 and 41 of 1895. The latter shows how carefully the Government reserved the rights of natives in native reserves: and this policy was not changed by the annexation of British Bechuanaland. See sections 16 and 17 of Act 41 of 1895 and Act 25 of 1894. Surely then the Court will not hold that a Divisional Council can, *mero motu*, extend their powers of taxation, etc., to native reserves without any new law or without any representation.

[Maasdorp, J.: Is there anything to show how these territories came under British authority?]

No, but that authority began with protection which was voluntarily accepted. Any other native territory can be brought under the Glen Grey Act, but no district in British Bechuanaland. That appears from the Glen Grey Act. We must read together the Proclamations 148 and 432 of 1896: otherwise it is impossible to follow Proclamation 148. I should like to be allowed to put in a plan of the Mafeking district to explain the Proclamation 148.

[Mr. McGregor (for the Municipality): I know nothing of the plan, but I am in the hands of the Court.]

[Hopley, J.: Of course the Proclamation was drawn up on the plan.]

That is so.

[The Bench called for the plan.]

I urge that Montsioa's stadt is a part of the Molopopo native reserve. Should the Court have any doubt on this point, I would ask that the question be referred back to the Resident Magistrate.

[Maasdorp, J. (to Mr. McGregor): Do you say that the stadt falls within the native reserve?]

[Mr. McGregor: I cannot say, but will see my attorneys.]

[Maasdorp, J. (to Mr. Schreiner): Which of these Proclamations do you say is to settle the question of boundaries?]

No. 148, and if the earlier Proclamation is not in accordance with it we say that earlier one was *ultra vires*, but No. 432 of 1896 shows that the two are not really opposed. My learned friend apparently relies upon Act 38 of 1899, which repeals certain Proclamations, but it does not abolish native reserves. It could no more do that than it could abolish a district of this Colony. If that had been the intention of the legislature we should have been placed in some field-cornetcy of other. Then if these people are in the Division, why are they not on the voters' roll and why is their property not valued for Divisional Council purposes?

Mr. McGregor (for respondents): I admit the difficulty as to the plan, but the appellant's whole contention seems to be that for purposes of dealing with taxation we must show that this stadt falls within a field-cornetcy. There should have been evidence as to whether it falls within the Division or not. The record may be imperfect, but as it stands it discloses no case for appeal. There is nothing to show that the stadt Mafeking does not fall within the village.

[Maasdorp, J.: We do not know where the "stadt Mafeking" is.]

The Court will always assume that the Magistrate has jurisdiction in respect of place.

[Hopley, J.: If he has, that does not prove that the stadt is in the Division.]

Proclamation 29 of 1887, section 2, places the law as to Divisional Councils under Colonial law.

[Maasdorp, J.: But that does not mean that if a subsequent law of the Colony does not provide for native reserves they are *ipso facto* abolished in British Bechuanaland.]

No; but see Proclamation 195 of 1894 and 220 of 1895, section 5. These bear on the question as to whether the area of a native reserve comes within that of a Division or not.

[Hopley, J.: But a Divisional Council does not put on a wheel tax and natives use the divisional roads.]

I admit that my argument from these Proclamations is not very cogent. Then section 17 of Act 25 of 1895 shows that land in reserves cannot be alienated.

[Hopley, J.: Suppose a native will not pay his dog tax: what are you to do, unless you sell him up?]

Possibly he might be imprisoned. Section 2 of Proclamation 29 of 1887 is really repealed by section 17 of Act 30 of 1899. Looking to section 4 of Act 41 of 1885 and taking it with Proclamation 95 of 1894 it would seem that a native reserve was a part of a division but a part over which the Divisional Council has no jurisdiction, for it would have been absurd to have expressly excluded the jurisdiction of the Council unless it had at least a colourable title to exercise jurisdiction.

[Hopley, J.: If the *stad* is in a native reserve, how can you get it into a fiscal division in face of Proclamation 148 of 1896?]

In Proclamation 29 of 1887 the district is defined and the native reserve is named and it is said that within that the Divisional Council has no jurisdiction.

[Hopley, J.: In every case the Proclamation carefully excludes the native reserves within the Mafeking district.]

There is nothing about the Malopo native reserve.

[Hopley, J.: No; because there the boundaries of the district only partly touch upon it.]

It is important that Act 38 of 1899 repeals the Proclamation. That Proclamation made these pieces of land so many refuges for all kinds of people, but all privileges were taken away by the Act. In *Parkinson v. Attorney General* (4 H.L., 100) it was laid down that the words of a taxing act must be strictly interpreted. We cannot deal with rules of polity. When the Act of 1899 laid down that these lands were to remain inalienable it would have been very easy to have expressed any other peculiarities which attach to these reserves.

Mr. Schreiner (in reply): The wheel tax was imposed by a legislative act and the Divisional Council was merely made the collector of it. It was a most equitable tax, because the natives used the roads and it was only fair that they should pay for them in some way or other. It would seem to me that the Magistrate had not read Proclamation 432 until after he had given his reasons. Counsel for the other side fell back on the Act of 1899, but when Parliament passed that Act they had Proclamation 432 of 1896 before them. Act 148 of 1896 was absolutely worthless until they got their district and field-cornetries marked out. If the Act of 1899 put this reserve into a district for the purpose of a dog tax, the District Council was bound to value the property and impose divisional rates.

Maasdorp, J., intimated that, before giving judgment, the Court would communicate with the R.M. of Mafeking by telegraph, in order to ascertain whether

he found, on the facts, that the reserve was included within field-cornetcy No. 1 of the division of Mafeking.

Postea (14th November).

Maasdorp, J.: The accused in this case was charged with contravening clause 225, sub-division 5, part 1, of the Additional Regulations of the Divisional Council of Mafeking by keeping in his possession a dog over the age of three months without paying dog tax thereon for the year 1904. He was convicted and fined 20s., or in default to be imprisoned for 14 days with hard labour. He now appeals on the ground that Proclamation 148 of 1896 made in terms of section 12 of the British Bechuanaland Annexation Act of 1895, altering the fiscal division of Mafeking as defined in the British Bechuanaland Proclamation No. 29 of 1887, is *ultra vires*, inasmuch as it was never the intention of the Legislature that the native reserves should be included within the limits under the control and jurisdiction of the Divisional Council. In September, 1885, a portion of Bechuanaland, which had until then being under a British Protectorate, was brought by Proclamation under British Sovereignty, and power and authority were by Royal Commission given to the Governor of that territory to make laws for it by Proclamation on the 5th of October, 1885. Laws and regulations for the government of British Bechuanaland were enacted by Proclamation, in which it was provided that the laws then in force in the Cape Colony shall, as far as applicable, be in force in the said territory, subject to the provisions of the Proclamation. Under the Divisional Councils Act 4 of 1865, which was then in force, a Divisional Council was by Proclamation No. 29 of 1887 constituted for the division of Mafeking, and the boundaries of the division were fixed. The laws in force in the Cape Colony with reference to Divisional Councils are by the Proclamation applicable to this Divisional Council; with the proviso, however, that the said Divisional Council shall have no jurisdiction over any native reserve. The appellant in this case resides at the *Stad* Mafeking, which falls within the Molopo native reserve, and this *stad* did not come within any one of the six districts into which the division was then divided by the Proclamation, whatever may have been the case with any other portion of the reserve. In 1895 the territory of British Bechuanaland was annexed to this colony by Act No. 41 of 1895, and under section 12 the fiscal divisions remained as they were, with power reserved to the Governor to alter them before the next session of Parliament. Section 13 provides that Divisional Councils shall be established for the several fiscal divisions by the law of this colony provided. All laws not repugnant to the provisions of

Act 41 of 1895 were to remain in force until altered or repealed by law. By virtue of the powers reserved to the Governor under section 12 of the Act, the boundaries of the several fiscal divisions were proclaimed by Proclamation No. 148 of 1896, and undoubtedly the Molopo Native Reserve, together with the Stad Mafeking, fell within the boundaries of the fiscal division of Mafeking. Subsequently, in the same year, by Proclamation No. 432 of 1896, the division of Mafeking was for Divisional Council purposes divided into the requisite six districts, which corresponded with the six field-cometries. Although the Molopo Native Reserve and the Stad Mafeking fall within the boundaries of the fiscal division, they lie, as has been ascertained by reference to the Magistrate, outside the districts composing the division for Divisional Council purposes. It was contended on behalf of the Divisional Council that by law the fiscal division and the Council divisions are identical, and such contention is to some extent borne out by the provisions of section 13 of the Annexation Act. It was also argued that, notwithstanding the fact that none of the six districts embrace the Stad Mafeking, it yet comes within the territorial jurisdiction of the Divisional Council, under the wider definition of the fiscal division, given in Proclamation No. 148. The decision of the Magistrate proceeded on the ground that the Stad Mafeking comes within the fiscal division, and, consequently, falls within the area allotted to the Divisional Council, and that however much the jurisdiction of the Council may have been restricted within that area, under Proclamation 29 of 1887, full jurisdiction was conferred on it when that Proclamation was repealed by Act 38 of 1899. If it were not for the precise terms of Proclamation 432 some very interesting legal questions might have arisen, which, in view of that Proclamation, it is now unnecessary to discuss. It certainly seems to have been the policy of Government at one time, as expressed in section 2 of Proclamation No. 29, not to allow the Divisional Councils any jurisdiction in native reserves, but nothing can prevent the Legislature from making a change in that policy, as seems to have been done when that Proclamation was repealed by Act 38 of 1899. However, it is perfectly clear that Proclamation No. 432 strictly carried out the policy of the former law, and is not affected by the later law. Under the Divisional Councils Act, a division must be divided into six subdivisions, to be called districts, and the whole machinery of the Council depends upon the districts so formed. Nothing outside these districts can influence the constitution of the Council, and the division, for the purposes of the Act, must be confined to the dis-

tricts. If it is said that under the law such division should accurately coincide with the fiscal division, then it would follow that Proclamation No. 432 is not in strict accordance with the law. But this Divisional Council, being the creature of the Proclamation in respect of its local jurisdiction, must look for such jurisdiction to the Proclamation, and not to the general law. The Stad Mafeking does not come under the Divisional Council, not being within any of the six districts of the division, and the imposition of the dog tax on the appellant, who lives in the Stad, was *ultra vires* and illegal. The conviction must, therefore, be quashed. The Divisional Council ordered to pay the costs of appeal, and costs in the Court below.

Hopley, J., concurred.

[Appellant's Attorneys: Findlay and Tait; Respondents' Attorney: G. O'Reilly.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

RHENISH MISSION STATION (1901.
V. AFRICA. { Nov. 8th.

Dr. Greer moved, as a matter of urgency, for a direction to be given to the Resident Magistrate of Tulbagh to note an appeal in the matter of the Rhenish Mission Station v. Sampson Africa.

Mr. Schreiner, K.C., opposed the application, and said that the motion raised an important point of practice that must be heard by a duly-constituted Court. He submitted that it was quite irregular to bring this motion before his lordship sitting alone.

[Maasdorp, J.: If it is not taken now, what will be the result? Is there such urgency that it must be taken now or fall through?]

I don't see why it should not be taken at two o'clock if the Court were properly constituted. There is a nice point of appeal practice involved.

[Maasdorp, J., said that the matter had better stand over until Thursday. It would be taken that the matter had been mentioned that day (Tuesday).

Dr. Greer: The only difficulty is this that supposing the Court should give us the order we ask for and direct the Magistrate to note the appeal, it will

give us very little time to bring on our appeal this term, seeing that Monday is the last day.

Hopley, J., said that the matter might be mentioned again on Thursday.

HEYDENRYCH V. DUNMAN. { 1904.
Nbv. 8th.
" 10th.

Principal and agent—Payment to authorized agent.

This was an action brought by Benjamin Godlieb Heydenrych, of Benville House, Observatory, against Mrs. Mary Dunman, of Muizenberg, to recover the sum of £270 upon a promissory note, together with interest at the rate of 3 per cent. per month.

The plaintiff, in his declaration, said that he resided at Observatory-road, and the defendant resided at Muizenberg, and was married without community of goods to Charles Barnett Dunman, and was by him assisted, as far as need be, in this suit. On the 13th December, 1902, the defendant made and signed in favour of the plaintiff, for money lent and advanced, a promissory note for the sum of £270 sterling, payable one month after that date at the office of the plaintiff at Observatory-road, and the said note was overdue and unpaid, together with the interest due on the said sum from the 13th December. It was specially agreed between the parties that interest should be paid at the rate of 3 per cent. per month on the said sum of £270, and that defendant should pass a bond as security for this sum, with interest, and the defendant from time to time, by her agents, paid interest accordingly, down to the 13th December, 1903, and she passed the said bond. On the 14th July, 1904, this Honourable Court refused to grant provisional sentence against the defendant upon the said promissory note, and directed the plaintiff to go into the principal case (14 C.T.R. 566). Plaintiff prayed for judgment for £270 sterling, with interest at 3 per cent. per month from the 13th December, 1903, and tendered to deliver up the bond duly cancelled.

The defendant, in her plea, admitted that she signed a promissory note, wherein she promised to pay the plaintiff, or order, at Benfield House, 1, Observatory-road, the office of the plaintiff, £270, but she denied that the said note, or any part thereof, or interest thereon, or any part thereof, was overdue and unpaid. She admitted having agreed to pass a bond as security for the promissory note, and also to pay interest at 3 per cent. per month; but she denied that she had paid any part thereof through any agent of hers. She said that the consideration for the said promissory note was the sum of £250

advanced to her by the plaintiff, and the costs of passing and registration of the said bond or other necessary costs, and it was further agreed between her and the agents, on behalf of the plaintiffs, Messrs. Sibbett and Stephan, in the presence of the plaintiff, that any amount over and above £250 not expended in such costs would be refunded to her upon eventual payment of the said promissory note. Plaintiff, without defendant's knowledge, appropriated to himself out of the said £270 the sum of £8 2s., being first month's interest. The amount of the costs was not within her knowledge, but, to the best of her knowledge and belief, such costs did not amount to £11 18s., and she put plaintiff to proof thereof. The defendant, in accordance with agreement with the plaintiff, paid interest to Sibbett and Stephan, plaintiff's agents, in that behalf, and finally, on the 6th August, 1903, she paid them the capital amount of £270, with interest thereon to that date; the said agents, on behalf of the plaintiff, gave her receipts for the amounts so paid by her, and no other receipts were given to her by the plaintiff. She prayed that the plaintiff's claim be dismissed, with costs.

For a claim in reconvention, she said that the defendant had not refunded to her any part of the aforementioned sum of £20 sterling, and prayed that Heydenrych be condemned to pay her the sum of £20 sterling, less such sum as the Court may find to have been expended in costs as aforesaid, with interest at the rate of 3 per cent. per month from the 13th December, 1902, with costs of suit in reconvention.

The plaintiff, in his rejoinder, admitted that £8 2s. was deducted for the first month's interest on £270, and that costs in connection with the bond were deducted. The amount actually paid over by Heydenrych was £261 18s. He denied the alleged agreement to refund to the defendant the sum of £20, or any part thereof, and prayed that the said claim for £20 may be dismissed with costs.

Mr. Schreiner, K.C. (with him Mr. Van Zyl), for plaintiff; Mr. M. de Villiers for defendant.

Mr. De Villiers intimated that the defendant dropped the claim in reconvention, except as to £8 16s.

Mr. Schreiner said that the defendant alleged that she paid the money to Sibbett and Stephan, as the agents for Heydenrych, and he submitted that the onus of proof of that payment rested upon the defendant.

Mr. M. de Villiers said he was quite prepared to go on with the case, but he wished before proceeding to apply for leave to amend paragraph 3 of the plea by the substitution of the word "loan" for "promissory note." The plaintiff prayed for judgment for £270 and interest, whereas the promissory note made

no mention of interest, hence it was upon a loan that the plaintiff sued.

Mr. Schreiner raised no objection to the proposed amendment.

The Court allowed the amendment.

Evidence was called by Mr. De Villiers. Mary Dunman (the defendant) said that in November, 1902, she wished to raise £250, and approached Mr. Stephan, of the firm of Sibbett and Stephan, through whom she met Heydenrych. She met Heydenrych in Mr. Stephan's office. It was arranged that she should have a loan for £250, and that she was to pass a bond on her property at Muizenberg. Nothing was said at that time about a promissory note. She afterwards went to Mr. Van der Byl's office, accompanied by Mr. Heydenrych, proceeding there with Mr. Heydenrych in Mr. Stephan's cart. At Mr. Van der Byl's office she was requested to sign a promissory note, and upon her raising an objection, she was told that the note was only collateral security until the bond was passed. She was told that it would be all right; when the bond was passed, the note would not matter. Nothing was mentioned about Mr. Heydenrych discounting the bill. She was to pay monthly interest on the amount. Both Heydenrych and Stephan told her that she must pay the interest to Stephan at Sibbett and Stephan's office. She also inquired why she should have to give a promissory note for £270, when the loan was only £250. She was told that the money would be refunded to her, less the expense of passing the bond. Subsequently, on the 6th August, she repaid the capital amount, with interest due to that date. Mr. Heydenrych deducted £8 2s. 6d. by way of what he called discount. She could never understand why she was called upon to pay interest on the extra £20, over and above the loan of £250. She passed a bond for £300; she did not know why £300 was demanded, because she only borrowed £250. She paid £8 2s. interest in January, 1903, to Mr. Stephan; she paid the interest regularly each month (with one exception) to Mr. Stephan.

[Maasdorp, J.: What amount was paid?]

Mr. De Villiers: She paid interest at the rate of 36 per cent. per annum on £270—3 per cent. per month.

Witness (continuing her evidence) said that a few days after she had repaid the capital and interest to Mr. Stephan, she met Mr. Heydenrych in Adderley-street. Mr. Heydenrych said: "I hear that you have paid Mr. Stephan the money." Witness said, "Yes." Plaintiff then said, "Oh, he has not paid me; I suppose it will be all right." Witness denied that she had told Heydenrych that Stephan was her agent, or that Heydenrych told her that she must get the money back from Mr. Stephan and pay it to him (plaintiff) direct. She spoke to Miss Legrew in Mr. Stephan's Office. On or

about the 30th October, she received a letter from plaintiff, saying that he had repeatedly called upon Stephan for payment of the money but without success, and that she must arrange for payment to be made to plaintiff direct. She told the plaintiff that she did not recognise him in the matter. After receiving the letter, she saw Mr. Stephan, who told her that it was all right, and that he had agreed to take over the loan from Mr. Heydenrych. She repeatedly asked about the bond and her title deeds. She denied having had conversation in the street with Mr. Heydenrych except on the occasion she had mentioned. Upon hearing the conflicting accounts from Heydenrych and Stephan, she tried to arrange a meeting. A meeting took place, at which Heydenrych and Stephan and Miss Legrew were present. Witness did not see the bond. Mr. Stephan then repeated that he had arranged to take over the loan. Witness asked Heydenrych if that were so. Heydenrych said, "Yes, if he pays me the interest." The bond was never returned to her. She denied that she had ever told Heydenrych that she had lent the money to Stephan.

Cross-examined by Mr. Schreiner: No commission was made to Messrs. Sibbett and Stephan for securing the loan. Whatever commission was paid to them was to come out of the sale of her property. On December 13 she received £100 advance from Sibbett and Stephan on account of the loan of £250. On the 20th, she received £150 on the same account. She had not had a statement of account from Stephan at any time. She did not know that she had been debited with £6 8s. commission on the 19th January. Mr. Stephan carried out a valuation of Cambridge House on the 18th June. There was no brokerage payable to Stephan, because the sale did not go through. Stephan had entered £187 10s. brokerage in his books. There was a hitch in the sale because the purchaser wanted a bond for five years. She did not remember Mr. Van der Byl saying that the first month's interest would be taken out of the difference between the loan and the bond. Her property was in the hands of Mr. Stephan before she sought to raise the loan. The brokerage was entered "for uncompleted sale."

Re-examined: She went to Mr. Tenant, her attorney, to ascertain why she could not get her cancelled bond. About that time Mr. Stephan often was ill, on account of his foot, and was unable to keep appointments at Mr. Van der Byl's office. When she paid £287 19s. 6d. to Mr. Stephan, it was a full settlement of accounts between Mr. Stephan and herself. The property that was being offered was valued at £7,500. If the sale had gone through, Mr. Stephan would have been paid brokerage and commission on the loan to the purchaser.

Further examined: On the day she made the payment of £287 19s. 6d., she drew a cheque in favour of Mr. Stephan for £100, as Mr. Stephan was in need of money. This was by way of loan.

Violet Katherine Legrew said she was in the employ of Messrs Sibbett and Stephan in December, 1902, when Mr. Stephan asked plaintiff if he would give a loan of £250 on property which he pointed out. It was arranged at Stephan's office that Mrs. Dunman should give a promissory note for £270, and that a covering bond should be passed. Mr. Heydenrych said that the interest was to be paid at Mr. Stephan's office. Witness made out a receipt on the 6th August for the repayment of the loan, with interest. A few days after the note had been paid off, Mrs. Dunman called at Mr. Stephan's office and discussed a meeting she had had in the street with Mr. Heydenrych. About the 11th November there was a meeting at the office between the defendant, the plaintiff and Mr. Stephan. Mrs. Dunman asked why the plaintiff was sending her letters demanding money. Stephan told her that it was all right, and that he had made arrangements to take over the loan. Heydenrych said it would be all right, as long as Mr. Stephan paid him the same interest. One day, later, she asked Mr. Heydenrych what security he had for the loan. Heydenrych admitted that he had no security, and said he was sorry now that he had let Stephan take over the loan. The general effect of the conversation was that Mrs. Dunman was absolved from all further liability for the bond. Mr. Heydenrych shrugged his shoulders, turned to one side, and said he regretted lending the money to Mr. Stephan.

Cross-examined by Mr. Schreiner: She twice went to Mr. Van der Byl's office for the cancelled bond of Mrs. Dunman's. Mr. Van der Byl said it could not be found, and he would send it over. Mr. Stephan told her to get the bond from Mr. Van der Byl.

Johan Carel Stephan, broker and commission agent, of the firm of Sibbett and Stephan, said he was applied to for a loan by Mrs. Dunman. The negotiations for the loan took place in witness's office. Witness corroborated the previous witnesses as to the arrangements that were come to. The reason why the note was given for one month was that Mrs. Dunman, at the outset, only wanted a loan for a month. Witness received at his office the interest from Mrs. Dunman, on behalf of Mr. Heydenrych. On the 6th August, 1903, he received from Mrs. Dunman payment of the loan and interest, he thought up to September. He had notified Mr. Heydenrych two or three days previously that Mrs. Dunman had sold the property, and that she would pay off the licence. On the previous Saturday witness took Heydenrych in his cart to a property in Chapel-street,

with the object of taking over the loan from Mrs. Dunman and offering the property as security. Heydenrych seemed satisfied with the security proposed. After the payment had been made, Heydenrych assented to the transfer of the loan. Witness shortly afterwards got into trouble, and Heydenrych then did not seem to think that the security was sufficient. Witness admitted his indebtedness to Heydenrych for the amount of £250. The plaintiff had demanded the money from him. On the 29th October his firm received a receipt from Mr. Heydenrych for £29 7s. 6d., interest due from Mrs. Dunman and a firm called Nicholas and Co.

Cross-examined by Mr. Schreiner: He denied that there were other people in the same position as Heydenrych and Mrs. Dunman respectively, and that he was holding money on behalf of the person who made the advance. He denied that he had received money that he had no authority to receive; he admitted that he had not devoted money to the purposes intended. He was allowed 2½ per cent. commission on this transaction between plaintiff and defendant, £6 5s. The amount was debited to Mrs. Dunman; witness received nothing from plaintiff. He entered in his books £257 5s. as the capital and interest received on account of Mrs. Dunman. Witness borrowed £100 from Mrs. Dunman; this was not entered in the books, because it had nothing to do with the firm. Heydenrych knew at the time the receipt of October, 1903, was given by him that Mrs. Dunman had paid up the capital and interest. He recollected that on one occasion Mr. Heydenrych told Mrs. Dunman that as long as witness paid the interest it would be all right; plaintiff then absolved the defendant from all liability. That, he thought, would be in December; if he had said so in his affidavit, on the provisional sentence, then it would be so. He paid £3,150 for the property in Chapel-street, it had been bonded for £3,000, and he applied to Heydenrych for a further loan of £300, the property being of the value at that time of £4,000. The property had not since been sold in witness's insolvent estate. He was in difficulties about August and September last year. He had speculated in landed property, and he found that the values were sinking; still his position was not so bad that he tried on all hands to raise the wind.

Mr. De Villiers closed his case. Benjamin Gottlieb Heydenrych (the plaintiff) said that Stephan was not his agent in this matter. He was just in the position of any broker, who applied for a loan. The arrangement for the promissory note was concluded in Mr. Van der Byl's office. The reason why the note was made out at £270 was because the defendant wanted £250 clear;

witness had to discount the note, his charge being £8 2s. He did not authorise Stephan to act as his agent to collect the interest on the bond. It was not agreed that Stephan should be his agent. He never agreed to accept Sibbett and Stephan as his debtors. He had always known that Stephan was a man of straw; Stephan had often tried to borrow money from him. Witness inspected the Chapel-street property long before August, 1903, and refused to give a loan on it, because the property was already over-bonded. Witness saw Mrs. Dunman on the 28th October, and the latter then told him that she had paid the money to her agent Stephan, and that it ought to have been paid over to witness. Stephan afterwards told him that she had allowed him to have the use of the money. Witness denied that he ever promised to let Stephan have the money.

Cross-examined: Witness looked upon Stephan as the agent of the defendant. The latter remarked that it was very wrong of Stephan not to pay over to witness the money she had paid to Stephan. Witness admitted that the rate of interest was 36 per cent. per annum, but this was the rate that was offered to him by Stephan on behalf of the defendant.

The defendant and her witnesses were mistaken in stating that the negotiations for the loan were completed at Mr. Stephan's office. The negotiations were concluded at Mr. Van der Byl's office. On the 28th October he told Mrs. Dunman that Stephan had committed a crime in converting the money to his own uses, and that she ought to prosecute him.

Re-examined: He denied that he had ever expressed to Miss Legrew at Stephan's office regret that he had lent Stephan the money. He had had no such conversation with Miss Legrew, as she had described in her evidence.

Vincent Alex. van der Byl, attorney, Cape Town, said that he formerly practised under the style of Van der Byl and Van der Horst. The plaintiff had been a client of his since he started practice. He saw the parties to the suit in December, 1902, at his office, when he received instructions to draw up the promissory note and power of attorney. Witness explained that the note was made out for £20 in excess of the loan in order to cover expenses in the way of drawing up the bond, and so forth, and to secure the defendant's first month's interest, which was to be paid in advance. He explained to Mrs. Dunman that the bond that she had to pass for £300 showed no indebtedness, and that it was simply to cover the promissory note. Mrs. Dunman authorised him to hand the cheque for £257 5s. to Mrs. Stephan; this was the net amount remaining of the £270 for which she had given a note after the first month's interest, and the expenses of passing the bond

and preparing power of attorney had been deducted. The plaintiff was in the habit of collecting his own interest and not appointing agents to do his business. Miss Legrew was absolutely incorrect when she stated that she twice came to witness's office, and applied to him for the cancelled bond. Miss Legrew asked for the transfers, but never asked for the bond.

Cross-examined: No mention was made in the note of interest, because the note was only for a month, and interest had been paid in advance. If interest had been mentioned in the note, it would have had to be paid twice over.

Mr. Schreiner closed his case. Mr. De Villiers said he submitted that if the interest now sued for was agreed upon, then the contract upon which the plaintiff was suing was entered into antecedent to the promissory note. He denied that the defendant had set up a novation. The defendant said that the plaintiff and Mr. Stephan agreed that the money which the defendant had paid should be held on loan by Mr. Stephan. The plaintiff had shown a certain amount of craft in getting this poor woman, to whom he gave £261 odd, to sign a document in which she promised to pay £270, and, moreover, had verbally agreed to pay 36 per cent. That craft was shown throughout. It was shown in his evidence, it was shown in the making up of his books, and in his giving a receipt on the 20th October, in which Mrs. Dunman's name was purposely mentioned for an obvious reason. The plaintiff in that receipt had simply manufactured evidence for himself. He submitted that the defendant's case that she had made one payment to the plaintiff of the loan had been established.

Mr. Schreiner said that his learned friend had spoken in very critical terms of the plaintiff. It could not be because he took up an unduly high measure of interest. Mr. Heydenrych took a high rate of interest, but Mrs. Dunman wanted this loan very much, and persons like Mr. Heydenrych often ran very great risk in advances they made. It did not follow, because they carried on a business of that kind, that such persons were to be discredited in regard to the facts. Counsel asked whether it was probable that a man so accustomed to money-lending transactions as the plaintiff would be likely to lend money to people without security, as he was alleged to have done to Stephan? He thought not. He contended that everything pointed clearly to the fact that Messrs. Sibbett and Stephan were the agents of the defendant throughout. There was no shred of evidence to show that Sibbett and Stephan were acting as the agents of the plaintiff, or had been appointed by him as his agents. As to the so-called "craft" of the plaintiff in regard to

[Hopley, J.: How can you show that you did not take an unfair advantage of the other creditors?]

We never bound ourselves to accept 5s. in the pound; and if any such promise was made, it was obtained by misrepresentation. If the signing of that document had no influence on the other creditors, there was nothing fraudulent in the transaction. Our signature could not have influenced their signatures, as all the others had already signed. As to duress, there is no evidence of legal duress.

[De Villiers, C.J.: Hermann left the other creditors under the impression that he would sign. If he afterwards changed his mind, should he not have given the other creditors notice of this?]

There is nothing to show that such notice was not given, and if there was any fraud in the transaction, that should have been specially pleaded.

Mr. Schreiner (in reply): No consideration includes illegal consideration. Cohen's evidence shows very clearly the *mala fides* of the whole transaction, and shows in what sense the term "no consideration" was pleaded. If the plaintiffs want to go behind their receipt they must proceed by way of *restitutio in integrum*.

De Villiers, C.J.: In this case the Magistrate said that he accepted the evidence given on behalf of the plaintiff, and he did not fully accept the evidence on behalf of the defendants. Now, I am quite prepared to decide the case upon the evidence given by the plaintiff himself. He admits in the early part of his evidence that he attended a meeting of the creditors of the defendant, and that he agreed to accept 5s. in the £1, but he added that on inquiry he found that the defendants had not given a correct statement. He does not say, however, that the creditors were ever informed that he resiled from the agreement and in point of fact on the 10th August when the plaintiff was asked to sign this agreement he did ultimately sign it. Now, it is important to read the terms of that agreement which the plaintiff signed. It says: "The undersigned creditors of Mr. Solomon Cohen, of 4, Wale-street, hereby agree to accept 5s., in the £1 in full satisfaction of all claims we may have against him as per the following statement showing claims and dividends set opposite to our respective signatures." On the same day he gave a receipt. That receipt is not quite as full as the document I have just read, but there he says: "Received the sum of £12 6s. 6d. in settlement, being payment of 5s. in the £1 on your account." But reading this receipt together with the agreement it is clear there was an agreement with the plaintiff and the defendant that the plaintiff should accept 5s. in the £1 in full

settlement. After that agreement had been made it is clear that the plaintiff could no longer sue the defendant for the balance of the account. That point was definitely decided in the case of *Malan v. Secretain and Co.* (Noord R. 94). Then, although the defendant was not bound to pay, a promissory note was passed by him dated five days afterwards, by which he promised to pay this amount. In my opinion there is no consideration for that promissory note. The defendant was not bound to pay the balance, and he gave a note for what he was compelled to pay. There is no consideration, and the Magistrate, upon the evidence ought to have sustained the defence. But I go further, and quite agree with the contention of the defendant that if there was consideration it was wholly invalid consideration, because the plaintiff had been present at the meeting of creditors, and had led the other creditors to believe that he joined in this arrangement to receive 5s. in the £1, and if he afterwards changed his mind it was his duty to inform the other creditors that he had changed his mind. If he did not do this any private arrangement with the debtor by which he is to receive his full claim is a fraud upon the other creditors. I am of opinion, that the Magistrate erred in his judgment, and that the appeal should be allowed, with costs in this Court, and judgment entered for the defendant with costs in the Court below.

Hopley, J., concurred.

[Appellants' Attorneys: Friedlander and Du Toit; Respondent's Attorney: A. W. Steer.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

COCHRANE AND CHERRY V. { 1904.
WOODSTOCK COUNCIL AND { Nov. 14th.
OTHERS.

Mr. Schreiner said that before Mr. Justice Maasdorp left the Bench he would like to mention this matter, which was a motion by the defendants in the action for a new trial. The trial was heard before his lordship and a jury, and the grounds of the motion for a new trial

were a mis-direction to the jury by his lordship on a point of law, that the verdict was contrary to the weight of evidence, and that the damages were excessive. At the hearing a stay of execution was granted until the 15th inst., so that the time allowed had now almost expired, and it seemed doubtful whether the motion would be reached before that date. He applied for a further stay of execution pending the decision of the Court on the motion.

Sir H. Juta (for the defendants) assented to the application.

De Villiers, C.J., said that stay of execution would be granted until a further order of Court, and in the meantime the Court would consider about a day for the hearing of the motion.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS.

Mr. Benjamin moved for the admission of Gilbert Percy Sheldon, as an attorney and notary.

Application granted, and oaths administered.

Mr. Schreiner, K.C., moved for the admission of Hjalmar Reitz, as an advocate. Petitioner had applied for admission to the High Court of the Transvaal, but it was necessary that he should first be admitted to the Cape bar.

Application granted, oath to be taken before the Registrar of the High Court at Pretoria.

PROVISIONAL ROLL.

MALCOMES AND CO. V. { 1904.
CARY. { Nov. 14th.

Mr. McGregor moved for provisional sentence on two promissory notes for the sums of £265 and £149 2s., respectively, with interest and costs, the defendant (a merchant at Tarkastad), having given the notes in favour of H. B. Cary. The notes were dated the 9th February, 1903, and were payable on the 8th May, 1903.

The affidavit of the defendant said that an arrangement was arrived at in connection with the accounts between deponent and H. B. Cary, showing a balance in favour of deponent of £106 odd. Plaintiffs had approved of this settlement. In the adjustment deponent was debited with the two promissory notes. The estate of H. B. Cary was now being finally sequestrated.

The replying affidavit of a partner in the plaintiff firm denied that they had assented to the alleged

adjustment of accounts between defendant and H. B. Cary, or that Conrad, who was referred to as their representative, had any authority to assent. A bookkeeper, named Mumm, who had been employed in insolvent firm, in an affidavit deposed that the balance-sheets of the insolvent estate of H. B. Cary did not contain any liability to Cary on the 28th February, 1902, or 28th February, 1903, when it was supposed to be in existence. He never believed in the counter-claim.

Sir H. Juta, K.C., for defendant.

De Villiers, C.J., in refusing the application, said there were several matters upon which there were grave doubts, and they could be gone into in the principal case. At present provisional sentence would be refused, the plaintiff to go into the principal case, costs to abide the result.

ROUX AND COLLARD V. COSAY.

Mr. Roux moved for provisional sentence on a mortgage bond for £400, with interest at 6 per cent. and costs.

Mr. Alexander put in the affidavit of the defendant, who asked for time, on the ground of the sudden death of her husband, who had had charge of the property. If given time, she could easily liquidate the plaintiffs' claim, and £150 would be paid within a fortnight.

Mr. Roux pointed out that Mr. Collard was waiting to leave for England, and had given up his position.

De Villiers, C.J., said it was one of those cases in which it would be unreasonable to expect the respondent to be in a state of mind to conduct the negotiations. The order would be granted and the property declared executable, but there would be a stay of execution for six weeks, on condition, fourteen days from date, £150 was paid to the plaintiff on account.

LOUW V. WINTERBACH.

Mr. Sutton moved for provisional sentence on three promissory notes for £30 15s., £44 1s. 7d., and £20.

Granted.

VISSEK AND CO. V. JARUS AND BENNETT.

Mr. W. P. Buchanan moved for provisional sentence on a promissory note for £35.

Granted.

PRETORIUS V. VAN WYK.

Mr. Sutton moved for provisional sentence on certain conditions of sale for £850, being the first instalment.

Granted.

LINDENBERG AND DE VILLIERS V. WESNER.

Mr. Close (for the plaintiffs) moved for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court for £43, including costs.

The defendant said if he was given time, he could pay. He was a farmer on the Flats, and had lost heavily through bad crops.

The matter was ordered to stand over until the first day of next term, the defendant in the meantime to make an effort to pay.

SMIT V. MAKATESI.

Mr. M. de Villiers moved for provisional judgment for the sums of £22 7s., £133 17s. 6d., and £4 5s. 2d., on unsatisfied judgments of the Magistrate's Court, and to have certain property declared executable.

Granted.

KATZ AND CO. V. SHEMER.

Mr. Lewis moved for provisional sentence on a promissory note for £31 18s., less two instalments paid on account.

Granted.

S.A. MUTUAL V. VERSTER.

Mr. P. Jones moved for judgment for interest on a mortgage bond for £56 13s. 4d., on a bond for £2,000.

Granted.

ESTATE JONKER V. JONKER.

Mr. De Waal moved for provisional sentence for £32, capital on a mortgage bond, with interest at 6 per cent. from December, 1880, which was fixed at £32. The bond had become due by reason of non-payment of interest. Counsel also asked that the property be declared executable.

Granted.

NATIONAL BANK V. KRAEMER AND CO.

Mr. Rainsford moved for provisional sentence on two promissory notes for £72 and £162 5s. 7d., with £11 1s. 10d. for stamps.

Granted.

HUGO V. SNYDERS.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £700, with 6 per cent., less interest paid, and that the property be declared executable.

Granted.

DUTHIE V. UHRBROOK.

Mr. Russell moved for provisional sentence on a mortgage bond for £300, with interest at 6 per cent.

Granted.

ESTATE CHINN V. JOHANNES.

Mr. Jeppe moved for provisional judgment on a broker's note for £1,500, less £100, with interest and £5, on an undertaking signed by the defendant's attorneys, to pay expenses on his behalf.

The defendant stated he would be able to pay the money if he got time.

Provisional sentence was granted, with stay of execution for 30 days.

S.A. MUTUAL V. ERASMUS.

Mr. P. Jones moved for judgment for interest on a mortgage bond for £34.

Granted.

ROWE V. MCGARRY.

Dr. Greer moved for a decree of civil imprisonment against the defendant on an unsatisfied award, which was made a rule of Court. The defendant, it was stated, had paid the capital, but the taxed costs, £9 11s., were not paid yet.

The defendant appeared, and said that his business was very unsettled.

The defendant was ordered to pay £1 a month, the first payment to be made on the 1st December, the decree to be suspended in the meantime.

BONSIEL AND CO. V. BEHN.

Mr. Russel moved for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court for £54 6s. 7d., less £10 paid on account.

Granted.

ILLIQUID ROLL.

HOLIDAY V. JOHNS, { 1904.
 { Nov. 14th.

Dr. Greer moved for judgment, under Rule 329d, for £52 rent, plaintiff tendering return of certain four shares held as security.

Order granted.

DE VILLIERS V. HAUPT.

Mr. Benjamin moved for judgment for the sum of £70, being certain money deposited with the defendant to be advanced on a mortgage.

Order granted.

PHILIP BROS. V. COMBRINK.

Mr. Russell moved for judgment, under Rule 329d, for £115 odd, goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

NETHERLANDS BANK V. BRAND.

Mr. M. de Villiers moved for judgment, under Rule 319, in default of plea, in terms of the plaintiff's declaration, for £500, with interest and costs.

Order granted.

BROWN V. KELLY.

Mr. Sutton moved for judgment, under Rule 329d, for £30 11s. 6d., money lent and advanced, with interest *a tempore morae* and costs.

Order granted.

WOOLVEN V. MITCHELL.

Mr. Pittman moved for judgment, under Rule 329d, for £141 15s., with interest and costs, and also for an order of ejectment from certain premises in Station-road, Observatory.

Order granted.

REHABILITATION.

Mr. Russell moved for the rehabilitation of Robert Charles Donaldson.

Granted.

GENERAL MOTIONS.

Ex parte THE DUTCH REFORMED CHURCH, COLEBERG.

Mr. Jeppe moved, as a matter of urgency, for a temporary interdict restraining the Colesberg Municipality from supplying water to the so-called dry erven in the Municipal limits to the detriment of the water erven held by the petitioners, and in conflict with the contract entered into between the parties.

Rule granted, to operate as an interdict, returnable on the 12th December, with leave to the respondents to apply in the meantime for discharge of interdict.

Ex parte METELERKAMP.

Mr. D. Buchanan moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

Ex parte PIETERSE.

Mr. Gardiner moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

DIMDORE V. DIMDORE.

Mr. Alexander moved for an order requiring the respondent (the husband) to provide funds to enable the applicant to institute an action for divorce and also for alimony.

Mr. Upington (for the defendant) said he was instructed not to oppose the application, and to leave the matter in the hands of the Court.

The Court ordered the defendant to pay over to the applicant £50, to enable her to institute an action, and £10 per month as maintenance, pending result of the action, costs to be costs in the cause.

A motion was also standing in the list for an interdict, in which the parties were Dimdore v. Dimdore and Others.

This was ordered to stand over till the 12th December.

Postea (December 15th).

Mr. Close, on behalf of the respondents, Clarke and Bohn, moved for a rule *nisi*, interdicting certain goods, to be set aside. Mr. Alexander appeared for the applicant in the interdict, Mrs. Dimdore.

Mr. Close stated that the petitioner was Mrs. Dimdore, wife of Alexander Dimdore, who had carried on business as a clothier and outfitter, at Main-road, Claremont. Mrs. Dimdore was married to her husband in community, and she intended to institute an action for judicial separation on the ground of her husband's continual cruelty towards her, and threats to take her life. She had moved the Court for alimony, but in the meantime the goods, shop fittings, and so forth had been taken possession of by the respondents, Clarke and Bohn, and removed to Cape Town, and her husband had absconded, and left his wife penniless and without means of bringing her action. Mr. Close read the affidavits of Max Clarke and J. Wolff, of Wynberg, showing that Clarke and Bohn had bought the stock, and shop fittings in October last for £200. Clarke said that at the time he made the purchase, Dimdore assured him that there was no legal obstacle against his concluding the sale, and that he had no outstanding liabilities. Wolff introduced Clarke to the respondent Dimdore. Clarke denied that he had any reason to believe that there was any claims against the estate of Dimdore, nor was he aware that Mrs. Dimdore was contemplating a suit against her husband.

Mr. Alexander was about to read a replying affidavit by Mrs. Dimdore, when

Mr. Close again rose, and called the attention of the Court to this affidavit, which, he said, contained many statements that ought never to have appeared on affidavit. She said "From inquiries I have ascertained," and referred to other matters, of which she had no personal knowledge.

Mr. Alexander contended that the objections of counsel would be more in order when the Court had heard the affidavit. He submitted that in the peculiar circumstances of the case, the petitioner was quite justified in making such an affidavit, considering that it was alleged that there had been collusion between the respondents. The respondent, Max Clarke, said that he could not find that there were any claims against Dimdore, while inquiries showed that there were a number of tradespeople in Cape Town to whom Dimdore owed money. Mr. Alexander was proceeding to read the affidavit of the petitioner, when

Hopley, J., interposed, and said it seemed to him that the deponent imported into her affidavit a good deal of matter that should not have appeared.

Mr. Alexander said that the taxing master could tax off unnecessary matter. He proceeded to read the affidavit further, when

Hopley, J., pointed out that the Deputy-Registrar had made inquiries, but he had been unable to find that a copy had been filed with the Court of this largely irrelevant affidavit, made up in a most peculiar way.

Mr. Alexander said that, under the circumstances, he should have to apply for an adjournment until a copy of the affidavits could be filed.

Hopley, J., granted an adjournment for twenty minutes, and informed Mr. Alexander that while he was having a copy of the affidavits prepared, he should look up an authority on which to base his claim.

Later on the matter was resumed.

Hopley, J., said that the affidavits had now been filed.

Mr. Alexander then continued his reading of the affidavits. The respondent, Alex. Dimdore, it appeared, had not been heard of or seen in Cape Town and suburbs since the 31st October.

Mr. Close said that he had answering affidavits denying that there had been collusion, and showing that the price paid by Max Clarke for the goods was quite reasonable, allowing for a fair margin of profit.

Counsel having been heard in argument on the facts

Hopley, J. said that he did not think that if Mr. Justice Maasdorp had known all the facts, he would have granted the rule. There were certain suspicious circumstances shown on the original petition, but the respondent (Clarke) had now

produced a deed of purchase and a cheque for £200, drawn in favour of Alexander Dimdore. He did not think the fact that the husband may have had in his mind the idea of defrauding his wife or getting away from the domestic relations which subsisted between them could affect the question at all. If the original petitioner, Mrs. Dimdore, were quite certain that she could establish fraud and swindling between Clarke and Bohn and her husband, it seemed to him (the learned judge) that she should take steps to set aside the sale, on the ground of fraud and collusion. The rule *nisi* would be set aside, and the goods released from the interdict, the costs of this application to be paid by the petitioner, Mrs. Dimdore.

Ex parte JACOBS.

Mr. M. Bisset moved for confirmation of the appointment of petitioner as sole liquidator in the estate of Sherriff Givingley and Co., carrying on business in Johannesburg, Port Elizabeth, and elsewhere. There was property belonging to the estate in Port Elizabeth, in respect of which the liquidator desired authority to act. The company had their head offices in Johannesburg, and petitioner had been appointed sole liquidator by the Witwatersrand High Court.

Order granted as prayed, subject to the petitioner giving security to the satisfaction of the Registrar in the sum of £500 for the due performance of his duties as liquidator.

VAN DER PAS AND OTHERS V. DUSSEAU AND CO.

Mr. Gardiner moved for an order for the winding-up of the respondent company.

Mr. J. E. R. de Villiers (for the respondents) said that they were prepared to assent to the application, subject to Mr. Andrews being appointed one of the liquidators.

Winding-up order granted, the liquidators to be Messrs. E. A. Buyskes and John Andrews, costs to come out of the estate.

Ex parte VAN DER BYL, SMUTS AND OTHERS.

Mr. W. P. Buchanan moved for the confirmation of a certain sale of property to Wm. Fouche, the petitioners being chairman and other officers of the second-class undenominational school at Riebeck West. Fouche, it appeared, was the principal of the school, and the property in question was used as a

boarding-house. The purchase price was £1,000.

Rule granted, calling upon all concerned to show cause why an order should not be granted as prayed, rule to be published once in a Dutch newspaper, and once in an English newspaper circulating in Riebeck West, and to be returnable on the 12th December.

Postea (December 12th).

The rule was made absolute.

MAKGOSIA V. FLAG MINI.

Mr. Alexander moved for an order compelling the respondent to deliver to her a certain child, of which she was the mother. Flag was alleged to be the father of the child, but this the man denied at first, though now it appeared that he had claimed the child. Flag was at Aliwal North, and petitioner was living with her husband at Bloemfontein. She also prayed for an order for payment of her railway fare between Aliwal North and Bloemfontein.

An order was granted for the restoration of the child and costs of the application, and also for £10 as expenses of the applicant in removing the child.

SMIT AND VAN NIEKERK V. DUCKWORTH AND SMITH.

Mr. M. Bisset moved for leave to sue the respondents by edictal citation for £465 for goods sold and delivered, with interest. The defendants were last heard of in Clanwilliam.

Order granted, the edictal citation returnable on 12th January, and to be published once in a newspaper circulating in Clanwilliam.

Ex parte BRINS.

Mr. P. Jones moved for an order rectifying the transfer of a certain piece of land, which the petitioner bought from the manager of the Standard Bank, at Oudtshoorn, and which was wrongly described. The petitioner never had any idea of passing the deed of transfer in trust for his minor children. Petitioner prayed for an order authorising the Registrar to rectify the transfer in order to enable him to deal with his own property. The affidavit of his wife testified to the correctness of the statements by the petitioner, and counsel put in an affidavit of consent by the major children.

De Villiers, C.J., said he could not do so without an inquiry. A curator would have to be appointed, and he appointed Mr. Russel as *curator ad litem*, with notice of the application to be served on him.

BUFFALO SUPPLY CO. V. NATIONAL BANK.

Mr. Close moved to make absolute a rule restraining the respondents from parting with certain shares of the company.

Granted.

Ex parte DRYENISH.

Mr. P. Jones moved that a rule *nisi*, ordered to be published for the cancellation of a mortgage bond be made absolute.

Granted.

BURDETT V. WIGGETT.

Dr. Greer moved that rule *nisi* be made absolute, calling on the respondent to show cause why certain moneys, to satisfy certain provisional judgment in the court, should not be declared executable.

Granted.

Ex parte SPIERS.

Mr. W. P. Buchanan moved for the cancellation of a certain transfer of property at Darling in favour of J. G. Steytler. The Registrar's report set out that the error was due to the Registry Surveyor.

Mr. Steytler was dead, but a rule might be served on his representatives.

A rule was granted, calling on all concerned to show cause why an order should not be granted, authorising the registration publication once in two Cape Town papers, and to be served on the executor.

Ex parte FEBRUARY.

Mr. Pittman moved for an order removing a certain executor in an estate, who was at present confined in Robben Island as a lunatic.

Granted.

Ex parte TRUTER.

Mr. D. Buchanan moved for an order authorising the Registrar of Deeds to pass transfer of certain property to the petitioner, who was co-executor in the estate of his father, Petrus Johannes Truter, with Mr. G. W. Steytler. The property in question was well advertised, and Mr. Steytler considered the price a fair and reasonable one.

De Villiers, C.J., said that under the special circumstances of the case, the order would be granted.

Ex parte WARNER.

Mr. Gardiner moved for leave to sell certain property in the estate of a native, named Bombani, who had left his property in trust for his children.

The matter was referred to the Assistant Chief Magistrate of Engcobo, more especially for his opinion as to the distribution under native customs.

Ex parte LE ROEX.

Mr. W. P. Buchanan moved for the appointment of a *curator ad litem*, in the interest of certain minors, in the distribution of certain property, one-half of which his lordship had granted the sale of for liquidating certain liability in the estate.

Granted.

HIGSON V. HIGSON.

Mr. Russell moved for the appointment of a commission in England to take the evidence of the plaintiff and her witnesses.

Granted. Mr. Mackarness to act as commissioner.

Ex parte MENGERS AND VON LIESON.

Mr. McGregor moved for an order as to the registration of a certain trade-mark. Counsel was not aware whether the Registrar was represented by counsel, but his report was distinctly unfavourable.

Petitioners represented a firm in Berlin, and made application in May last for the registration of a certain trade-mark of a sewing machine. Messrs. Oppenheimer, of London, objected, and the Registrar of Deeds refused the application, on the ground that the owners should have made it. Petitioners prayed for an order directing the Registrar of Deeds to hear the application in their name. Affidavits were put in, giving petitioners authority to apply in their own name, and to have it transferred afterwards to the names of the principals.

De Villiers, C.J., said he could not disturb the decision of the Registrar. The Act contemplated that application should be made in the name, and on behalf of the proprietor, and the present applicants did not pretend to be owners. The application would be refused.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

TRIAL CAUSES.

LATEGAN V. COLONIAL GOVERNMENT. { 1904.
Nov. 15th.
" 16th.

Fire—Railway—Negligence.

This was an action brought by Benjamin Lategan, farmer, district of Worcester, against the Colonial Government for £100 damages, in respect of a fire upon his land, alleged to have been caused through the negligence of the Railway Department.

The declaration set out that trains belonging to the defendant were run over certain lines passing through the plaintiff's farm. On the 23rd January, 1904, defendants ran an engine over the line through the plaintiff's farm. It was the duty of the defendant to construct and maintain and work the said engine, so that no sparks, living coals, clinkers, or fire therefrom should set fire to the plaintiff's land, and it was their duty to prevent any fire which might be caused on the said railway line from spreading to the plaintiff's land. The defendants had neglected their duty in that behalf, and had so negligently and improperly constructed, maintained, and worked their engine that sparks and so forth from the engine set fire to the defendants' railway line, which fire was allowed to spread to the plaintiff's land, and, as a consequence, he had lost a large number of blue gum trees and fruit trees, his grazing veld was burnt, and also his wooden fence. He claimed damages in the sum of £100.

The defendants, in their plea, admitted the formal allegations, and admitted that it was their duty so to maintain and work the engines run by them that no fire therefrom, if the same could be prevented by reasonable care and caution, should set fire to the plaintiff's land, and also to prevent fire originating through the act or default of themselves or their agents from spreading to and over the said land. Save as aforesaid, they denied all the allegations in the plaintiff's declaration, and prayed that the claim may be dismissed, with costs.

Sir H. Juta, K.C. (with him Mr. P. Jones), was for the plaintiff; Mr. Schreiner, K.C., (with him Mr. Howel Jones), was for the defendant.

Evidence was called in support of the claim.

Benjamin Lategan (the plaintiff) said he was a farmer, and lived near the Breede River Station. On the 23rd January, he left his farm early in the morning, and came back a little before sundown, and got out at the station. After walking along the line and passing through his vineyard, he went to his house, and he then walked down to the place where a fire had broken out. He sent a letter on the same day to the Government, claiming from them the sum of £100 damages. He pointed out that the "down" train that passed his farm between 10 and 11 o'clock that morning threw fire into his summer paddock, and burned all the grass, besides about 300 blue gums, and about a dozen peach trees. Afterwards, in a letter to the Government, he stated that he had ascertained that he was wrong in supposing that the fire was caused by a "down" train, and that, as a matter of fact, it was an "up" goods train. Witness traced the fire. There was an embankment from the railway sloping down to witness's ground, which was separated from the railway by a wooden fence. The grass was dry in summer. There had also been a fire caused from the railway in December. Part of the fencing had been burned by a fire early in January. There was high grass near by. Witness spoke to receiving a notice from the Railway Department regarding the making of fire-paths, so as to minimise the danger of fires along the track. He received the notice in 1902. He gave the inspector authority to clear three feet on each side of the fence on his land. In some parts the path was made, and in others it was not. The palmietgat was left uncut. The path was not kept clean. Witness spoke as to the accuracy of a number of photographs (produced) of the scene of the fire. He said he traced the fire within three feet of the rails. He found cinders on the freshly-burnt place, along the embankment. Witness had no reply to his letter until May, when one of the engineers came to the farm to see about the fire-path. The engineer gave instructions to his men to have the fire-path cleared. The work was partly carried out, and was not completed until last week. A further fire occurred in October, and there was another outbreak last week. If the grass were kept clear between the fence he did not think any fires would occur. He did not think that the sparks from the engines were the cause, but rather the stuff that came from underneath. His losses included between 300 and 400 blue gums, 30 peach trees, and the summer grazing. He considered that the amount of the damage would be about £300. The value of the blue gums would be about 15s. each. The fruit trees were worth about £5 each.

Witness received this year a further circular from the department in regard to the making of fire-paths.

Cross-examined by Mr. Schreiner: The paddock was also known as a vlei; witness called it a vlei. He was not aware that there was a fire on the vlei about half-past eight on the morning of the 23rd January. Witness went from home by the early morning train, and he would not have an opportunity of knowing what took place on the farm about 8.30 a.m. A report was made to him on his return from Worcester by his wife and his foreman, Le Roux.

By the Court: He had heard from the railway employees that they had taken up the position that there was a fire on the land at 8.30.

Re-examined: A fire-path was made in 1902, but the palmietgat was not touched.

Rudolf D. le Roux, overseer for the plaintiff, said that from the ground that he cultivated he could see the railway line. He remembered Saturday, January 23; witness was working in his garden in the morning, with his face towards the line. He did not see any trains pass in the morning; he saw trains pass towards Cape Town between 11 and 12 o'clock. He saw no fire or smoke in the camp, before the trains had passed; he saw smoke soon after a goods train had gone by. The goods train was preceded by a passenger train. No fire-path had been made on the site of the palmietgat. At first he did not take much notice of the fire, and after dinner he went to sleep. When he awoke the fire had spread from the railway line, and had burnt nearly all the gum trees. If the property had been his, he should have claimed a sum of not less than £150 as damages.

Cross-examined by Mr. Schreiner: Had it not been for the steps they took to put out the fire much greater damage would have been done.

Hans Plessis, a labourer, in the plaintiff's employ, stated that the fire broke out on the line side after the second train had gone by in the direction of Cape Town. They did not take any steps at first, but after dinner they found that the blue-gums and fruit trees had been reached by the fire.

Reyno Palm, son of a neighbour of the plaintiff, said that the fire broke out about noon on the 23rd January.

Hans Dampers, a coloured labourer, said he did not see any fire at the point in question until about 11.30 a.m., when two trains went past. He saw a fire when the second train had gone by.

Gideon Francois du Toit, farmer, living near the plaintiff, said that in September, he made an examination of the blue-gum and fruit trees damaged. He thought plaintiff's estimate was too low, and should have been £200.

Cross-examined by Mr. Schreiner: He counted about 350 gum trees that had been damaged; he reckoned their average value at about 10s.

Frederick Lindenberg, of Worcester, gave evidence as to a rough plan that he had drawn of the scene of the fire.

Sir H. Juta closed his case.

Wm. Heath, stationmaster at Breede River, said that Green, the foreman, went off duty at 7 a.m. on the 23rd January. Witness had had a list prepared of the trains passing through on that day, and also showing whether they were goods or passenger trains. Witness went on duty about 7 o'clock, and he did not take over the cash until about 8.35, when he went to his breakfast. On the way to breakfast, Green drew his attention to a fire on B. Lategan's farm; they saw smoke rising; they could not see a blaze. The smoke was rising on the side of Palm's farm, nearer to the station. Witness saw the smoke nearer to Mr. Lategan's house about 11 o'clock. When witness first saw the smoke rising, about 8.40, it was quite away from the line. His idea was that the fire had nothing to do with the railway. Nearer the dinner hour a fire broke out on A. Lategan's farm, nearer to the station. This fire was the subject of another claim. Witness went down the line to the spot on the following day, but he could find no indication as to where the fire had commenced, because the ground was black from a point near the fence away towards B. Lategan's house. About 11 o'clock on the 23rd January he saw the fire travelling towards the line. The gangers on the railway frequently destroyed the veld on the line side.

Cross-examined by Sir H. Juta: He did not regard the fire path as a "luxuriant garden of weeds." The wind was blowing right across the line towards Mr. B. Lategan's house; he could not say in what direction it was.

Joseph Green, foreman, Breede River Station, said that soon after the 8.30 a.m. passenger train had left, he observed heavy smoke rising behind the oak trees in B. Lategan's paddock, about 100 yards from the line.

Cross-examined by Sir H. Juta: The smoke was being blown across in the direction of Mr. B. Lategan's house. He thought the wind was blowing from the north-east. He should say the fire was not far from the blue gums when he saw the smoke.

By the Court: He did not think the smoke that he saw could have been rising from Palm's house, even though he had had a big fire.

Gert Danster, a platelayer employed near the Breede River Station, said that on the morning in question, between 9 and 10 o'clock, he saw a fire in the vlei, between the line and Mr. B. Lategan's house. The fire was outside the line fence. Inside the fence they had burned

grass eight days before. The fire travelled towards the railway. He did not think the fire that he saw could have been caused by an engine; it was too far away from the line.

Cross-examined by Sir H. Juta: He had only been in Die's gang a few days when he saw this fire. He did not know what the present month was. When he saw the fire, it was not near the blue gums, and he thought it could not have reached the trees. The wind was blowing from Bain's Kloof.

Laban Die, ganger, Breede River, said that there was a fire on the 23rd January on Mr. Lategan's farm. He received a report from the last witness. Witness's duty was to put out all fires caused by the engines. Later, witness saw smoke rising; he walked along the line about half-past eleven, to catch the 11.47 train from Breede River to Ceres-road. He saw a fire at Lategan's camp; it was then coming nearly over the camp. There was no fire on the embankment. Witness had burned the dry grass on the embankment about eight days before; this had gone to the wooden poles of the fence, which witness replaced with iron standards.

Cross-examined by Sir H. Juta: He burned the palmiet in January in order to clear the bank. He went to Breede River Station on the 23rd January because of the report made to him by Danster, and of the instructions he had received to put out any fire on the line.

Patrick Bergen, railway inspector, stated that in January, 1904, he was in charge of the district. He first saw the scene of the fire on the 17th February. From what he heard from Mr. A. Lategan, he did not see Mr. B. Lategan. He could swear that 110 gum trees were scorched by the fire, and in that total he included every tree growing by its own roots. Certainly, not half of the trees scorched were destroyed, he calculated the number at about ten.

Cross-examined by Sir H. Juta: He was not the inspector of permanent ways. He thought it was better to inspect the place himself without calling on Mr. Lategan. He did not visit the farm with a prejudiced mind.

By His Lordship: He was so satisfied with the information he received about the fire that he did not think it worth while to speak to Lategan.

Thomas Holohan, locomotive inspector, said he examined the engines which passed the farm on the morning of the 23rd. The engines were in good order, and fitted to prevent as much as possible the spread of sparks. Small sparks could not be prevented from falling from the grid-way. It was possible that sparks striking the rails or the wheels might drop on to the embankment.

By De Villiers, C.J.: Whatever precautions were taken it was possible for

the engine to set fire to dry grass at the side of the line.

Mr. Schreiner closed his case, and counsel having been heard in argument on the facts.

De Villiers, C.J.: I quite accept the proposition of the learned counsel for the defendant that the plaintiff can not succeed in this action unless he prove first of all that ashes and cinders from the locomotive caused the fire, which spread to his property, and, secondly, that the fire was caused through the negligence of the Railway Department. The defendant has produced evidence as to the appliances for preventing sparks from locomotives doing any injury. I am satisfied every precaution had been taken that could reasonably be expected, but the same witness was bound to admit that, notwithstanding these precautions, and notwithstanding the use of the best Welsh coal, fires had occasionally arisen from ashes and cinders, and that where dry grass was growing near there was every probability of a fire. The English case on this point can not be of much material assistance to the Court, considering the great difference in the climates between the two countries, the moist climate to England to a large extent preventing any great danger from sparks which undoubtedly exist in this Colony. In the month of January the veld is parched, and there is always a great danger of the slightest spark causing a conflagration, and, therefore, I consider the least that can be expected from the Railway Department is that they will keep the portion within their own control clear of grass, or any inflammable materials. That opinion has previously been expressed in the Supreme Court in more than one case, and it is an opinion that has been expressed by the department themselves, as evidenced by the circular of July, 1902, sent out to the farmers by the District Engineer. If the Government keeps the portion within their control clean, I will not say that should absolve them entirely from liability, but it should throw the onus on the claimant to show negligence. I am satisfied the fire-path, which was agreed upon by the plaintiff and the defendant, had not been kept clear by the defendant, and I think if ashes or cinders from the engine caused the fire, the Government will be responsible for not keeping the embankment clear of grass. I am convinced that it was caused by the defendant's engine. The defendant ought to have given the plaintiff the credit of being honest when he invited an investigation as to the cause of the fire, but the department kept him at arm's length, and ultimately made an investigation in the absence of the plaintiff. The department apparently preferred to take the report of their officials, and the only course for the Court is to give judgment for the plaintiff. In regard to

the amount of damages, no doubt there is always a tendency to exaggerate the amount of damages, and I do not think it good public policy to award more damages than the amount actually sustained. The Government has important functions to perform towards the public and accidents do sometimes occur, and I think their liability should be confined to the amount actually sustained. The Court should look at the material damage sustained, which in my opinion is about £50, and judgment will be for that amount with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BACHELOR V. SOUTH AFRICAN BREWERIES. { 1904.
 { Nov. 16th.

This action was set down for trial by jury to-day.

Mr. Gardiner (in the absence of his leader, Sir Henry Juta, K.C.) appeared for the plaintiff; Mr. Upington (with him Mr. D. Buchanan) for the defendant.

Mr. Upington said that, before the jury was called, he wished to make application for the postponement of the case. On the 10th inst. defendants applied to have the case postponed on account of a material witness being ill with enteric fever and unable to give evidence. The Court refused to grant a postponement, but made an order that the evidence of this witness (Mr. Polmear) should be taken on commission. Mr. Polmear's medical attendant, however, regarded the patient's condition as being too serious to admit of this being done, and application was now made for a postponement, the Court having intimated when granting the order for a commission that leave would be reserved to the defendants to move for a postponement on the day of trial. The case arose in connection with a contract for the building of a brewery depot and hotel at East London, plaintiff claiming damages for alleged breach of contract.

Affidavits were read in confirmation of counsel's statement.

Mr. Gardiner opposed the application, stating that the principal witness for the plaintiff had come from England, and it was imperative that he should return shortly.

After hearing counsel, The Court ordered that the case be postponed *sine die*. Hopley, J., intimating that it would be left to the attorneys of the parties, both of whom

seemed anxious to facilitate the hearing of the action, to make the best arrangement possible with regard to fixing a date for the trial. Instructions would be given to the Registrar to set down the case out of term, and the question of costs would be reserved.

GENERAL MOTION.

FELTHAM V. SCHLATER.

Misjoinder of parties—8th Rule of Court.

The Court refused an application to amend a certain record by substituting the name of L. F. (married out of community to H. J. F.) for H. J. F.; holding that the 8th Rule of Court made it incompetent for the Court to grant the application.

This was an application calling upon the respondent (Wm. Lutley Schlater) to show cause why the record in a certain case, in which Henry John Feltham was the plaintiff and the respondent was the defendant, should not be amended by substituting as plaintiff, instead of Henry John Feltham, Louisa Feltham, married without community of property to H. J. Feltham, and by him duly assisted, as far as need be, the applicant tendering costs of plea in abatement. The action was for £75 damages, alleged to have been caused through the respondent, who was a tenant of Mrs. Feltham, having removed certain rose-trees and other plants from a garden, and having also damaged the house. Defendant tendered £15. The declaration alleged that H. J. Feltham was the registered owner of the property, and that the defendant filed a plea in abatement, saying that H. J. Feltham was not the registered owner, and that the lease was not between him and the defendant. Upon inquiry it turned out that it was not H. J. Feltham, but Louisa Feltham, who is the owner of the property, and that the lease was entered into with the latter. Applicant was ignorant of this until the pleadings were filed.

It transpired from the affidavits that Mrs. Feltham was absent from the Colony. Applicant, however, offered to give security for the costs of the action in the event of Mrs. Feltham not wishing to proceed with it on her return to the Colony.

Respondent complained that the action was a vexatious one, and that the applicant—the son—had an indirect mo-

tive in bringing the action. He (defendant) believed that the action was brought without the knowledge of Mrs. Feltham.

The applicant stated that his mother was aware of the proceedings, and he believed that she wished to proceed.

Mr. Upington appeared for the applicant; Mr. Gardiner for the respondent.

Mr. Upington said the amendment was a purely formal one, and no prejudice could accrue to the respondent if it was allowed.

[Hopley, J.: As a matter of practice, have you any precedent for this course? Has a case arisen here or in England where the Court has ordered the substitution of the proper plaintiff for a wrong party in face of objection by the defendant, who comes into court, and says he is brought in by the wrong person?]

Mr. Upington: There have been cases both here and in England, where, upon exception to non-joinder, a person has been allowed to be joined. That is really the case here, because H. J. Feltham will have to be a party.

[Hopley, J.: He is not a plaintiff; he is just the legal person to assist the plaintiff.]

Mr. Upington said he quite appreciated that, on strict technical grounds, his client had not a leg to stand on, but he submitted that the Court would not in a case of this sort, where there was no prejudice to the defendant, allow him to push technicalities to the extent of expending costs on the plaintiff.

Mr. Gardiner contended that to allow the application would create a very dangerous precedent, and would be directly in conflict with the 8th Rule of Court.

Hopley, J., said there were many reasons why he should have liked very much to assist the applicant in this matter. First of all, whatever the Court was in the habit of doing, as argued by Mr. Upington, in not allowing the prevalence of technicalities over equitable considerations, he, personally, was very strongly imbued with similar principles in his own feelings. He always tried to brush away technicalities, and consider the equities, but there was a technical side to the law, as well as an equitable one, and the technical side was regulated by strict practice and observance of the Rules of Court. He was sorry the present application was made, because it put him to decide between his own feelings, which were all in favour of a course which would avoid an accumulation of costs, and his due regard, as a Judge of the Court, for the practise of the Court, and for the observance of its rules. As to the merits of the dispute between the parties, he had not the slightest knowledge of them, and all he could say was that it seemed a pity that there should be what appeared to be a squabble about a matter of this sort. But that was not

what he had to consider. His Lord-ship read the eighth Rule of Court, which provides that a warrant or power to sue shall be signed by a complaining party before action can be brought, and, proceeding, said that without such warrant from the proper plaintiff—Mrs. Feltham—the defendant could not be sued. It was going a long way, therefore, to call the breach in this case, a mere technicality. It was a technicality, certainly, but it was one of the things that was strictly required, and he did not see that it stood on the same footing with a plea of abatement in an instance where, say, a partner was omitted to be joined. He was now asked to put upon the record, as the proper person to sue, the person who ought really to have been there originally, and to let the proceedings go on, although they were improperly instituted. Even at the present moment there was no proper power from the right person to sue. To hold that the present proceedings could continue would be establishing a precedent which might create difficulties in the future, and it might bind the Court to make room for great laxity of practise. The respondent had, after all, stood on his strict legal rights, as he had a right to do. With all sympathy for the applicant, who naturally wanted matters rectified at the least possible cost, he did not think he could, with proper regard for the practise and rules of the Court, grant the application, especially when by so doing he would be penalising the respondent, who had, admittedly, done nothing wrong. The application must be refused with costs.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

TRIAL CAUSE.

LAWRENCE V. LAWRENCE. { 1904.
Nov. 17th.

This was an action in which the plaintiff, Arthur Lawrence, claimed from his brother Robert transfer of certain six plots of land and damages. The circumstances were that at about the beginning of the present year, the plaintiff was in possession of these plots. The defendant had been living for some fifteen months previously with the plaintiff at West London on the Cape Flats, and both were, at about this time, anticipating a legacy,

which would benefit each to the extent of about £100. The plaintiff was pressed for the money, and he endeavoured to mortgage these plots, but he failed. Thereupon his brother, the defendant, who was under obligation to him, decided to take the plots over from him for the sum of £100, this, the plaintiff alleged, being done with the stipulation that the ground should be re-transferred to him (the plaintiff) when he became able to pay his brother the amount advanced. Plaintiff now stated that he had repaid the defendant the amount loaned, and he accordingly claimed re-transfer of the land, according to the agreement. Defendant, in his plea, said that there was no such stipulation as alleged, but that the ground was bought out-and-out without any conditions whatever. He further stated that the moneys paid to him by the plaintiff, which plaintiff said were in repayment of the amount of money, were moneys due to him by the plaintiff irrespective of this transaction.

Mr. Gutche appeared for the plaintiff; Mr. Close for the defendant.

Arthur Lawrence, the plaintiff, said that at the beginning of the year he kept a shop at West London. In about March last he was in want of funds, and endeavoured to raise a loan on the ground now in suit. The shop on the property was burned down in January. His brother was staying with him, having come to this colony some fifteen months previously. Defendant did some occasional services for witness, who supplied him with food, clothing, and pocket-money. At this time they were both expecting a legacy of £100, and defendant offered to lend him the £100, on the ground, stipulating that the money should be paid back by instalments, and that after repayment, the ground should be re-transferred. Witness was to pay costs of transfer. The legacy accrued in January, but there was some delay in sending it from England. The arrangement was that the ground should be transferred when the money came. Witness's liabilities absorbed his own £100. The arrangement between witness and his brother was made before the amounts of the legacies arrived. The legacy amounted to about £150 each. On the receipt of the money witness told his brother that, inasmuch as he had got £50 more than he expected, he would pay him (defendant) £50 off the loan. The transfer papers were then at the attorney's office, awaiting signature. Witness then gave defendant a cheque for £60, being £50 off the £100, and the balance in payment of costs. Defendant then gave him a cheque for £100. The reason he did not stop the transfer was because he had no for the balance of the £100. One morning, some time afterwards (in April), the defendant asked leave to marry witness's

daughter. Witness objected, and then offered him £50 in notes, asking him to come to the attorney's office on the following morning, so as to get the ground re-transferred. He took the money, but did not turn up at the attorney's office next morning. Correspondence ensued in May. Witness visited the defendant's attorneys, and understood from what was told him by a clerk that defendant was willing to re-transfer the ground, and he wrote to the defendant congratulating him that "his better self had, at last, asserted itself." Defendant wrote that he declined to enter into correspondence with his brother, saying that there were serious matters between him and witness, and in a later letter, written the day before that upon which the action was set down for trial, he said that he had agreed to turn King's evidence against witness on a charge of arson. Witness took this letter to his attorneys, and subsequently to the Detective Department. There was no truth in defendant's allegation. Witness had been paid the insurance money on the property destroyed by fire, and had a few days ago entered into a policy on another property with the same company. Defendant came to this country unexpectedly; witness took him in, and kept him. There was no agreement with defendant as to payment of wages. Previous to his arrival, witness's wife, stepdaughter, and sister had assisted in the business, and witness had no need of his services; in fact, he had told defendant to go out and look for work.

By Mr. Close: Defendant was forced to leave England. He asked witness to go Home and endeavour to settle with his creditors, and witness went Home, but found no funds or property where-with to pay the debts.

By the Court: In England the defendant ran a sort of a loan society. He used the funds in his business, and was unable to meet his liabilities, and came to this country. Afterwards he sent witness Home to see if he could settle the liabilities. There was not nearly sufficient to pay off the amounts due to the members of the society. The power of attorney given to witness by defendant for the purpose of settling the debts expired before the legacy accrued, and therefore witness was unable to use this amount for the purpose.

By Mr. Close: Witness did not ask defendant to stay in his service at a salary of £6 a month. Witness had three shops, but defendant did not manage any of them. Defendant was not left in charge of the business when witness went to England. He left his daughter and a Mr. Hall in charge of his affairs. Witness was in a temper when he paid defendant the £50 in notes, but he did not think it necessary to get a receipt from his own brother. Witness could not remember exactly what the clerk at the defendant

attorney's office said to him about the re-transfer of the ground, but the impression left on his mind, from what the clerk said, was that defendant was willing to re-transfer the property.

[Hopley, J.: Why didn't you, instead of transferring the ground, give your brother a mortgage on it?]

Witness: I had already tried to raise money on mortgage, and it was my brother's own suggestion that I should transfer the ground.

[Hopley, J.: But why didn't you offer him a mortgage?]

It didn't strike me. I had tried to get money on mortgage, and this seemed to me to be the only way out of the difficulty.

Beatrice Ligo, stepdaughter of the last witness, gave confirmatory evidence. Defendant had told her that her brother had sold him a piece of land, and that he was to sell it back again. He also told her that he would hold back the transfer until plaintiff consented to his marriage with witness. Witness had consented to marry him. After defendant left the house, witness and he corresponded. In one letter defendant said: "I am not prepared to transact business with anyone outside my own farm until my marriage. I think that is a fair offer. I have to wait, and others will have to wait." Defendant told her in July that if he could not ruin his brother in one way he would in another.

Mr. Gutsche closed his case.

Robert Lawrence, defendant, stated that when he came out here he intended going to Johannesburg. After seeing his brother, he was advised not to go, and his brother agreed to engage him at £6 a month. Witness was at work from six o'clock in the morning until the shop closed. At the end of January a fire took place, and witness knew that the plaintiff was going to burn the place down. The plaintiff was insolvent at the time. The money from the insurance had come in before witness purchased the ground, and there was no idea of re-transference. The ground was bought out and out, and witness got transfer. He never had any knowledge that his brother had the transfer deeds.

By Hopley, J.: His letter of the 6th May meant that he would re-transfer the ground if he was paid the same price. The £68 10s. paid to him was for wages, the salary due amounting to £90.

He did not receive any small sums of money from plaintiff and Beatrice Lawrence. He brought £35 away with him from England. He had enough money to carry him to Johannesburg.

In cross-examination by Mr. Gutsche, witness put in a letter signed by "George Weston," and written at defendant's dictation.

After some remarks with regard to the charge of arson, witness, in answer

to his lordship, said he still hoped to appear in the witness-box to give evidence against his brother.

Henry Joseph Findlay, attorney in the firm of Findlay and Tait, gave evidence as to the transfer of the property. He gave plaintiff no reason to suppose defendant would be willing to transfer the ground back again.

Counsel having been heard in argument on the facts,

Hopley, J., said that, with regard to Mr. Close's argument that the defendant was in a better position than he was when in possession of the land, before a man could be removed from such a strong position the Court would have to be absolutely certain that anyone wishing to dispossess him would have to show clearly that they would have the right to have the land transferred to them. This difficulty therefore faced the Court at the start, and it was a difficulty which would have to be overcome before any judgment for the plaintiff could be given. The whole of the case had disclosed a series of somewhat strange transactions between two men, who were also somewhat out of the ordinary. Neither of them seemed to do anything exactly the same way as other men, and they had large gaps in their armour of absolute veracity and truthfulness. No plea had been put forward that the land had been transferred to the defendant to enable the plaintiff to defraud his creditors, and so defeat the ends of justice, and it was not suggested that there was any immorality in the matter. It was possible something of that sort might have been at the bottom of the transaction. Nothing to that effect having been mentioned, he had only to consider on which side the balance of evidence lay as to the truth of the allegation that there was an agreement that the land should be transferred. When the defendant gave a cheque for £100 to the plaintiff, the latter also gave a cheque for £68 to the defendant. That seemed to him to be illogical and wrong, and more natural, instead of two cheques passing, only the balance had been paid. The full amount, however, was paid on both sides. After reviewing the evidence, His Lordship said that both parties could not be considered quite honest, yet it would seem that the plaintiff's character would not seem to be so discreditable as the attitude taken towards him by the defendant. If there was any truth in the allegation of arson, then the letter written by the defendant was one of the most discreditable productions ever seen in a court of law. As the matter stood, His Lordship was inclined to believe the evidence of the plaintiff that at the time the ground was bought, it was understood that it would be transferred. He thought the money had been paid, and he did not believe the defendant's

contention as to wages. Judgment would therefore be given for the plaintiff for the retransfer of the land, with costs.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

COWLEY AND CO. V. VASSIES. { 1904.
{ Nov. 18th.

Mr. Close moved as a matter of urgency for an order attaching certain bales of tobacco, the property of applicants, which was at present in bond at Cape Town, and for leave to sue the defendant, whose whereabouts were unknown, by edictal citation, for the purchase price, £96 12s.

An order of attachment *ad fundandam jurisdictionem* was granted, with leave to sue by edictal citation, returnable 12th January, the order to be published in Johannesburg.

WIBER V. FISH.

This was an application on notice of motion to have a certain order of Court granted in October last amended, and to have certain property on which the applicant had a first mortgage bond for £1,800 transferred to him free of a certain lease which had been entered into after the bond had been executed to the prejudice of the bondholders.

The affidavit of the lessee, set out that under the terms of the lease between Fish and himself, he had a tenancy for a period of four years, and not for three years as stated by the petitioner. He had paid £48 for a year's rent in advance, and if the application was granted he would be put to great inconvenience.

Mr P. Jones was for the applicant, and Mr. Russell for the respondent, Macafini.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The lease in question was executed after the bond in favour of the applicant. When the interest fell due the applicant then sued the defendant, and an execution was ordered, and no

protest was made on behalf of the respondent, the lessee, against the property being sold free of the lease. Accordingly the lease was not mentioned at all, and a purchaser therefore might fairly assume, as the mortgagee seems to have assumed, there was no lease upon the property, and notwithstanding the circumstance that the lease was not mentioned the highest bid was £1,650, far less than the amount of the bond. Clearly, therefore, if this statement is true, the mortgagee was prejudiced by the lease, because with the lease the property would have sold for much less. I consider, therefore, the mortgagee is now entitled to claim that the property shall be held free from the lease. The only question is one of costs. The affidavit of the respondent is to my mind wholly unsatisfactory. He does not say that he was not aware of the sale, and he doesn't say that he attended the sale. After he received this notice of motion, it was quite competent for him to ascertain the grounds upon which the Court ordered the property to be transferred to the applicant. The application is for an amendment of that order, and it is quite competent for the respondent to have got the information. Such information as is given by the applicant in this case, was sufficient, and it was quite competent for inquiry, but he closed his eyes, and now he says he was not aware of the application. The application will be granted with costs.

Hopley, J., concurred.

ESTATE TANTSI V. EXECUTOR. 1904.
TOBIAS ESTATE NCHELA. { Nov. 18th.

Native Succession Act, 1864—
Community of property—
Setting aside appointment of
executor.

A native, to whose property Act 18 of 1864 would apply, having died, the respondent was appointed as executor, and two years after his appointment the applicant, a son of the deceased, applied to have the appointment and all proceedings thereunder set aside, alleging as a cause of prejudice that one-half of the estate had been awarded to the widow of the deceased, whom he had married according to Christian rites.

Held, that in the absence of an antenuptial contract, the deceased must be presumed to

have been married in community, and that, although letters of administration were not necessary on his death, yet as the appointment had been made and the estate fully administered without any prejudice to the applicant, there was no good ground for setting the proceedings aside.

This was an application on notice of motion calling on the respondent, the executor of the estate of Nchela, to show cause why an order should not be granted stopping the administration of a certain estate for the purpose of administering it under the Native Succession Act of 1864, and for the setting aside of the executor, Mr Bolus.

The affidavit of Mr. Bolus stated that he was appointed executor in the estate of Sabina Nchela. The petitioner, by filing an account in the estate, had acknowledged deponent's legal status, and if the application were granted, the result would be confusion and trouble.

Mr. Buchanan (for applicant). The case of *Xasa v. Xasa* (1, E.D.C., 201) shows that natives married by Christian rites enjoy community of property under Act 18 of 1864. See also *Tabata v. Tabata* (5, E.D.C., 328) which shows that the estates of Christian natives living in locations should be administered according to native law under Act 18 of 1864. There Blain, K.C., argued that if the community came into effect it might happen that the whole of the property would be given away, and that the eldest son would be left with the burden of supporting the widow.

[De Villiers, C.J.: If natives marry according to Christian rites they surely enter into community. If they marry according to native rites, they must follow native law.]

I cannot contest the community as to half the property. We have no certificate of the second marriage. If Jonas was born before his parents was married, that Christian marriage could not prejudice his rights under native law. The information is meager. I should wish to point out that Act 39 of 1887 exempts registered voters from the provisions of Act 18 of 1864.

Mr. Benjamin (for respondent): Act 18 of 1864 does not apply to this case. It is not stated that deceased had a certificate of citizenship, neither Section 2 nor Section 6 of the Act of 1864 applies. This location had never been proclaimed by the Governor.

[Hopley, J.: Is it necessary that a special location should be proclaimed under this Act, or is not a general proclamation sufficient?]

Certain "Native Locations as described by the Governor" must mean locations proclaimed under this Act. The Act clearly refers to locations already proclaimed. The Act does not apply, because, in Xasa's case (7. E.D.C., 201), the man is said to have held a certificate of citizenship, and this would have been unnecessary if the Act applied. If the Master had no right to appoint an executor dative in the one of these estates, he had no power to make a similar appointment in the other, and my learned friend has no *locus standi*. The onus is on him to show on what ground this Act applies, and, if he can show that, he will show that he and his clients are out of Court.

Mr. Buchanan (in reply): Jonas was a registered voter, and therefore the Master was quite justified in appointing an executor dative under Act 39 of 1887, and we have a *locus standi*. It has never been argued that a special proclamation is required to bring a location under any special Act. Section 4 of Act 37 of 1884 recognizes all locations already established.

[Hopley, J.: That applies only to private locations. Act 8 of 1878 deals with public locations, but that is repealed by Act 37 of 1884.]

De Villiers, C.J.: The person in respect of the administration, of whose estate the Court is now asked to interfere, died as far back as 1896. Then in 1902, it would appear, the letters of administration were issued in favour of the respondent, and now, after the estate has been under administration for two years, the applicant comes forward in order to have all proceedings in this estate set aside on the ground that he, as a son of the deceased, is entitled to the whole of the estate. Now, the Court will not interfere with the administration unless the applicant can show that he has been prejudiced by it. If the testator was married according to Christian rites the presumption is that he and his wife intended to be married in community of property. Upon his death, therefore, his widow was entitled to one half of their joint estate, and there is nothing in Act 18 of 1864 to deprive her of that right. There was no necessity for letters of administration from the Master, but the question is whether after the estate has been fully administered, the Court should now set aside the appointment of the respondent as executor, and all proceedings thereunder, without proof of some prejudice to the applicant. The only tangible objection raised by him is that one half was awarded to the widow of the deceased, but that she was entitled to. In other respects the distribution appears to have been according to the customs and usages of the tribe to which the deceased belonged. The applicant having received everything he would have been entitled to if his

father's estate had been administered under the Act, is not, in my opinion, entitled to the order asked for, and the application must accordingly be dismissed with costs.

Hopley, J., concurred.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorneys: Findlay and Taft.]

Ex parte WOOD.

This was an application on notice of motion, calling on the respondent to show cause why an order granted 20th October should not be changed by coupling Henry Richard Wood as a co-liquidator with Mr. Steytler. Counsel said that insolvent company, the Orange River Irrigation, Limited, were indebted to the East Loan and Investment Company to the extent of £3,500 on second mortgage. On 20th October certain creditors to the amount of £240 and £120 respectively, had the company wound up, and George William Steytler was appointed as liquidator. Petitioner and the directors were thoroughly acquainted with the farms, and it was thought that in the interest of the second mortgagees the petitioner should be joined with Mr. Steytler to liquidate the company.

Sir H. Juta, K.C., was for the petitioner, and Mr. Schreiner, K.C. (with him Mr. Sutton), was for the respondents.

Mr. Schreiner said that the Government were creditors to the extent of £4,000, and they had no objection to Mr. Steytler, and Mr. Walbeck, the late secretary of the company, was in Cape Town, and was in a position to give Mr. Steytler any advice he required.

Sir H. Juta said no doubt the Government would be indifferent, as they were thoroughly secured.

De Villiers, C.J., said the learned counsel for the applicant had very fairly argued the matter, as if all the information had been before the Court on the first occasion, but he could see no reason to suppose Mr. Steytler would not be sufficient for all the purposes, and he felt confident that if all the information had been before the Court on the occasion of the original application Mr. Steytler would still have been appointed. The applicants could lay before Mr. Steytler all the information they possessed, and Mr. Steytler would no doubt give it consideration. The application would be refused, costs to come out of the assets of the company.

AFRIKA V. RHENISH MIS- } 1604.
SION SOCIETY. { Nov. 18th.

• Resident Magistrate's Court—
Civil action—Noting appeal
—Leave to appeal.

The defendant, in a Magistrate's Court, against whom judgment was given in an action for rent, noted an appeal with the Clerk three days after the next Court day, under a mistaken impression as to the days on which the Court usually sat.

Held, that it was competent for the Supreme Court to give leave to appeal notwithstanding the omission to note an appeal on the next Court day after judgment, and as important interests were involved and the appeal was not shown to be frivolous, the Court granted leave to appeal.

This was an application to have an appeal noted against a decision of the Resident Magistrate of Tulbagh. The affidavit of Wm. Coulton, attorney, set out, that notice of appeal was given, and that it was understood that November 4th was the Court day. The petitioner notified the Resident Magistrate's Court of the intention to appeal, and in reply the Magistrate's Clerk wrote that section 33 of Act 20 of 1856, had not been complied with. The notice should have been handed in on the 30th October.

Dr. Greer (for applicant). The court had always granted relief when through a *bona fide* mistake a technicality had not been complied with. Such relief had been granted in *Smith and Another v. Pinto* (Buch. 1868, p. 105). In *Jones v. Cape Town Town Council* (S.C.R. 13, p. 4), and in *Hills v. The Colonial Government* (Cape Times L.R. 13, p. 1124), the principle had been laid down that the court would always facilitate appeals when the only bar was non-compliance with some formality. In this case it was apparent that the mistake was *bona fide* as appeared from the intimation of intention to appeal when the judgment was given, and the fact that on November 3 the notice of appeal was sent and the cheque for amount of deposit. This was a test case, and large interests were involved. The rights of several hundreds of natives were really the subject in dispute. As it was a test case, it was emphatically one that should come before the Supreme Court, especially as

it was alleged that a question of title was raised.

Mr. Schreiner, K.C. (for respondents). An appeal must be noted within four days, and due notice must be given in writing, see *Mossel Bay Municipality v. Wiggitt* (2 C.T.R. 181). So also in appeals under the Charter of Justice. *Montmort v. Board of Executors* (4 Juta, 61). If this were a matter which should go further we might consent to an extension of time, but feel that a great injury will be done to the Mission if this matter is allowed to stand over. The case of *Smith v. Pinto* was only heard *in camera*, and is not binding on the Court. Mr. Coulton's affidavit is contradicted by that of the Magistrate. The Magistrate states that he said the next Court day would be October 31st. Jones said November 4th. He must have been mistaken. The rule as to noting an appeal on the next Court day is imperative.

Dr. Greer in reply.

De Villiers, C.J.: The case of *Smith v. Pinto* (Buch. Rep. 1868, p. 105), is an authority for holding that the Court has the power to grant leave to appeal from a Magistrate's Court in a civil case, although appeal was not noted in due time in terms of the 33rd section of Sched. B. to Act 20 of 1856. The 42nd section of the same Act confers criminal jurisdiction "without appeal or review" on Magistrates. The 4th section of Act No. 21 of 1876 for the first time gave a right of appeal in criminal cases, "provided that within four days next after conviction notice in writing be given to the Clerk of the Court of Resident Magistrate." This proviso was held in *Reg. v. Simenloff* (11 S.C.C. 419), to be imperative, but it was there pointed out that under the 48th section of Act 20 of 1856 the Court retained the power of directing an argument on behalf of the accused, notwithstanding that an appeal had not been noted. As to civil appeals there has been a right of appeal to this Court from its first establishment, and consequently the provisions that appeal should be noted on the next Court day after judgment has been held to be merely directory, and not excluding the power of the Court to grant leave to appeal notwithstanding the failure to note appeal in due time. The plaintiff's counsel admits that the case is regarded by the parties as a test case, and he does not allege that the appeal would be a frivolous one, but he denies the power of the Court to grant leave to appeal. The omission to note the appeal on the next Court day was caused by a mistake on the defendant's part as to the day on which the court usually sits, and accordingly the appeal was noted a few days after the time fixed by the 33rd section. It is a case, therefore, in which the power of the Court might be reasonably

exercised, but the costs of the application will abide the result.

Hopley, J., concurred.

[Applicant's Attorney: W. G. Coulton; Respondent's Attorneys: Walker and Jacobsohn].

APPEAL CASE.

REED V. PORT ELIZABETH TOWN COUNCIL.

Malicious arrest.

This was an appeal against a decision of the Resident Magistrate of Port Elizabeth, in which the applicant unsuccessfully sued the Port Elizabeth Town Council for a malicious and wrongful arrest.

From the record it appeared that in the first instance the Town Council gave notice to a firm known as the Reed Combination to quit certain uninhabitable premises, and subsequently a summons was issued against four of the brothers Reed. The appellant, John Thomas Reed, was summoned, and he failed to put in an appearance at the Magistrate's Court, denying that he was a partner in the firm, and thereupon he was arrested and lodged in gaol. On coming to Court he was informed that the case against him had been withdrawn. He then sued the Town Council for £8 and £12 expenses, and damages, for wrongful and malicious arrest, and the Magistrate dismissed the case.

Mr. McGregor was for the appellant and Mr. Close for the respondent.

Counsel for the appellant having been heard as to whether there was probable cause for arrest,

De Villiers, C. J., said the appellant was not entitled to succeed unless he could prove malice, and want of reasonable and probable cause, and the Court below had found that he had failed to prove either. The evidence given in the case fully justified the finding of the Magistrate. The Town Council was undoubtedly misled by these different combinations which the plaintiff and his brothers had entered into for the purposes of business. What the object of such combinations was it is very difficult to see. There were two brothers in combination "A," two in "B," and when the appellant was asked he refused to give any information as to whether there was a "C" in existence. There certainly appeared to be no proof whatever of malice, and the arrest standing by itself would not prove want of probable and reasonable cause. The appeal would be dismissed, with costs.

Mr. Justice Hopley concurred.

GENERAL MOTION.

Ex parte GOURLAY, CAVANAGH AND CO.

Mr. Close moved as a matter of urgency for the appointment of a provisional trustee in the estate of David Israelson, in order to carry on the business. It would be detrimental to the creditors to close the bar. Petitioners were creditors in the estate to the extent of £3,074, and it was suggested that Mr. J. E. P. Close might be appointed.

Application granted, Mr. Close to have power to carry on the business.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

APPEAL CASES.

HAAK V. BASSON. { 1904.
{ Nov. 19th.

Resident Magistrate's Court—
Jurisdiction — Damages —
Trespass — Right of way —
Bona fide defence.

To a summons for trespass in a Magistrate's Court, the defendant excepted on the ground of want of jurisdiction, inasmuch as he claimed a right of way over the plaintiff's land. The Magistrate thereupon took the evidence of the defendant's witnesses, and finding that there was no prima facie case in support of the existence of such a right of way, he overruled the exception.

Held on appeal, that, as in the absence of such a prima facie case, the defence could not be held to be a bona fide one and that consequently the jurisdiction was not ousted.

This was an appeal by the defendant against a decision of the R.M. of Prince Albert, in which a judgment was given against the appellant for trespassing on the plaintiff's farm.

The appellant was summoned on a complaint by the plaintiff at various times, and especially during June last, for unlawfully opening up the enclosures on his farm and causing the plaintiff injury. The defendant excepted to the jurisdiction of the Court on the ground that future rights were involved, and pleaded he had a perfect right to use the road in dispute. The road had been used for upwards of thirty years, and the defendant, in terms of the plaintiff's title deeds, claimed a right over the farm, and he was always ready to compensate the plaintiff. The exception was overruled, and an appeal noted. The Magistrate, in giving judgment, said that an occasional search up the mountain for stray oxen had evidently given the defendant the impression that he had an uninterrupted use of the road. If the evidence, he said, could establish a right-of-way, then thousands of servitudes might be set up.

Sir H. Juta, K. C., was for the appellant, and Mr. Burton was for the respondent.

Sir H. Juta: The defendant (now appellant) wishes to go into the whole question of right of way. As the Magistrate upheld the exception this would be *res judicata*, and if that judgment stands the defendant is estopped.

[De Villiers, C.J.: The Magistrate must take some evidence to show that the exception is *bona fide*. If a claim were plainly untenable, surely that would not oust the jurisdiction?]

The Magistrate cannot enter into the merits if his judgment would bind future rights. The facts that the defendant is now appealing shows that his claim was *bona fide*. The plea shows that a claim was not set up to this path, and was founded on a title to a *via necessitatis*. The defendant did not go into all the grounds of his claim of a right of way. If the Magistrate's judgment for trespass is to stand, the question of right of way will be *res judicata*, and future rights will be bound.

Mr. Burton: I admit that if it were shown to the Magistrate that *prima facie* there was a *bona fide* claim to a right of way, his jurisdiction would be ousted. Any defendant might avoid a just demand by setting up a bogus claim. The plaintiff is owner of these two farms. The defendant entered upon these farms and broke down our fences. He simply says: "I have a right of way." There is no evidence to prove this right of way. He says that he has a right to a *via necessitatis*, in virtue of certain stipulations in the plaintiff's title deeds. But he does not produce these title deeds; and he does but call some three witnesses, none of whom prove prescription.

[Hopley, J.: Suppose that in an action for trespass a defendant were to set up a counterclaim for a declaration of rights, would not the Magistrate's jurisdiction be ousted?]

Yes, but there was no counter-claim.

[Hopley, J.: It seems that the Magistrate was influenced by the merits to this claim to right of way.]

He alludes to it in his reasons for dismissing the whole case. The evidence of each of the witnesses is very vague. It has nothing to do with prescription, and does not go to show the *bona fides* of the counterclaim. See *Myburgh v. Cloete* (3 Menz., 564). This case goes to show that evidence must be led to show the *bona fides* of an exception to the Magistrate's jurisdiction. In *Westfall v. Bartlett* (1 E.D.C., 72) evidence was led to show the *bona fides* of the defendant's contention. In *Bertram v. Wood* (3 C.T.R., 167) the question of the Magistrate's jurisdiction as to further rights was again discussed, but there again the question of *bona fides* emerged.

[De Villiers, C.J.: But in his reasons the Magistrate does not seem to go into the question of *bona fides*, but rather enters into the merits of the claim.]

Evidence was not led for that purpose, but only to establish the *bona fides* of the defendant. That was the only question before the Magistrate.

[De Villiers, C. J.: Is title to land involved in a claim for a servitude?]

The exception was not taken on the ground of title to land being involved, but on that of future rights being bound.

[De Villiers, C.J., referred to *Grutzer v. Maddox* (3 H.C., 151).]

Some summonses show *ex facie* that a judgment would bind future rights, and in that case there can be no question as to *bona fides*. In this case the summons did not disclose anything of the kind, and hence the Magistrate could take evidence as to *bona fides*, but could not enter into the merits. He went further than this, and says that defendant's witnesses do not support his claim. I regret that evidence as to the *via necessitatis* was not put in, but the defendant did not go into Court prepared to do that. Why should he have done so?

Mr. Burton was not called upon.

De Villiers, C.J.: It is not denied on behalf of the defendant that the Magistrate had jurisdiction in an action for trespass, and it clearly lay on the defendant to adduce evidence sufficient to oust such jurisdiction. The defence was that the defendant entered on the plaintiff's land in the assertion of a right of way over it, and a counter-claim for a declaration of such a right would clearly be beyond the Magistrate's jurisdiction. If this was a *bona fide* defence it would, if established, extinguish the plaintiff's right to damages for such trespass, and, upon the principles laid down in *Bertram v. Wood* (10 Juta 177), the Magistrate would have no jurisdiction. The Magistrate, therefore, very properly took the evidence of the defen-

dant's witnesses in order to ascertain whether the defence was a *boni fide* one. The evidence wholly failed to establish a *prima facie* case in support of the existence of any right of way, and the Magistrate, therefore, correctly held that he had jurisdiction to decide the case. It is quite possible that at the trial further evidence may be forthcoming in support of the defence, and if the Magistrate should then be satisfied that it is a *boni fide* defence, it will be competent for him to dismiss the action on the ground of want of jurisdiction. In dismissing the appeal the Court will remit the decision as to the costs of appeal to the Court below.

Hopley, J., concurred.

DE LANGE V. THERON. { 1904.
Nov. 19th.

Municipal regulations — Governor's approval—*Ultra vires*.

The Municipality of M. had enacted a certain bye-law, whereby the owner of any goat who should allow it to trespass on any private property should be liable to a certain fine. This bye-law had been approved by the Governor.

Held, that the Municipal Act gives no power to a Municipality to make any bye-law, whereby a private injury done by one individual to another is constituted a criminal offence.

Held further, that the Court has jurisdiction to enquire whether any bye-laws of Municipalities, even though approved by the Governor, are intra vires or not.

This was an appeal against a decision of the Resident Magistrate of Mossel Bay. There was no appearance on behalf of the Mossel Bay Municipality, and the Attorney-General had intimated that he would not oppose the appeal. The circumstances of the case were that the appellant was charged before the Resident Magistrate of Mossel Bay in September with having contravened paragraph 2 of section 21 of the Mossel Bay Municipal Regulations, in that he unlawfully and wrongfully allowed certain goats to run at large on the property of Mr. C. W. Black. Exception was taken to this regulation, on the ground that it was *ultra vires*. It was contended in support of the exception that the Municipality had no power to

make this regulation, inasmuch as the Act of 1892, giving power to the Municipality to frame regulations, provided that animals found trespassing should be impounded. It was further stated that the goats had been impounded when trespassing on the day previous to that on which the offence now in question was alleged to have taken place, and that the prosecutor had accepted trespass money in respect of that. He gave a receipt for the trespass money, in which he stated that he did not absolve the Municipality from the performance of their duties under the Municipal regulations. The Magistrate imposed a fine of £4. In his reasons for dismissing the exception, he stated that the bye-laws had received the sanction of the Governor.

Mr. Gardiner (for appellant) contended that the regulation under which the defendant was charged was *ultra vires*. He pointed out, further, that the Magistrate had convicted the defendant of trespass on four occasions, whereas he was only charged with trespass on one date. He submitted moreover, that Black had lost his right to take proceedings, by reason of his having, on a date subsequent to the trespass with which appellant was charged, accepted trespass money. Counsel asked for costs against the Municipality or Black.

De Villiers, C.J.: The Magistrate, in his reasons, says that the Municipal bye-laws and regulations have received His Excellency the Governor's approval, and that therefore they should be held to be valid. I do not blame the Magistrate for holding this view, but this Court has continually exercised the power to inquire whether any bye-laws or regulations of municipalities are within the powers of such municipalities to enforce or not. In the present case, the bye-law, the validity of which is disputed, is to the effect that the owner of any goat who shall allow the same to run at large on private property without the permission of the owner shall be liable, on conviction of such offence, to a penalty not exceeding five pounds sterling. I can find nothing in the Municipal Act of 1892 which justifies any municipality in making a bye-law by which a private injury done by one individual to another is constituted a criminal offence, and punishable with a fine. So far as this bye-law makes it an offence to allow cattle to stray on any public thoroughfare, it seems quite within the power of the Municipality, but it cannot be carried to the extent of applying it to trespass upon private property. The Attorney-General has received notice of this appeal by direction of the Court, so as to enable him to defend the validity of this bye-law, and he has not, on behalf of the Government, appeared to

defend the validity of a bye-law which has received the sanction of the Governor. Neither the public nor the Municipality can be affected by trespass on private property, for which ample redress is provided for by law, and I am clearly of opinion that this Council had no power to constitute such a trespass a penal offence. The appellant has also asked for costs against the Municipality. It is clear that the Municipality are not parties to this suit, and although notice was given to the Municipality that costs would be applied for against them, the Court cannot give judgment for costs against them. Then as to Black, the complainant, it is true made the complaint, but according to the record, it would appear that the prosecution was a public one. Black simply finds a regulation in existence, and he makes complaint that this regulation has been infringed. I do not think the Court would be justified, then, in holding that Black is to be liable for any portion of the costs. The appeal must be allowed, and the conviction quashed, but there will be no order as to costs.

Hopley, J., concurred.

[Appellant's Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

{Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr Justice HOPLEY.]

Es parte FREMANTLE. $\left\{ \begin{array}{l} 1904. \\ \text{Nov. 21st.} \\ \text{" 22nd.} \\ \text{" 23rd.} \\ \text{Dec. 12th.} \end{array} \right.$

Election petition—Sub-agent—
Bribery — Personation —
Treating—Paying travelling
fares.

This was an election petition, presented on behalf of H. E. S. Fremantle, praying that the election of T. W. Mills, as M.L.A. for Uitenhage, be declared null and void, on the ground of bribery, treating, and inducement to personation.

The petition is in the following terms:

The petition of Henry Earldley Stephen Fremantle, of Cape Town, humbly sheweth:

1. That your petitioner and Thomas William Mills were on the 20th of June,

1904, duly nominated as candidates for membership of the House of Assembly of this Colony for the electoral division of Uitenhage.

2 That thereafter a poll was demanded and taken throughout the said division on the 12th of July, 1904.

3. That on the 14th of July, 1904, the Returning Officer of the said division declared the state of the poll to be as follows:

Thomas William Mills	1,086 votes
Henry Earldley Stephen Fremantle (your petitioner)	1,069 votes

4. That on the 19th of July, 1904, the said result of the election was proclaimed in the "Government Gazette."

5. That the return and election of the said Mills was undue by reason of corrupt and illegal practices in the following respects:

(a) The said Mills, by himself or his agents, or by other persons on his behalf, with the knowledge, consent, or approval of himself or his agents, gave or agreed to give, or offered, promised, or promised to procure, or endeavour to procure money or valuable consideration, to or for certain voters in order to induce such voters to vote or refrain from voting at the said election, and did, so far as certain of the said voters are concerned, corruptly give or procure such money or valuable consideration on account of such voters having voted or refrained from voting at such election.

Your petitioner annexes hereto a schedule marked "A," giving particulars of certain of the acts of bribery herein referred to.

(b) The said Mills, by himself or his agents, or by other persons on his behalf with the knowledge, consent, or approval of himself or of his agents, gave or promised or caused to be given or provided, or was accessory to the giving or providing certain drink and refreshments to or for certain persons, for the purpose of corruptly influencing such persons or other persons to give or refrain from giving their votes at such election, or on account of such persons having voted or refrained from voting at such election.

Your petitioner annexes hereto a schedule marked "B," giving particulars of certain of the acts of treating herein referred to.

(c) The said Mills, by himself or his agents or by other persons on his behalf, with the knowledge, consent, or approval of himself or of his agents, gave or agreed to give, or offered and promised to procure or to endeavour to procure money or valuable consideration to or for certain persons in order to induce such persons to commit the offence of personation, and to vote for the said Mills at the said election, and did aid, abet, counsel, or procure the commission by certain persons of the said offence by personation.

Your petitioner annexes hereto a schedule marked "C," giving particulars of certain of the wrongful acts referred to:

(d) The said Mills, by himself or his agents, or by other persons on his behalf with the knowledge, consent or approval of himself or of his agents, paid or contracted to pay certain persons in connection with and either before, at, or during the said election, on account of the conveyance of electors to and from the poll for railway or other fares.

Your petitioner annexes hereto a schedule marked "D," giving particulars of certain of the illegal practices referred to:

Wherefore your petitioner prays that it may please your lordships to declare the election of the said Mills null and void, and that your petitioner may have the costs of this petition, or that your lordships will make such further or other order as to your lordships may seem meet.

The usual verifying affidavit was annexed.

SCHEDULE A.

1. James Glannan, a voter registered as No. 708 and a sub-agent of the said Mills, on or about the 11th of July aforesaid, and at the Masonic Hotel, Port Elizabeth, gave one George James Bubb, a voter registered as No. 260, the sum of 10s. 6d. in order to induce the said Bubb to vote for the said Mills and to refrain from voting for the petitioner.

2. The said Glannan on or about the day of the said election, and at Port Elizabeth, gave one Thomas Graham, a voter registered as No. 734, the sum of 10s. 6d. in order to induce the said Graham to vote for the said Mills and to refrain from voting for the petitioner.

3. The said Glannan, on or about the 8th of July aforesaid, and at the said hotel, corruptly promised one John Henry Edwards, a voter registered as No. 551, money or other valuable consideration for the purpose of inducing him to vote for the said Mills.

SCHEDULE B.

The said Glannan shortly before the election, and at the Masonic Hotel aforesaid, corruptly provided or caused to be given or provided or was accessory to the giving or providing certain persons, amongst them being the said John Henry Edwards, David Halley, a voter registered as No. 764; Alfred Smith, a voter registered as No. 1,680; William Oliver Cheney (or Chexey), a voter registered as No. 333; and Reuben Wahl (or Wall), a voter registered as No. 2,027, with drink free of cost for the purpose of inducing the said voters to vote for the said Mills, and to refrain from voting for the petitioner.

SCHEDULE C.

1. The said Glannan shortly before the election, and at the Masonic Hotel aforesaid, gave one Charles C. Boyd, of Port Elizabeth, who was not registered as a voter for the said division, money or other valuable consideration in order to induce him, and did corruptly counsel him, to personate Thomas Stockdale, a voter registered as No. 1,752, and to vote for the said Mills.

2. The said Glannan, on or about the 11th of July aforesaid, and at the said hotel, promised one Sydney Hallstead, who was not registered as a voter for the said division, money or other valuable consideration in order to induce him, and did corruptly counsel him to personate one Clement Bauer, a voter registered as No. 118, and to vote for the said Mills.

3. The said Glannan, on or about the 8th of July aforesaid, and at the said hotel, corruptly counselled the said John Henry Edwards to personate Hugh Donnelly, a voter registered as No. 506, and also to personate the said Clement Bauer and to vote for the said Mills in the name of one or other of the said persons.

4. The said Glannan, by himself or by one Fletcher, with the knowledge, consent or approval of the said Glannan, shortly before the said election and at the said hotel, gave one Gray the sum of 10s. in order to induce him to personate and did corruptly counsel him to personate one Richard Currie, a voter registered as No. 423, and to vote for the said Mills in the name of the said Currie.

SCHEDULE D.

1. The said Glannan, shortly before the said election and at the Masonic Hotel aforesaid, paid the said George James Bubb, referred to in Schedule A, the sum of 2s. 3d. for the conveyance of the said Bubb by railway to and from the poll for the purpose of recording his vote for the said Mills.

2. The said Glannan, shortly before the election and at the said hotel, offered, promised and contracted to pay the said John Henry Edwards and the said Thomas Graham, above referred to, their railway fares for the purpose of being conveyed to and from the poll and of voting for the said Mills.

Mr. Burton (with him Mr. Van Zyl) for petitioner; Mr. Upington (with him Mr. Bisset) for the respondent.

Mr. Burton, in opening the case, said that as to the formal allegations the parties had agreed upon certain admissions. The respondent agreed to admit allegations 1, 2, and 3 of the petition, and also specially admitted the appointment of James Glannan as his sub-agent, and that James Glannan acted as such. In regard to Schedule B counsel did not propose to press the

portion relating to Reuben Wahl. The subpoena to the witness Boyd had not reached him, and it would, therefore, be impossible to proceed in relation to Schedule C (paragraph 4). Counsel said that, owing to the non-arrival of the mail steamer from the coast, several of his witnesses had not yet appeared, and it would not, therefore, be possible to take the case in proper order. Briefly, the petition alleged that Glannan, shortly before the election, was staying at the Masonic Hotel, Port Elizabeth, and he seemed to have visited various people, and to have sent messages to others to come and see him at the Masonic Hotel. There were different charges of bribery, treating and inducing to personation, and illegal practices.

John Frederick de Wet, Assistant Resident Magistrate of Uitenhage, who was the returning officer at the election, produced the original documents of the election of Mr. Mills. He said that Dr. Vanes (as agent of Mr. Mills) communicated to witness the fact that Glannan had been appointed sub-agent. Witness presented the summary of the successful candidate's return of the election expenses. The amount was £107 19s. 6d., the principal items being £50 share of returning officer's expenses, £50 3s. 2d. printing, advertising, and stationery, £3 5s. postages and telegrams. Payments to sub-agents were returned as nil.

L. Tennant Thomas, clerk at the Colonial Office, said he was in charge of the marked copies of the voters' list. He produced a certified copy. He found that Bubb was marked as having voted in the Field-cornetcy No. 1, Uitenhage. Thomas Graham was marked as having voted in the same Field-cornetcy; John Henry Edwards was shown as having voted there. The original papers would show at what polling stations these persons had voted. The returns also showed the following as having voted: David Halley in Field-cornetcy No. 1; also Alfred Smith in the same, and William Olivier Cheney or Chexey. Hugh Donnelly had not been marked as having voted, nor had Clement Bauer. Witness would produce later on the original marked copies of the votes recorded.

Cross-examined by Mr. Upington: The list had been prepared in the Colonial Office, and was certified.

George James Bubb, of Port Elizabeth, a riveter, said that he had been employed by the Harbour Board, for 16 months. He had previously lived at Uitenhage, and had been registered there as a voter (No. 260). He was described upon the list as a farmer; he was employed in a workshop. He met Glannan at Port Elizabeth about the time of the last election; Glannan came to him at the Jetty on the Friday (July 8) preceding the polling day. Glannan was ac-

companied by Polson, who used to have a bar at Uitenhage. Glannan said that he had seen Mills about him, and that he (witness) must come down to the Masonic Hotel that night. Witness did not go down, and on the following day, Jack Price, a workman at the Jetty, brought witness a message. Witness, in consequence, went to the Masonic Hotel on the night before the poll. He saw Glannan and Dave Halley. Glannan asked him if he was coming up on the following day. Glannan said that Mills would pay his wages (10s. 6d.) and train fare (2s. 6d.), and he handed over a sovereign and some silver to Jack Price. Half was to be given to witness. Witness received from Price 12s. 9d.; the money was paid at the next bar.

[Hopley, J.: What made you think that Glannan gave the money to go and vote at Uitenhage?]

Glannan said he would pay us to go and vote. Glannan did not mention the election to him. Glannan was not present when Price handed over the sum of 12s. 9d. to witness. Witness went to Uitenhage and voted. He received permission at the works to go and vote; he lost his day's pay at the Harbour Board.

Cross-examined by Mr. Upington: He saw Glannan give money to Price on the Monday night; he did not hear what passed between them. He did not know whether there was a half-sovereign amongst the money paid by Glannan; he did not know the exact amount that was received by Price. Witness did not know, as a matter of fact, that he was to receive half the money. Price did not ask witness at the other bar if he was going up to Uitenhage; he asked him on the way down to the Masonic Hotel. Witness told Price he was not going to lose a day's pay. He had had three glasses of beer with Price. He was not "over the sober line" when the money was paid over at the bar lower down than the Masonic. When witness saw Glannan, the latter asked him if he was going to vote on the following day; Price was not present. Nothing was said about the election.

By the Court: The word "election" was not used in the conversation.

Thomas Graham, of Aberdeen, a baker, said that during the Uitenhage election he was engaged at the Victoria Bakery, Port Elizabeth. He had previously lived at Uitenhage. He was registered as a voter at Uitenhage. About the time of the Uitenhage election he was visited by one Polson, who was then working at a bar. He promised Polson that he would go and see Glannan on the following day, the Saturday before the election. Polson had a voting card, which he left with witness. Witness did not see Glannan until the Monday morning, but he had no interview at that time. On the day of the election he saw Glannan about 8.15 a.m., in the Masonic Hotel.

Glannan asked him if he was going to vote, and whether he would be voting for Mills. Witness said "Certainly; what do you think?" Witness wanted to know what about his expenses. Glannan told him it would be all right about his expenses. Witness said he wanted his expenses before he asked leave at his work in the afternoon. Glannan took him to one side, and gave him 10s. 6d. Glannan afterwards gave him another shilling. Witness went by the train in the afternoon, and voted at Redhouse. A few days after the election he saw Glannan coming down from Uitenhage to Port Elizabeth. Glannan asked him what he thought about Edwards, and said that the latter had given him (Glannan) away. Still later, he saw Glannan at the Vine Hotel; Glannan asked him if it were true that he had made an affidavit. Witness said "Yes." Glannan told him that he would not make anything by that. Witness replied that he could not lose anything, as he had nothing to lose.

Cross-examined by Mr. Upington: Witness had been a barman. He had been prosecuted for receiving money in the bakehouse at night. He had handed the money to a certain gentleman. He got the money, and paid it over, and the prosecution dropped. He saw one Fletcher, and made certain statements in regard to this matter. The document (produced) correctly set out his statements. Witness did not know at that time that there would be a case.

Mr. Upington (reading from the document): "He (Glannan) did not give me any drink or money, neither did he promise me any." Is that true?—Witness: It is not true.

Why did you tell him what was false?—Because I was not on oath, and I knew the man I was talking with. I reckoned Fletcher had a confounded cheek to stop me in the street and ask me about my business.

"I did not see him give money or drink to anyone else, nor did I hear of anyone receiving money or drink?"—I said that to him.

Is that also a lie?—Yes, certainly.

[Maasdorp, J.: Did you see him give money to any one else?]

No.

Mr. Upington (again reading): "Nor have I heard of any one receiving money or drink?"—Witness: That is a lie.

In answer to another question, witness, referring to the document, said: I tell you it is a parcel of lies from beginning to end what I told him.

Mr. Upington: Now, why did you tell this parcel of lies from the beginning to end when you did not know there was going to be any case like this?—Witness: Because I know the man I was dealing with, and he had no authority to stop me in the street and ask me about my business.

By way of vindicating your honour you went there and told this parcel of lies?—I did not know what he was going to quiz me about when I went in the office. I saw that he had brought me in for his own convenience.

Witness was now living in Cape Town at Annandale Hall. He had stayed until a few days ago at the Aberdeen Hotel. He got into trouble on the day after the election because he took a day's holiday with the money he had received for voting. He was dismissed from his employment. He obtained other employment. He cheerfully accepted 10s. 6d. from Glannan, but he told Hallie and the others that he got nothing. Mr. Hofmeyer took him to sign the affidavit.

Re-examined by Mr. Burton: Halley and Cheney were disputing about one man having got more than another. Halley said: "Don't vote until you get 'seventeen bob' from Glannan." He got into trouble because he took a holiday to spend the money he received to vote.

Maasdorp, J.: On the day of the election he got a full day's pay. He gave them to understand that he would not vote unless he was paid for it. He considered it the proper thing not to vote unless he was paid for it.

John Henry Edwards, a registered voter at Uitenhage, who at the time of the election was living at Port Elizabeth, where he was unable to obtain work, stated that prior to the election he had known Glannan for about six years. About the time of the election he met Glannan at the Masonic Hotel, Port Elizabeth. When he went home to his lodgings he found the following note: "Jack Edwards—Come and see me at Masonic Hotel, inquire for me," signed "Jimmy Glannan." At the Masonic Hotel, Glannan asked him what he would have to drink, and witness had a gin and bitters at his expense. There were several others in the bar at the time whom he recognised. Glannan, he believed, paid for four drinks. Cheney, to his mind, came to the hotel for the same purpose as witness. Glannan began talking about the election, and witness said he was not in a position to go to vote, when the former said, "I'll fix that all right." During the conversation Glannan gave him a card with an X opposite the name of Mills. Glannan said he had a lot of cases to hunt up at Port Elizabeth. Witness, in reply, said that one of the men named Graham was working at South End. Glannan then said, "There will be a lot of these fellows missing," and asked witness if he knew if any of them could be found to vote. Witness said he would go and see, and then Glannan showed him a card with Clement Bauer's name, and said, "There is one here you might vote on at Red-

house." Witness said he would not like to do that, and when Glannan produced Hugh Donnelly's card, and asked him to vote on it, witness said, "I am too well-known to do that." Witness advised him to drop the business as he would get into trouble. Hugh Donnelly had gone away on tramp from Port Elizabeth. Glannan went away to speak to some one for a few minutes, and then returned, saying, "Let's have another drink," for which he paid. Subsequently, he said we must get these fellows up somewhere, and added, "I have sent a dozen dummies away to Van Staadens." When witness said he had no money, Glannan said he would fix it up when he saw Mills or his partner. Witness kept his appointment on Monday night at the Mañonic Hotel, and Glannan, in an intoxicated condition, came into the billiard-room. Glannan sent for drink for witness and his friend, Hallstead, and when witness asked for a shandy, Glannan called for a large bottle of champagne. The champagne did not arrive, as one of the waiters took Glannan out. On the day of the election he went down to Uitenhage, and at the station he met two men named Paulsen and Rowe. The former bought witness's ticket, and got into the same compartment.

Cross-examined by Mr. Upington: He had been employed on behalf of Mr. Fremantle to work up the case. Witness was asked, would he try and find out the others on the Sunday after the election. Prior to leaving England two years ago, he was secretary to a branch of the United Kingdom Coach-Builders' Society. He had remitted money to the society, because they charged him with being short of some money. After some time in this country he went into the workshop of the Port Elizabeth Tramway Co., and after being dismissed he was employed as a conductor, and was again dismissed for issuing a wrong ticket. He picked up a used ticket, and handed it to a man, who was set to trap him. That was on the 22nd April, 1904. He denied that previously he had systematically issued wrong tickets. Between the time of his dismissal and the election he was very hard up. To a great extent he was to work up the case for the love of the thing. He refused on the election day to make an affidavit for Professor Fremantle, and the Rev. Mr. Pienaar. On the Saturday after the election he was approached by Messrs. Schoeman, Van Rensberg, and Bulb, when one of them said: "You won't get into any trouble and you will be well looked after." They said, "We'll protect you," and Mr. Schoeman made some remarks about a passage Home, but he could not say that there was any offer of a little money on the voyage. He was to get any expenses increased through obtaining evidence. Witness had no authority to tell

others that they would have passages Home, and a little money on the voyage. Hallstead was present when he made that statement to Halley. Witness told Moses that if he gave any information he would have a trip to Cape Town, and his expenses paid during the trial. Halley was told that he would get a passage Home, or a ticket to Johannesburg, and the probability of a job if he gave information. At the hotel witness introduced Halley to Schoeman, and the latter engaged Halley in conversation. Witness did not hear Schoeman say to Halley "You will have a free passage Home, and expenses if you give the information." Mr. Schoeman said to Halley: "If you don't give the information you will be subpoenaed, and then you will get nothing at all." Witness left Schoeman and Halley dining at the hotel, and subsequently received instructions to see Halley off by the night train to sign an affidavit at Mr. Schoeman's office. Witness asked Cheney to go to the Golden Fleece Hotel for the purpose of making an affidavit, but he did not think he made Cheney any offer. He did not remember an offer being made to Cheney when the offer was made to Halley. Witness told all sorts of lies to fellows that were hunting after him, and he might have said anything to Anderson. He knew John Steel, of Port Elizabeth. He remembered meeting Steel and another man, named Hallstead, in Port Elizabeth, on the morning of the election. He denied having boasted to Steel that he was going to make money out of the election. Witness could not say whether he now had the letter he received from Schumann through Hallstead. He did not remember having told Steel that the Bond had promised him a free passage to England, and also his board until he left. He would not deny that he had said so; he was not sure about it.

[Hopley, J.: Was there any foundation for that?]

Witness (hesitatingly): No, I don't think so.

[Hopley, J.: Don't say you don't think so. You must know?]

Well, the man whom I said before used those words, I don't think he had the authority to carry the things out.

[Hopley, J.: Who was the man?]

Schumann once said so. He said, "Oh, wouldn't you like a free passage to England?" I said, "Well, I don't know." He did not say anything about board then.

[Hopley, J.: At another time?]

Yes. But the board was for what I was doing in lieu of work.

Further cross-examined: He had not tried to persuade Reginald Moses to say that the money Fletcher was spending was for election purposes. He was never present with Moses and Schumann at the Fountain Hotel; he was at the Falcon with them. Steel came in after-

wards. It was false to say that witness tried to "school" Moses into what he was to say. He tried to get Steel to give evidence. Witness was paid his expenses, because of the wages he had lost through going to vote. He was paid his expenses by Mr. Wynne, of Wynne's Hotel. The money was paid to him for going to vote; he was not ashamed of receiving the money, because he had lost the time. At the time of the election of Vanes and Lee, he was working at Van Staaden's Pass as a carpenter. He knew Wm. Sadler Metcalfe; witness did not ask him on the day of the election if there was any money knocking about. Witness asked him for the price of a dinner or tea, as he had no money. He told Metcalfe that he had lost two days through coming in to vote. He would not swear that he did not say, "I have voted for the Progressives, and have got — all." He did not remember; it was so long ago. He did not go to Mr. Adcock, Lee's agent, and ask him for money. He had been told that he would be paid his two days' wages. He did not remember having said that he had lost two days' wages through going to vote for the Progressives, and that he would make it hot for them. He did not think that he had said in Port Elizabeth that he wished there was an election every day. He had not said that he had been paid £1 by Mr. Fremantle's agent to go and vote. He received no money from the agent to go and vote. He used to tell people any mortal thing they wanted to believe. Glannan, whom he met in a Port Elizabeth bar, asked him to personate five or six people. Witness received a card from Glannan in the presence of Halley and Cheney. He was only to personate one voter.

Mr. Upington: Was it upon your information that certain persons were prosecuted for personation in connection with this election?—Witness: I dare say.

Can you explain to me why Glannan was not prosecuted for procuring these personators? No.

Do you know that these men have been acquitted?—I only heard it the other day — that one case was withdrawn.

Cross-examination continued: He was not to get anything for personation; he refused to do the work. He told Glannan that he would not do it, and that he was too well known to try it. He was prepared to have taken his expenses to go and vote, say, his wages and railway fare. He was out of work at the time. His wages at the Bay had been 14s. a day. He expected to be paid when he did work.

Mr. Upington: And so you expect to be paid for working up this case?—Witness: Well, I don't know about that.

Further cross-examined: He did not tell anybody whom he voted for. He did not promise to vote for any particu-

lar person. He met Mr. Fremantle, and wished him luck. He sympathised with Mr. Fremantle a little, because of the attacks made upon him, and the scandalous way they had treated him in Uitenhage.

He was promised a passage Home for helping to get up this case. He told them that he must have some protection, and that he would not be safe in Port Elizabeth if he was going to give all this away, and that he might just as well clear. He did not intend to go Home, as a matter of fact. His idea was that, through helping them, he might have a chance of a job somewhere, and of keeping himself. Witness got Graham to go up to Aberdeen and vote, and he advanced his expenses from money the witness had borrowed from Mr. Wilkie, a clerk in Mr. Moore's employ. The money was not a loan. Witness received communications from the Fremantle party through Mr. Schumann. Graham was taken to Aberdeen out of the way of further corruption.

Witness received no pay for doing that. Graham worked at Aberdeen as a baker for two days; he remained at Aberdeen about five or six weeks. Mr. Moore paid something for witness at the first. Witness worked most of the time. Hallstead was also staying at the Aberdeen Hotel; he had stayed there from September until he had come down here. Witness's board money in Port Elizabeth came down from Mr. Schumann; the same party paid his railway fare to Aberdeen and also Hallstead's.

Re-examined: On the polling day, witness told Mr. Fremantle that a lot of poor men were going to get into trouble; there were wrong practices going on. Witness had heard of one man who was convicted of personation; his name was Lamb. Others disappeared, and witness got Graham and Hallstead away to protect them from a similar fate. Boyd made an affidavit one Saturday, and then he disappeared on the following Wednesday.

[Hopley, J.: Do you suggest foul play?]

Yes, I suggest it, because I know he was not in a position to disappear; that's my reason.

The witness Thomas (recalled) produced the original marked copies of the voters' lists in the election in question.

Sidney Hallstead, lately of Aberdeen, said that at the last election at Uitenhage he was in Port Elizabeth, and was out of employment. He had been a signal fitter in the C.G.R. He met Glannan on the 11th July in the billiard-room of the Masonic Hotel, Port Elizabeth; he was introduced by Edwards. During conversation witness was asked by Glannan to have a drink. Witness said he would have a glass of beer. Glannan asked him if he would vote for the Progress-

sives at Uitenhage. Witness said he had no vote at all. Glannan said, "We can fix that up all right." Then the beer came in, and Glannan again started the conversation about the election, and gave witness a card (produced). He said witness could vote in that name (Clement Bauer), as he (witness) was a mechanic as well. Witness did not examine the card. He afterwards showed it to Edwards, who was lodging at the same place. Subsequently, he handed the card to Mr. Fremantle. Glannan told him that he would pay his expenses to Uitenhage. After that, Glannan called for a bottle of champagne, which did not come in, because somebody took Glannan to bed. Witness did not vote at Uitenhage. He handed the card to Mr. Fremantle in Uitenhage on the Saturday after the election; his expenses to Uitenhage were paid by Bubb.

Cross-examined by Mr. Upington: He was not promised a free passage Home if he made the affidavit, by Mr. Fremantle's supporters. They promised to try to get him a situation, and do their best for him. Mr. Schumann, Mr. Bubb, and Mr. Edwards were with witness when he went up to Uitenhage. He had certain drinks. He was afterwards sent to Aberdeen by Mr. Hofmeyr; he left on the 18th August, and had stayed there until he came down to Cape Town. He had worked part of the time at Aberdeen; Mr. Moore had paid his expenses at the hotel when he had not been working. Mr. Moore advanced his expenses; witness would have to repay the money. He did know how much he now owed Moore. He did not expect to receive anything for making the affidavits. He was fairly hard up about the time of the Uitenhage election. Because others had been paid to go and vote, he was not surprised to be introduced to Glannan with a view to personation. Witness did not exactly want to get money, but if Glannan had offered him money he would have taken it. Glannan, when he handed him Bauer's card, said: "There's a card, you can vote on that."

Craddock Parkin, of Uitenhage, said he was a member of the well-known Port Elizabeth family; he was a J.P. and also Mayor of Uitenhage. He knew Glannan, who had been a Town Councillor a little over twelve months. On the day before the election, witness was in Mr. Adcock's shop at Uitenhage. Mr. Roberts was present. Mr. Glannan came in, and in speaking about the election, he opened a purse and showed several banknotes and some gold. He remarked: "This is what I have got to do with for the election." Adcock said: "Be careful. Mr. Glannan; you have to deal with the Beck Act." Glannan answered: "Oh. I have seen more elections than you or your grandfather, and I can ride through the Beck Act with a carriage

and four horses." Glannan said he was going to Port Elizabeth to get up voters. This occurred about 9.30 a.m. Witness was and always had been a Progressive in politics, and an open advocate of the party. All the men present when the conversation took place were Progressives. Witness did not know anything about coming to give evidence until Thursday last, when he was notified that he would be subpoenaed. As far as witness knew, Glannan was not a man of means; he was employed as Clerk of Works in the town. He seemed to have no permanent occupation. Witness was very sorry he had had to come to the court and give evidence. He should say that there was £10 in gold in Glannan's purse, besides notes.

Cross-examined by Mr. Upington: Witness was told that Glannan's wife had some means. He was not aware that Glannan had been *curator bonis* of Mrs. Crook's estate. Witness was very, very sorry to be away from home now, because they had a Town Council election coming on on Wednesday; there would be a keen contest, and he was one of the candidates. He did not remember a bet being made in Adcock's shop on the 11th July.

Wm. Robert Adcock, tailor, Uitenhage, also gave evidence as to the incident in his shop on the day before the election. He said that Glannan, though not drunk, seemed to be under the influence of drink. Glannan showed one or two £5 notes and some gold. Witness cautioned him about the money, and said: "Be careful of the Beck Act." Glannan said he could drive a coach and four through the Beck Act.

[Hopley, J.: What was it that connected the money with the Beck Act in your mind?]

Knowing that he was an election agent. In further evidence, witness said that Glannan and he was going to Port Elizabeth. Witness had always been a Progressive.

Cross-examined by Mr. Upington: Glannan was very jovial, and he seemed to be confident of Mr. Mills's success. Witness did not say he thought Mr. Fremantle would be elected; he was sure Mills would get in. He did not remember a bet being mentioned. He would not say that no bet was made. Witness was agent for Mr. Lee at the previous election. John Henry Edwards was brought to him at that election, and he asked for his expenses from Van Staaden's Dorp. There was no necessity for Edwards to have come to Uitenhage and vote; he could have voted at Gedult River. Witness refused to give him any money, whereupon Edwards used some very abusive language. He said he had risked losing his situation to come and

vote Progressive, that the Progressives had never done anything for him, and that he would make them pay for it at the next election. Edwards wanted £1 12s. 6d. Witness attached very little importance to the conversation in his shop.

Re-examined: His advice to Glannan was not intended to warn him about betting. It was on account of the money that he told Glannan to be careful about the Beck Act.

Henry Chase, attorney, Uitenhage, said that he had been engaged upon this case for the petitioner. He had as an attorney taken a statement by a man named Charles Boyd, either in Port Elizabeth or Uitenhage. Witness was a Justice of the Peace. The statement (produced) was made on the 23rd July, 1904. About a month ago witness heard that Boyd had disappeared; he meant by "disappeared" that he could not be found, and had gone. Another man named Alfred Smith had gone. Witness thought it was better that the other witnesses should leave Uitenhage. A subpoena was issued for Boyd. The Deputy-Sheriff of East London wired to say that Boyd was not to be found.

Cross-examined by Mr. Upington: Cheney was brought to witness's house by Schoeman and Bubb. Cheney was not drunk; he was frequently in liquor, but was not on that occasion. The man came at 12 o'clock at night. Cheney may have had liquor given to him by witness. Cheney made a statement before he got the liquor. Witness could not say whether David Halley was taken to his house. Sometimes the men went to Schoeman's house. Absolutely no inducement was held out to Cheney at witness's house to make a statement. As far as witness knew, Cheney was not told that he would be looked after if he made a statement. He only heard a few days ago that Edwards and the other men had been removed to Aberdeen. He did not know who had made the arrangement or had paid the men's board. He had paid one of the men £1 for procuring information as to the whereabouts of people. He did not know whether the man was Edwards. The object was to find information as to the whereabouts of two or three people who were wanted to make statements.

S. Alexander Hofmeyr, attorney, Cradock, spoke to going to Uitenhage and finding the position in which the witnesses were placed. He advised Mr. Fremantle to send the men away.

Cross-examined by Mr. Upington: Witness paid for the men's keep; he was Mr. Fremantle's attorney. He had paid altogether £29 on account of Edwards and Hallstead; he had given 5s. to Graham. He paid the men's expenses, and he gave them something

to keep them going. The money was not given to the men to provide them with whisky and smokes. The men had no money. Witness did not expect to get the money back again. He understood that Edwards was busy-ing himself to fish out evidence for the case. Witness gathered that Edwards was being paid his expenses. He gave Edwards a few shillings now and again.

By the Court: He felt that the witnesses were placed in a very difficult and trying position by being left in Uitenhage.

[Hopley, J.: You did not trust their moral character sufficiently to leave them in Uitenhage?]

I thought the temptation might be too great, and they might succumb to it.

Mr. Upington admitted certain handwriting upon cards and notes as Glannan's, and

Mr. Burton then closed his case.

James Glannan, the sub-agent of Mr. Mills, M.L.A., was called for the respondent. Witness said he was employed as a clerk of works. His wife had means, their income being about £320 a year. His wife had property at Port Elizabeth. On the 8th July he went to Port Elizabeth to collect rents. He was *curator bonis* in the estate of Catherine Elizabeth Crooks. He took blank election cards with him and also a few cards for people whom he knew. He had cards for Hugh Donnelly and Clement Bauer. On Friday evening he stayed at the Masonic Hotel, and attended a meeting of the "Buff" Lodge. He had sent a note to Edwards, who, it appeared, had been sleeping in the park for a few weeks. He left the note with Edwards's landlady. About 7.45 p.m., Edwards came to the Masonic Hotel, and in the billiard-room witness gave him a card for himself and one for Hugh Donnelly. Witness wanted to find out where Donnelly was. He did not intend that Edwards should personate Donnelly. Donnelly was well known at the Uitenhage shops. Both Edwards and Donnelly had been working at the tram depot in Port Elizabeth. Witness asked Edwards to hand the card to Donnelly. He also saw Cheney and Halley. He had not asked Boyd, Hallstead, or Edwards to personate any one. He did not see Hallstead on the evening in question. Witness was in the lodge room from shortly after 8 o'clock until 10.40 p.m. He remained at the Masonic all night, as he had not time to catch the train. He stayed in Port Elizabeth the following day, because he had not got his rents. Witness met Jack Price on the Saturday evening, and asked him for a loan. Mrs. Price lent him £2. Witness, Price, and Mrs. Price went into the bar and had a drink. He had not discussed the Uitenhage election; that election was

dwarfed by the contest in Port Elizabeth. He did not see Edwards on the Saturday. On Sunday morning he returned to Uitenhage. He returned to Port Elizabeth on Monday morning. He called at Adcock's shop close upon 12 o'clock noon. He saw the sub-editor of the "Chronicle" in the shop of Geo. Smith, commonly called "Christo." In conversation, Smith said he thought Fremantle would head the poll. Witness pulled out his purse, and offered to lay Smith £5 on Mills' chances. Smith replied that he was not going to bet £5. Then somebody said, "Be careful, Jimmy, about the Beck Act." Witness, during further remarks, said, "I suppose it will be same as Dan O'Connell said—they will drive a carriage and four through it shortly." At the Masonic bar in the evening, Price came up to witness, and asked him for £2 money lent, which was promptly paid. Witness never spoke to Bubb, nor did the latter ever ask witness anything about expenses. Spittal was present when the money was paid over to Price. He never saw Graham on the morning of the election; he saw Cheney, who came to see him. Mr. Mills had never given witness a penny to spend, as his sub-agent.

Cross-examined by Mr. Burton: He had had considerable experience of elections at Uitenhage, and had an intimate knowledge of the voters' list. He threw himself into the Progressive cause heart and soul, and spent only money on his own account. He would swear that any money he spent came out of his own pocket, but money he had spent was not altogether for the purposes of the election. When witness produced his own purse, full of money, he said, if it cost him all the money he had he would hunt up the boys in Port Elizabeth. Mr. Parkins's statement that he produced the purse with a view of spreading the money about for the election was incorrect. Witness did not say that he, like Dan O'Connell, would drive a coach and four through the Beck Act. The incident about producing the money was quite a surprise to him, and if George Smith was wired to he would readily contradict it. If witness had not to collect his rents he would not have gone to Port Elizabeth at all. He had not the slightest idea that Hugh Donnelly had gone away when he gave the card to Edwards. When he went to see Halley one of the men said he was "retrenched," and witness told Bubb to tell Halley to come and see him. He had no knowledge of Bubb's railway fare. All the men went up to vote at their own expense. Witness did not authorise anyone to spend money. In the case of Graham, his employer gave him leave off to vote, and he received no money from witness. Cheney and Smith were Buffaloes, but

witness could not say whether Halley was accepted or not. He was just as elated over Mr. Brooks' election as that of Mr. Mills. Edwards never had a single drink for which witness paid. The reason he did not stand him a drink was because Edwards had tried to blackmail witness after Mr. Lee's election. He wrote a note to Edwards to come down, and see him, and the reason he did not stand him a drink was because he knew him to be treacherous. The only suggestion he could give of Hallstead having possession of Blauer's card was that Edwards had threatened to put the Progressive candidate out. The writing on the card with Clement Bauer's name was not his. Witness had not the slightest idea that Bauer had left Uitenhage for a long time. To the best of his ability he crossed off all the dead and missing from the registry list. The card must have been picked up at the polling booth. It was not correct that he said to Graham, "What do you think of Edwards?" When he met Graham he was aware that Edwards had made a statement. When witness heard of the trouble he sent Fletcher away to get a plain statement of facts from the witnesses, who were present in the hotel, and Graham made the statement voluntarily. When witness challenged Graham later on, witness said to him: "Tommy, watch it; you have made a correct statement, and I suppose they have filled you up with booze, and got you to make another." Alf. Smith's father paid his fare to London. Witness would finally swear he did not go down to Port Elizabeth specially on account of the election, and that he did not pay out a single penny to anyone.

Re-examined by Mr. Upington: Certain cards were written out in the office and numbers of them were posted, and in that way some might find their way into the hands of unscrupulous persons. Witness produced the lease of his wife's property, which showed that the rent was due on the 7th. He did not go down to Port Elizabeth specially to hunt up the voters on that day.

By the Court: He usually kept £30 or £40 in the house, and he took the £10 from the drawer. He was prepared to spend every penny of the £10 to get up the voters from Port Elizabeth, as Mr. Mills had done him many a good turn.

Frederick Wm. Spittal, a clerk in the employ of Mr. Mills, said that on the night of the 11th July he saw Glanann at the Masonic Hotel about 6.20. He saw Glanann in the lobby. Glanann went away, and had tea, being absent 10 or 15 minutes. Glanann again came into the lobby. Witness spent the rest of the evening in his company. They intended to go to a meeting in the Feather Market Hall, but on account of the rain, they returned to the bar of the

hotel. He saw Price in the course of the evening. Price touched Glannan on the shoulder. They went to one side, and Glannan gave Price some money. Witness did not hear what was said. Witness did not remember seeing Bubb at the hotel during the evening. He did not hear Glannan speak to Bubb; he never saw Bubb in company with Glannan that evening. Witness had some drinks with Glannan and a man named Morgan. He heard Glannan call for drinks; Glannan made some remark to the effect, "Buffs, fill them all up." Glannan had had a good deal to drink, and he went to bed early. On that night Glannan was never in the billiard-room between 6.20 and 8.15 to 8.30. Nothing was said about the Uitenhage election. If witness had thought Glannan was ordering drinks for that purpose he would have stopped him. The principal topic of conversation was the Macintosh election.

Cross-examined by Mr. Burton: Witness had been a clerk in Mr. Mills's private business; Mr. Mills was a banker, or moneylender. Witness was in Port Elizabeth just before the Uitenhage election on private business of his own. He believed he saw Jack Edwards in the bar on the night in question, but he was not quite sure. Witness did not see Hallstead. Witness believed Bubb was in the bar on the night named; Halley and Cheney were present. He did not think that Glannan paid for more than one round of drinks. Witness remained in Mr. Mills's employ until the end of July. He was engaged temporarily. Witness had again been in his employ since the 1st November. In the interval he had applied to Mr. Fremantle for a billet. He was in Cape Town for nearly two months until he returned to Uitenhage about the beginning of November.

John Thomas Richard Price, an employe of the Port Elizabeth Harbour Board, said that he saw Glannan on Saturday evening, July 9. Glannan called him to one side, and asked him for a loan of £3. Witness's wife lent him £2. Witness and Glannan went to a bar; his wife did not enter the bar. By Monday evening, as arranged, he went to the Masonic Hotel for the return of loan of £2; this was between 7 and 8. He met Bubb on the way; Bubb said he was going to see Mr. Glannan by appointment. Witness met several friends, Halley, and others. On reaching the bar, he saw Glannan, who paid him back the £2. He did not remember seeing Spittal. He did not hear Glannan say anything to Bubb about going up to Uitenhage to vote. On leaving the hotel, he met Halley, Barraclough, and others. They called at the Criterion Hotel, and had several glasses of liquor. Bubb said he had no money with him, and that he wanted

10s 6d. for his day's pay, and his railway fare. Witness lent him 12s. 9d. Witness afterwards spoke to Glannan about the loan; the latter said he understood the money he had given him from Mr. Glannan. Witness expected to be paid back his 12s. 9d. by Bubb. Shortly after the loan to Bubb, witness demanded the return of the money. Witness had not been instructed by Glannan to pay the money to Bubb.

Cross-examined by Mr. Burton: His wages varied from £9 or £10 or £14. He had had a livery stable in Graham's Town, but he failed there. He was sued in the court for a small debt soon after the election, and he then pleaded poverty, and was ordered to pay the debt by small instalments. He did not observe Bubb in conversation with Glannan. He had not carried a message to Bubb from Glannan. He had never understood that of the money he received from Glannan he was to pay 12s. 9d. to Bubb. On the way to the hotel, Bubb told him he had an appointment with Mr. Glannan about the Uitenhage election. Mr. Hofmeyr, Mr. Bubb, and Mr. James Bubb called at his home subsequently, and tried to induce him to make a statement that was incorrect. He denied that he had told Hofmeyr that he received money from Glannan, and that he was to give 12s. 9d. to Bubb. If Mr. Hofmeyr said he did make such a statement, it was untrue. He afterwards saw Hofmeyr and others at the Criterion Hotel. Witness then told Hofmeyr that he would give his statement at the proper place. He had no idea whom Bubb would get the 12s. 9d. from. He had not said that Bubb told him that Glannan had promised him his day's expenses and railway fare. When witness spoke to Bubb on the works about the loan, the latter said he saw Glannan give the money to witness to hand to him. On the day of the election he went to Redhouse; he was not well in the morning. He simply went there as an afternoon's pleasure. He lost his pay on that day.

Ralph Beckett, a traveller, said he saw Glannan on the 8th July, about 8 p.m., at the Masonic Hotel. They were together at the lodge meeting of "Buffs" until 10.40 p.m.

Cross-examined by Mr. Burton: Witness was boarding at the hotel. He saw Glannan just before the lodge meeting. Glannan was drinking ginger ale at the lodge meeting.

John Frederick Hollings, an employe of the C.G.R., said he was Grand Registrar of the R.A.O.B. He took a note of the arrivals on the night of the 8th July. He remembered Glannan coming to the meeting in company with Beckett. Witness produced the register of attendances. They came about 8.40.

Thomas Abbott, coachsmith, stated on the night of the Assembly election he was in Wynne's Hotel, Port Elizabeth. Edwards came into the hotel that evening between 9.15 and 10 o'clock and asked witness to have a drink. Witness thought it funny that he should have money to buy a drink when he was out of work. Edwards said, "It doesn't matter, old man, I had a 'quid' from Fremantle's agent."

Cross-examined by Mr. Burton: He said he got the sovereign that morning. Witness never asked him about his vote. Anderson and one or two more were present on that occasion. Next morning witness's employer made a statement to him about corruption when witness said Edwards was not to be relied on, as he told a different tale the previous night.

Mr. Burton: I suppose you are a Progressive?

I don't know what I am.

He knew Edwards would twist any way.

Mr. Burton: Was he a friend of yours?

Witness: Well, if you call him a friend, I lent him money to take him over difficulties, and never got it back. He bore no malice to him for that. If he himself had been on the Uitenhage list he would have made a bit himself. He was anxious to see how Edwards got his money.

Albert Edward Anderson, auctioneer, stated that on the evening of the election he was also in Wynne's Hotel, where he saw Edwards and the last witness. Edwards asked them to have a drink, and witness, regarding him as a man who didn't pay, was rather surprised. When Edwards said he had been to Uitenhage, witness said, "You are a fool." Edwards said, "Never mind, I have had my fare up, a good feed, and a sovereign, and I am to get more from the Bond agent."

Cross-examined by Mr. Burton: Witness was positive that Edwards mentioned a feed and a fare. He had no political sympathy. Edwards added, "As a matter of fact I am spending some of it now," and further, "I wish there was an election every day; I would never work." Witness was approached by a detective, who asked him what Edwards had said, and then to swear an affidavit.

By Hopley, J.: He had known Edwards for about eight months. Edwards gave witness a dummy ticket on the train. Edwards was regarded in Port Elizabeth as a "stiff."

[Hopley, J.: You knew the man to be a blackguard and a thief. It doesn't reflect much on your morality that you associated with him.]

I knew him through some friends.

Mr. Burton said that the first three charges in this petition were

based upon the terms of Act 9 of 1883 (section 7), viz., as to bribery, treating, and personation. He submitted that if the facts which were relied upon in this matter were held proved by the Court they clearly fell within the words of the statute. The fourth charge of paying or contracting to pay for the conveyance of voters to the poll was based upon section 4 of the Act 26, 1902, commonly called the Beck Act. The Act made this a new offence. Before that Act was introduced the payment of a man's fare to go to the poll was not a corrupt practice, but it was now specifically made so by the Act of 1902. With regard to the consequence of the commission of corrupt practices at elections, that was specifically set forth in the course of this Act under section 13. So far as it affected the case, it showed that if, upon the trial of an election petition, it was proved that any corrupt or illegal practice had been committed by or with the knowledge and so on of the candidate or his election agent, such election would be void. Under section 17 the responsibilities of a sub-agent were defined. There was, in this case, no charge against the candidate himself personally, and there was no claim for the seat. The question was purely whether there had been such illegal and corrupt practices as to void the election. The charges were based entirely upon the alleged malpractices of the sub-agent Glannan. These charges were serious, seeing that, according to Glannan's own statement, the chief agent (Dr. Vane) was ill for some days, he himself, on his own admission, ran the election from that stage onwards, he was perhaps the most important man in connection with the conduct of the campaign by the Progressives. Glannan played a most important and prominent part. In dealing with a case of this kind they were compelled to have men who were not of irreproachable character. They could not expect to have angels of light. They must go into the byways and lanes to find men of that sort. He appealed to their lordships, who were really sitting there as a jury, to take a broad view of the whole case, and to say whether, upon the whole, taking the specific evidence given on the one side or the other, together with the probabilities and surrounding circumstances, their lordships were satisfied beyond reasonable or substantial doubt that these charges, or the greater portion of them, had been brought home to the respondent's sub-agent.

[Maasdorp, J.: You cannot take all the charges in a sort of hazy, cloudy manner. They must be dealt with clearly and distinctly. You cannot take the

whole bulk and get some cumulative idea.]

Oh, no; I do not ask the Court to do that, but upon each specific charge I would ask the Court to bear in mind all the evidence in the case. He intended to briefly go over the outstanding features of the case. The main point of the defence was based upon Edwards's connection with the case in the first instance, and upon the fact that some of the petitioner's witnesses were removed to Aberdeen, where they had their expenses paid, and were looked after until they gave their evidence. He submitted that such an Act was not inconsistent with the practice adopted by the Crown for the protection of witnesses. He urged that the point should not be pressed home too strongly against the petitioner that the witnesses were removed by the petitioner, and their expenses paid pending the trial. As to Edwards, one appreciated that one had to meet the facts which Edwards himself had admitted as to his own character, and his past career and his connection with the case generally. It seemed that he was not a person of very high character. The circumstances surrounding his history did not redound to his credit, but there was this to be said for him, that he appeared on the whole to have been a very candid witness, he had made a fairly clean breast of it, and he had answered all the questions. It was upon his information, first of all, that the petitioner was moved to his inquiries. Counsel admitted that the statements made by Schoeman to Edwards as to a passage Home, and so on, were very unsatisfactory. Edwards was out of work at the time; he was what was popularly known as a "stiff." Was he a man who was likely to pay his own fare in order to go to Uitenhage to vote? Surely, the probabilities were in favour of the story of Edwards as against that of Glannan, who was adopting the very reprehensible practice of conducting an election from a public-house. Touching on the allegation that Glannan induced Edwards and Hallstead to personate voters, counsel said that the contest was extremely keen and close, and that Glannan was not the sort of man who would be over-scrupulous about seeing that all the votes that could possibly be recorded would be recorded. Dealing with the charges of treating, he contended that those allegations had been clearly established. In further remarks, counsel commented on the absence of certain men, who had gone away since the case was commenced, men whom it was alleged had been treated. If Edwards had stood alone, he could have understood that a case would be made out for the respondent; that was with the exception of the treating. But they had other evidence. They had the witness Graham, who said that he was paid his wages and fare to go and

vote. In regard to the false statement made by Graham, counsel said he thought Graham, in his evidence, had been quite candid in reference to his reasons for the false statements he made to Fletcher. He had been very frank in regard to the money alleged to have been detained by him. Whatever imperfections Graham may have had, counsel submitted that Graham was a witness who appeared to be speaking the truth. Graham had been unshaken in his story of his relations with Glannan. Coming to the evidence of Bubb, Mr. Burton said that nothing had been shown against this witness's character, and it had not been shown that he had any association with Edwards. His story was not at all exaggerated.

[Maasdorp, J.: Bubb says he gave Price the money so that he should go to vote at Uitenhage, and "gave me half." How does he know that?]

I don't think that comes out specifically. It may have been in the talk between him and Price.

[Maasdorp, J.: He doesn't say Glannan or Price says so. He says: "He gave Price the money so that he could go and vote at Uitenhage, and gave me half."]

[Hopley, J.: Do you suggest Glannan spent his own money, or that of Mills?]

I don't suggest he spent his own. What I mean is that I am hardly bound to account for the source. I would hardly think he spent his own.

[Hopley, J.: If you ask the Court to hold that he was spending Mills's money, doesn't it involve finding Mills guilty of making a false return?]

It is not necessary to find that he was spending Mills's money. There are such things as political associations, and other sources. I don't for a moment wish to throw any discredit upon Mr. Mills. To think that Glannan had this money to scrape out of the drawer, and was going to spend it himself, was going a bit too far. It was very unlikely that he was going to spend his own money. On Parkin's evidence, the Court must come to the conclusion that the money was not accounted for in the return.

[Maasdorp, J.: Is there any limit to what a candidate may pay his agent?]

There is no limit to that, but it must appear. Under the circumstances, one is not bound to account for the way in which this money was got. Counsel then proceeded to refer to the section of the Act under which the case was brought, and pointed out that in England, for a single fare paid by respondent's agent, the respondent would be unseated. If one of the charges were proved, however trivial it might be, it would be sufficient. Bubb and Graham actually did get money for conveyance, and Edwards was promised. The sworn

statements for the plaintiff stood out against practically Glannan's evidence alone. The incident in the shop was extremely important, and would be material in assisting the Court to decide the case. Mr. Parkin said on the day before the election the party of Progressives were present when Glannan pulled out a purse containing several £5 notes and gold, and said that he had that amount to put about for the election. Counsel did not know whether Glannan had driven a coach and four through the Beck Act, as he himself said, but there could be little doubt that he had tried. Parkin was clear that the money was produced for the purpose of the election. On the morning before the election, counsel took it as proved that Glannan exhibited the money for the purpose of distribution, and if that was clearly proved, the case was very simple. Whether it was his own money or not, it was an important contravention of the Beck Act. The Act provided that all payments should be made through the agent, in order that one could see what was spent. The return of Dr. Vanes would show that nothing had been spent by Glannan. Glannan admitted that he would spend every farthing to bring the boys up from Port Elizabeth. He declared that he did not spend a penny, but money legitimately spent could be accounted for. The Court could not possibly believe that Glannan went down to Port Elizabeth to specially collect the rent. If Glannan was prepared to pay the money, he could easily find the "stiffs" who must have been paid to vote. In conclusion, Mr. Burton quoted the Chief Justice in the case of *Kyle v. Krige* (9 C.T.R., 1), and submitted, from the evidence, the Court would hold that the contest was not fairly carried on by this agent, and if justice was to prevail, this petition must be held to be proved, and the respondent unseated.

Mr. Uppington for the respondent.

His learned friend closed his address with a quotation from the Chief Justice, and he (Mr. Uppington) would quote another, in the case of *De Waal v. Sirencright* (9 C.T.R., 12), held before five judges, in which the Chief Justice said: "The evidence in a case of bribery and corruption should be clear and conclusive. The consequences to a candidate of corrupt treating, even when he had no personal knowledge of it, are so serious that the Court should not hold it to be established except upon evidence which would warrant a jury in finding the charge proved." Counsel's suggestion was that this was a case, so far as the petitioner was concerned, tainted from its very inception. Means had been adopted to work up the case not wholly creditable

to the persons concerned, and his learned friend would admit that, in the case of Schoeman and Bubb. He would urge that the Court was not justified as a jury to find for the petitioner on the evidence of such self-confessed liars as Edwards, Graham, and Hallstead. In such a case, the character of the witnesses was of the utmost importance, and he would ask the Court not to lose sight of the fact that a verdict adverse to the respondent in this case was practically finding Glannan guilty of various serious criminal offences, upon which serious results would follow. To ask counsel why he did not call Halley and Cheney, the principal witnesses for the plaintiff, was what he would certainly call audacious. Both Halley and Cheney were in court, and the latter had been subpoenaed by the petitioner. If the story told by Edwards and Hallstead was correct, why were these two men not called to corroborate the statement. The inference was that his learned friend could not get them to back up Edwards. Edwards, on his own confession, was such a rogue that no man could take his word, and therefore it was highly important to obtain corroboration. The fact that it was a difficult thing to prove a charge of bribery did not dispense with the necessity of doing it, and bringing adequate proof. His learned friend was asking the Court to perform almost the most important function it could, by unseating the choice of the people, and that should only be done on clear and specific proof on a clear and specific charge. Touching on Edwards's evidence, counsel said that it was common cause that Hugh Donnelly was the most unlikely man in Uitenhage to personate, and that Edwards, known as he was like a bad sixpence, was the most unlikely person to do it, and where was Edwards asked to do it? In a public bar! His learned friend talked a deal about the probability of the case. Well, was that charge probable in the case of a man like Glannan, who was experienced in elections. In regard to that, counsel urged that Glannan's story was to be believed. Where, in the case for petitioner, was the corroboration? The production of the card! To be in possession of a card after an election could not be argued as proof that it had been handed over to the person in possession. Who was Hallstead? A man who confessed he was open to receive a bribe, and at once he would go down as an unreliable person. In addition to that, he was living with Edwards in the same room. From three different points of view, the evidence came into court with a taint, and counsel said there must be strong corroboration before Glannan could be found guilty of such a serious charge. There was abeo-

lutely no corroboration. Hallstead also gave evidence about treating, and it was interesting to test the value of his evidence. On the Monday night, he said Glannan offered him a drink, and that the latter insisted on champagne. There were two men playing billiards at the time, and neither of them were called. Was there any reason to suppose that Spittal came here to commit perjury, and he was either doing that, or telling the absolute truth. If Spittal's evidence was true, then Hallstead's story was simply a fabrication put into his head by Edwards. Glannan would appear to be a member of a somewhat jovial body, called the Buffs, and the Court would not forget, according to Spittal, that Glannan, on the verge of intoxication, said, "You are all Buffs. Fill 'em all up." Because Halley, Cheney, and, possibly, Edwards were there, and got the drinks, his learned friend would have them believe that Glannan was doing that for the purpose of votes. There was no evidence to show that he was standing liquor promiscuously to voters, and non-voters alike, to obtain Halley's and Cheney's votes. His learned friend, so far from calling Halley and Cheney, had the audacity to ask why he (Mr. Upington) had not called them. Upon the uncorroborated evidence of a self-confessed thief and liar, counsel submitted that the Court would not hold for the plaintiff. It was not sufficient to show that a sub-agent stood drinks; it was essential to prove that it was done for the purpose of influencing votes. If the theory of his learned friend would hold good, a candidate's life would not be worth living; he would have to be carried about in a glass case, and exhibited to his constituents. Counsel submitted the petitioner wholly failed to make out any case even to go to a jury. Cheney was hustled away at midnight, and brought to a Justice of the Peace, and counsel suggested the reason he was not called was that he would not support Hallstead and Edwards. With regard to the alleged promise to Edwards, when one considered his career, it would be unnecessary to deal further with that particular charge. It would be sufficient to say that no man would be safe if Edwards's evidence on a charge of bribery was to be believed. It was easily to see how Bubb possibly went up with a view of getting money from Glannan, and in a generous mood, while intoxicated, Price lent him his railway fare to go to Uitenhage. What really happened was that Bubb drew the inference from what he saw that part of the money Glannan paid to Price was intended for him. What earthly motive could Spittal have in committing perjury? His whole story showed that if he were here to bolster up a rotten case, he would have made it very much stronger. He would not have admitted the possible presence of

Halley, Cheney, and Edwards. If it was a bribe by Glannan the money would have been paid over in the same bar. When Bubb made the statement to Price that he expected to receive money next day, it was impossible to say who he was to get it from. To use the words of Sir Jacob Barry, Bubb had exhibited the mind of a bribee, and his evidence was uncorroborated, and against him there was the evidence of Glannan, Price, and Spittal, who all three must be committed for perjury if Bubb was believed.

Mr. Upington said that most of the remarks that applied to Hallstead and Edwards also applied to Graham. Counsel specially directed the attention of the Court to the contradictory evidence now given by the witness Graham, in view of the statement that he had made before Fletcher. Graham said himself that that statement was a "parcel of lies"; yet at that time, according to his own statement, he did not know there was going to be a case. This statement was made on the 29th July. Then Graham was seen after that by the other side. Graham expected to get something out of it, just as Edwards did and Hallstead did. In addition, Graham was one of the noble trio who were sent to the segregation camp at Aberdeen. He actually did two days' work at Aberdeen. He was sent up in August to Aberdeen, and he remained there until this case came on. Counsel ridiculed the suggestion that the practice of sending witnesses away in this manner would be followed by the Crown. Graham had said that he was bribed by Glannan in the sight of Halley and Cheney. Yet they had had no corroboration given of this alleged bribery. Counsel submitted that Graham was a man who, on his own confession, could be corrupted, who could be bribed, on his own confession a liar and an inventive liar. There they had two most important elements. There was the temptation also of the man being out of work, and looking out for employment, looking out for future reward. Against this man they had the evidence of Mr. Glannan, against whose career there was not one breath of suspicion. He submitted it was idle to argue that Graham's story was plausible, that his story was probable, or to talk airily of the probabilities of the case, to bring a large number of charges, not one of which was satisfactorily proved, and to say, because there were many of them, because there was an air of suspicion about this, that, or the other thing, the Court must find this particular charge or the other particular charge proved. Why, counsel asked, was not Halley or Cheney called? That, he thought, disposed of the whole of the schedule. He would say, generally this, about the case, that if they were to talk of the probabilities of the case, if they were

to talk of the surrounding circumstances, the far better test, whether there was a genuine case, whether the petitioner's complaint was a genuine one, would be to show how this information was obtained, and he said that this reckless going about, admitted by Edwards, offering and promising this, that, and the other consideration if information was forthcoming, and, in spite of that, not being able to obtain any information, was one of the strongest proofs that the charges now put forth were without foundation. If there was a fear that these men would be spirited away, or there was a fear that they might be corrupted, what weight was to be attached to their evidence? He said that these men had got every inducement to say that which was false, every one of them had admitted the possession of a morality which was open to be corrupted; Edwards had admitted to being a false-lying, thieving rascal; Graham had admitted to being a liar and a person open to be bribed; Hallstead had lived with a man whom one must assume that he knew, to use the words of Mr. Justice Hopley on Tuesday, to be "a blackguard and a thief," and one may assume that Hallstead had not been entirely uncorrupted and uncontaminated by contact. With regard to Bubb, he did not wish to describe Bubb more than was necessary. He would simply say that, in all probability, he was a weak sort of man, that he had been over-persuaded, and that, as a result of over-persuasion, he had come to believe that these things had happened. Counsel also dealt with the conversation in Adcock's shop on the day before the election, and again quoted from the Sivewright case. He submitted that the charges embodied in the petition had not been proved.

Mr. Burton briefly addressed the Court in reply. He again laid stress on the evidence given by the witnesses Parkyn and Adcock, and emphasised several of the features in the evidence of the petitioner's witnesses, and more particularly that of Bubb.

Cur. Adv. Vult.

Postea (December 12).

Maasdorp, J.: The petitioner and respondent were candidates at the election of members of the House of Assembly for the electoral division of Uitenhage in June last. The respondent was declared duly elected by 1,086 votes to 1,068. The petitioner has presented a petition complaining of the undue election of the respondent by means of bribery, treating, personation, and the illegal practice of paying fares for the conveyance of electors to and from the poll. In the general terms of the petition it is alleged that the corrupt and illegal practices were committed by the respondent himself or his agents, or others on his behalf with his knowledge,

consent, and approval, but in the schedule of particulars the charges are narrowed down to acts of respondent's sub-agent Glannan, and no attempt was made at the trial to establish knowledge or approval of such acts on the part of Mills. In dealing with the evidence for the purpose of determining the issues between the parties no advantage will, to my mind, be gained in taking the charges in the order they appear in the petition. For the sake of clearness, I think they can be more conveniently dealt with by following up the evidence of the witnesses who are involved in, and give their testimony upon certain of the charges, falling under different heads. By so doing, the credibility of the witnesses can be better tested, and amid the direct conflict which exists in the evidence it will be found that the credibility of the witnesses is the point upon which the case will mainly turn. Under the charge of bribery, it is alleged that Glannan, as sub-agent of Mills, promised a voter named Edwards, money, or other valuable consideration, for the purpose of inducing him to vote for Mills. Glannan is charged with treating this man Edwards, amongst others, by giving him drink free of cost for a like inducement. Under personation it is said Glannan corruptly counselled Edwards to personate two voters called Donnelly and Bauer, and to vote for Mills in the name of one or other of them. And, lastly, Glannan is alleged to have promised Edwards his railway fare for the purpose of his being conveyed to the poll and voting for Mills. It appears from Edwards's evidence that in response to a note received from Glannan he visited the Masonic Hotel, in Port Elizabeth, on the 8th of July last. This was on a Friday, and the election took place at Uitenhage on Tuesday, the 12th. On arriving at the hotel, Glannan asked him what he was going to have, and stood drinks in the bar of the hotel to him, and three others, called Wall, Halley, and Cheney. Glannan then asked him if he was going to Uitenhage to vote, and upon his saying that he was not in a position to go, Glannan replied, "I will fix that all right." After discussing the election, and the desirability of finding the voters living at Port Elizabeth, Glannan took some voting cards out of his pocket, gave Edwards one for himself and another, bearing the name of Clement Bauer, and said, "There is one; you might vote at the Red House on that." Edwards said, "I do not know Clement Bauer, and they will very soon find me out at that game. I will not do it." Glannan then showed him a card bearing the name of Hugh Donnelly, and asked Edwards to take Hugh's place. Edwards refused, and did the same with respect to several other cards. Glannan then went out, and after a couple of minutes returned and paid for drinks to the same lot of fellows as be-

fore. After that Glannan took him a little apart from the others, and during their conversation Edwards said he had no money to go to Uitenhage. Glannan said, "I am going to Uitenhage, and will have to see Mills—or Mills' party—and I will fix you up." This conversation took place in the bar of the Masonic, where there were several other persons present who joined in part of the conversation, but much of it was addressed to Edwards, as he says "in a little aside." It will be seen that it was almost at the conclusion of the conversation that Glannan took Edwards a little apart from the others. In cross-examination, Edwards says, "Glannan wished me to personate Bauer or anyone of the five or six whose names were on the cards which he showed me. I got my card in the presence of Halley and Cheney. They probably heard what was going on. It was in something like a whisper that Glannan presented me with cards, and asked me to personate the people." The evidence of Edwards imputes to Glannan at this one meeting the offences of bribery, treating, personation, and illegal conveyance of voters. He then goes on to say that on Monday evening he and Halstead went to the Masonic Hotel, and in the billiard-room Glannan offered them drinks, but Glannan was taken out of the room by someone before they had the drinks. On Tuesday morning, Edwards says he went to Uitenhage by the 10.10 train, having been provided with a railway ticket by a man called Paulse. The evidence of Edwards with respect of the occurrences on the evening of Friday, the 8th, is not corroborated by any other witness. On the other hand, Glannan says that on that evening, at his request, Edwards came to the Masonic Hotel at 7.45, and he gave Edwards a voting card for himself and one for Donnelly, but that he never asked him to personate Donnelly or any other voter. He says he went into the bar of the Masonic Hotel with Beckett, a little after eight o'clock, but did not see Edwards there. From there they went to the Grand Lodge of Buffaloes, where they stayed till 10.40. Beckett states that he was with Glannan on the night of the 8th at the hotel from 6 to 11 o'clock, and from 8.30 they were at the Buffalo Lodge, which was held in the hotel, and the only drinking he mentions was when he stood Cheney and Glannan drinks. I may here mention two other witnesses with whom Edwards comes into conflict in his evidence. Abbott and Anderson say that on the night of the Uitenhage election they met Edwards between 9 and 10 o'clock at Wynne's Hotel, in Port Elizabeth, and in conversation, Abbott says Edwards told him "I had a quid from Fremantle's agent this

morning." To Anderson he is said to have remarked, "I had a sovereign from the Bond agent, my fare and a good feed, and I am going to have some more money." This is denied by Edwards, who adds, however, "I told people all sorts of lies when I thought they were trying to get information from and spy upon me." This is the evidence bearing upon the following charges: Schedule A 3, Schedule B, Schedule C 3, and part of Schedule D 2, and upon this evidence, together with such light as can be derived from circumstances, we must determine these charges. In my opinion a certain degree of improbability attaches to Edwards's account of what took place at the Masonic Hotel on the 8th of July. It was certainly a stupid and dangerous thing for Glannan to resort to the illegal practices mentioned at the public bar of an hotel in the immediate presence of a number of other persons. Nevertheless the improbability is not so great but that it may be removed by the evidence of reputable witnesses. On the other hand, it was contended that when an election agent goes about amongst the voters during the election showing his money about, he falls at once under suspicion. These general considerations are, after all, of very little utility. What we have to consider is whether we have credible evidence affording clear proof of the offences charged. Can we safely rely upon the evidence of Edwards for our finding upon this part of the case? His statements are uncorroborated by other witnesses, they are denied by witnesses for the respondent, and very little light is derived from surrounding circumstances. That being so, one very important consideration will be the credence due to the evidence of Edwards, having regard to his general character and his conduct in this case. It does not necessarily follow that his evidence should be rejected merely because his general reputation is bad. We should still be obliged to scrutinise his conduct in matters relevant to the case itself. I do not think it would serve any good purpose to describe the character of Edwards in detail, but I must say at once that upon his own admissions, his reputation in respect of honesty and truthfulness stands very low. Such being his general character, he was employed by what he calls "the Fremantle party" to work up this case, and he was to be paid any expenses he was put to in getting information for them. In endeavouring to obtain evidence, he told Moses and Steele that if they gave information there would be a trip to Cape Town for them if the case was tried there, together with their expenses, and to Halley he said the people whom he (Halley) had befriended by giving information would give him a passage Home. He says he told plenty of lies for the edification of people who

tried to get information from him, and that it was quite possible he might have said the Bond had promised him a free passage to England. Edwards and Halstead went up to Aberdeen, and lived there for some time at the expense of those who managed the case for the petitioner. One of the attorneys of the petitioner paid for the board and lodging of the witnesses who were sent up to Aberdeen, and gave them a few pounds to keep them going. This procedure was certainly very ill-advised, and the justification offered was that it was necessary to secure the evidence, and prevent the witnesses being got at. But considering the character of Edwards, these proceedings were quite as likely to prove an inducement to give false evidence as to secure an adherence to the truth. However, the result of all this evidence is that Edwards, by his employment, became an interested witness; that he is convicted of having made statements before the trial relative to the subject matter of the cause inconsistent with his evidence at the trial, and that in giving his testimony, he has been subject to the influence of improper inducements. Taking all this in connection with his previous character, and the circumstances as to time and place when and where the offences are alleged to have been committed by Glannan, I feel no hesitation in entirely rejecting his evidence, which is in conflict with that of the respondent's witnesses. And I find that the following charges have not been proved, viz., Schedule A3, Schedule B, Schedule C3, and that part of Schedule D2 which refers to Edwards. Having dealt at some length with the case of Edwards, the consideration of those of Graham and Halstead will be shortened, in so far as they are affected by the same general condition. The charges in connection with Graham come under Schedule A2 and Schedule D2. Graham says that on the morning of Tuesday, the day of the election, Glannan spoke to him, and upon being asked by Graham who would pay his expenses if he went to vote, Glannan said "Your expenses will be all right." I said, "I want my expenses before I leave." He took me out of sight of the people in the passage and gave me 10s. 6d. Before I came away he said, "Don't forget to meet me at the station," and he gave me another shilling. He says he had promised to go and see Glannan on the previous Saturday, but did not go. Glannan, on the other hand, says he saw Graham at seven o'clock on Saturday night at the Masonic Hotel, and spoke to him about the election, but neither promised nor paid him anything, and did not see him at all on Monday. Here again we have a direct conflict of evidence upon which we have to decide. I may here refer to a contention advanced by counsel for the petitioner, when he argued that al-

though certain of the witnesses might not be quite reputable, and their evidence singly might not be regarded as reliable, they might yet be taken generally as supporting one another, and thus on the whole making out a good case. Such an argument might be sound where the Court entertains doubt of the veracity of a witness, and requires corroboration to remove the doubt, but it cannot apply where the evidence of witnesses has been entirely rejected as false, as in the case of Edwards. In deciding between Graham and Glannan, I feel myself obliged, through lack of other aids, to resort to evidence of a character similar to that in the case of Edwards. Graham says he was first spoken to by Edwards about this case, but before that, and before he knew that any case was coming on, he went upon invitation of a man called Fletcher, a private inquiry agent, to his office, and there made a statement that was taken down in writing. The statement contains the following allegations, amongst others: "I afterwards saw Glannan on Tuesday, the 12th inst. He asked me if I was going to vote. He did not give me any drink or money, neither did he promise me any. I was not asked whom I was going to vote for or was told who to vote for." In his evidence Graham says: "The statement is a parcel of lies from beginning to end. I told them to Fletcher because he had no right to ask these questions." This man was also taken to Aberdeen, where his expenses were paid by Moore, at the request of Schoeman, Fremantle's election agent. He was sent to Aberdeen to prevent his being got at in Port Elizabeth, but he himself says that he went to Aberdeen because he was sent for by Edwards, who had work for him there. In this case we have a direct illustration of the danger of holding out inducements to a witness like Graham to adhere to a statement once made by him. It is impossible to say what might have happened if sufficient inducement had been held out to keep him to the statement made by him to Fletcher. Graham had been shown not to be a truthful witness, and, with the exception of previous general bad character, similar considerations exist in his case to those which operated in the case of Edwards. It is therefore impossible for me to find upon his evidence that the charges in Schedule A2 and Schedule D2 have been proved. The next charge I shall take is the one under Schedule 2, which alleges that Glannan promised Halstead, who was not a registered voter, money or other valuable consideration to induce him to personate Clement Bauer, a registered voter, and to vote for Mills. Halstead says he did not know Glannan before the election, but was introduced to him by Edwards in the billiard-room of the Masonic Hotel

on the evening of Monday, the 11th of July. "The conversation," he says, "turned on the Uitenhage election, and Glannan asked me if I would vote for their party?" I said, "Which party?" He said, "The Progressives party." I said, "I have no vote in the Uitenhage division." He replied, "We can fix that up all right." I said, "But I am not entitled to vote." "Then," he goes on in his evidence, "the beer came in. Glannan gave me the card produced. He said, 'I could vote in that man's name, as I was a mechanic as well.' I put the card in my pocket without looking at it. I took it home and showed it to Edwards. Glannan said he would pay my expenses. After that he called for a bottle of champagne, but someone took him out." As a matter of fact, Halstead did not go to Uitenhage to vote. He says he gave the card, which contains the name of Clement Bauer to Fremantle on the Saturday after the election. Edwards, who was present in the billiard-room, and speaks of the beer-drinking and ordering of champagne, says nothing of the conversation between Glannan and Halstead. Glannan says, "I did not ask Halstead to personate anyone. I do not know Halstead. I did not see his face until he was pointed out to me yesterday." Glannan did not fill in Bauer's card. Spittal states that on the evening of the 11th July he was with Glannan all the evening. He met him a little after six o'clock, and saw him into bed after eight o'clock. Glannan was not in the billiard room at all that night. Spittal was at the time of the election in the employment of Mills, who is described as a private banker or money-lender. The evidence of Halstead briefly amounts to this: That Glannan, who was a perfect stranger to him, meets him in the public billiard room, where there were others present, and without much ado requests him to proceed to Uitenhage to personate a voter, offering to pay his expenses. This is directly denied by Glannan, and indirectly contradicted by Spittal. It appears that the card bearing Bauer's name was not in the handwriting of Glannan, although there is evidence that other voters' cards given out by him were filled in by him as they were required. Here again the question of credibility comes in. Mr. Hofmeyr says he advised that Halstead, amongst others, should be sent away from Port Elizabeth. He paid as the keep of the men while they were away in all £29 on behalf of Edwards and Halstead. He also gave Halstead £2 10s. No arrangement was made for the money to be returned, and he did not expect to get it back. Halstead, on the other hand, states he will have to repay the money for his expenses, part of which, besides what was paid by Hofmeyr, was paid by Moore. Halstead lived at the hotel at Aberdeen at the

rate of £6 10s. per month, and does not know how much he owes Moore. I think there can be no doubt that this is false, and that he was well aware that he was living at the expense of Fremantle's agents. He admits he was sent to Aberdeen by Hofmeyr along with Edwards, and could not possibly have contemplated going there at his own expense. Then he says he worked for a time at Aberdeen, whereas Edwards says there was no work for him there. Here, then, we have Halstead contradicted by Glannan and Spittal, unsupported by Edwards, who was present at the alleged conversation; we have untruthfulness on the part of Halstead; we have conduct operating as an inducement held out to give evidence favourable to petitioner; and a degree of improbability attaching to his story. On the whole, I come to the conclusion that the petitioner has failed to establish the charge in Schedule C2. Lastly we come to the case of Babb, which differs in some important respects from the others. Babb says he was asked by Glannan to go to the Masonic Hotel on Friday, the 8th of July, but he did not go till Monday night, when he went there in consequence of a message delivered by Jack Price. He went into the bar and spoke to Glannan, there being no one else present. Glannan said, "Are you coming up to-morrow?" I said, "Yes, but what about my day's pay?" He did not say to me what I was to come up for. He said, "How much a day are you getting?" I replied, "10s. 6d.; but want 2s. 3d. for my train fare." He said he would pay me that, and he adds Glannan gave Price the money to give him half, and Price gave him 12s. 9d. at the next bar lower down the street. Glannan, on the other hand, says on the evening of Monday he was at the bar of the Masonic Hotel in company with Spittal, and stood drinks to the Buffs, there being a number of persons present. Price came up to him and asked him for the two sovereigns he had lent him on Saturday. He saw Babb there, but did not speak to him. Spittal was present when the money was paid to Price, no portion of which was intended for Babb. Spittal says, "I did not see Babb there that evening. He certainly was not with Glannan, because I was with Glannan all the evening. I am certain he never spoke to Glannan that evening." Price states that on Monday evening he went to the Masonic to get the money he had lent to Glannan on the Saturday. On the way he met Babb, who said he was going to see Glannan. At the Masonic he asked Glannan for his two sovereigns, and got it in gold. Glannan never said anything to Babb about the election; if he had, Price must have heard it. Price, Babb, and others then left for another bar, where Babb, according to Price, said if he had his day's pay he would stand a

drink. Price said, "How much do you want?" He said 10s. 6d. for his wages and 2s. 3d. for his ticket. Price said, "I will give you the 12s. 9d." Price afterwards demanded his money back, but Babb said that part of the money which Glannan had paid to Price was for his day's wages for going to vote. Now the bare statement made by Babb as to what passed between him and Glannan, contradicted as it is by three witnesses, leaves the matter in a very unsatisfactory state; but it is certainly true that in some respects what took place between him and Price does seem to support his evidence of some promise having been made by Glannan. However, when carefully examined, there seems to be a hiatus in his evidence—an important link wanting, which makes it difficult to follow him. According to him, money was paid to Price, of which he was to get half; but when Glannan gave Price the money, he did not hear what passed between them. No reason is given why Glannan did not pay Babb himself, and Babb does not know how much was paid to Price. Price says he got the money in repayment of a loan, and there is nothing to contradict him unless it be the fact that he gave 12s. 9d. to Babb. Babb did not say that anything was said or done by Glannan to show that he was to receive a portion of the money paid to Price. Even if a promise was made to him, there was nothing to connect that promise, by word or deed of Glannan with the money paid to Price. If Price paid on account of Glannan, how was it that he afterwards demanded the money back from Babb? Price said he paid nothing on account of Glannan, and Babb, when asked how he knew that he was to get half the money given to Price—not having heard what Glannan said to Price—gave the following inconsequential answer: "I was standing there when he gave Price the sovereign and the silver. I do not know whether he owed Price any money, but I was told to get half—that is 12s. 9d." Glannan could only be held responsible for the payment by Price, or be looked upon as principal in the transaction, if the payment was made in consequence of something said or done by himself, and no information upon that point could be discovered in Babb's evidence. It must be borne in mind that under this charge the actual payment of the money must be proved, and not merely the promise. Babb, upon the evidence, was wholly ignorant of what took place between Glannan and Price, and there was nothing to disprove their statement that the money repaid was a loan, and had nothing to do with Babb. In that case there was no proof that the money Babb got from Price was paid on account of Glannan, and the petitioner must fail in that part of the case also. He did not wish it to be supposed that

his decision upon the evidence would have been otherwise if the promise to pay had been charged instead of the actual payment, because if Babb's evidence as to the payment was rejected, his statement as to the promise was seriously impeached. He had not lost sight of the important bearing on the case of the evidence of the occurrences at the barber's shop and of Glannan's admitted intercourse with the witnesses in the case. When an election agent went about flourishing the money he carried with him and boasting of what he would be able to perform with it, he brought himself under grave suspicion. But he was afraid suspicion very readily attached to election agents, who seldom went about with empty pockets in view of the legitimate expenses they might be put to. Circumstances of suspicion might operate very seriously against such agent where the weight of evidence was uncertain in the balance, but they were of less importance where the petitioner's case failed through its own inherent weakness. Again, where negotiations took place between an election agent and voters of doubtful character, he would on occasion find it of no avail to try to escape by reflections upon their reputation. It was the duty of the Court to examine the evidence with an eye upon all those considerations, and to find the facts upon the whole of the case. Upon such of the charges contained in the petition as had not been dealt with in the judgment, the petitioner offered no evidence, and upon the rest he had, in his opinion, failed to prove his case. The Court therefore determined that the respondent was duly elected. Petitioner was ordered to pay costs.

Hopley, J.: In this matter the petitioner, who was the unsuccessful candidate at the election held in July last for the representation of Uitenhage, in which constituency an additional seat had been created by the Additional Representation Act of 1904, seeks to unseat the respondent, who was the successful candidate, on the grounds of bribery, treating, counselling to personate, and carrying electors to and from the poll by paying moneys for their railway fares, which illegal acts were, it is alleged, committed by one James Glannan, who had been appointed a sub-agent for the respondent in the conduct of the electoral contest in question. The particulars of these offences against the election laws, in so far as they have not been abandoned, set forth: (1) That the said Glannan bribed three voters, registered as such for the said electoral division, to wit, George James Bubb and Thomas Graham, by giving each of them the sum of 10s. 6d. to vote for the respondent or to refrain from voting for the petitioner, and one John Edwards, by corruptly promising him

money or valuable consideration to induce him to vote for the respondent. (2) That the said Glannan treated four registered voters, viz., the said Edwards, one Halley, one Smith, and one Cheney to free drinks for the purpose of inducing them to vote for the respondent or to refrain from voting for the petitioner. (3) That the said Glannan, by means of promises of money, endeavoured to induce and corruptly counselled one Sydney Halstead and the aforesaid Edwards to personate certain absent voters, and to record votes in their names. And (4) that the said Glannan paid the aforesaid registered voter, George Bubb, the sum of 2s. 3d., to convey him by railway to the polling station of Uitenhage from Port Elizabeth and back again, and that he also promised to pay the aforesaid Edwards and the aforesaid Graham their railway fare to and from the poll. The facts disclosed by the evidence show that Dr. Vanes, of Uitenhage, was the election agent for the respondent, and that he appointed one Japhta, a coloured man, and the said James Glannan as sub-agents. Shortly before the date of the poll, which was fixed for Tuesday, 12th July, Dr. Vanes became ill, and Glannan admits that he then became virtually the respondent's chief agent, and was practically "running the election." This would not render any illegal acts of his more illegal, or give an air of illegality to acts otherwise innocent; but it is nevertheless a fact to be borne in mind, as tending to prove that Glannan would be more upon his mettle, and would strain every nerve and make every possible endeavour to secure a victory. It was known that the struggle would be a close one, and in such a case there was every inducement and temptation to any, save the most scrupulous, agent to disregard the provisions of the law, if by so doing he could secure, or be likely to secure, a successful issue to the contest. The constituency in question has for its near neighbour the important town of Port Elizabeth, and it is to be expected that many of the voters, especially of the labouring classes, are at all times likely to be attracted to that larger field, and that anyone who loses a situation in Uitenhage would almost naturally gravitate or migrate to the more hopeful and possibly more attractive centre. Such, at all events, when the lists were scanned, seems to have been the case in the present instance, and it was found that a number of Uitenhage voters, probably sufficient to turn the scale, had gone to Port Elizabeth, and were in many instances to be found there. To procure them, then, would naturally become the wish of any election agent, and in all probability both sides made efforts to attain this object. It is with Glannan's efforts in this

direction that the Court is concerned, and it becomes material to inquire and discover, if possible, what manner of man he was, and whether he was likely to be in such circumstances highly scrupulous or somewhat lax in the interpretation of the duties and obligations incident to his anxious and responsible position. The evidence shows that he was a keen partisan, with considerable experience in electoral contests, and with an intimate knowledge of a section of the electorate, that especially which consisted of the white men employed in the Uitenhage workshops, or in the railways as artisans or mechanics. A great many of these he seems to have habitually known and addressed by their Christian names, generally in the diminutive form, and as far as I could judge, he was always ready to drink with any of them at any time, if only there were a convenient bar or public-house, as, so far as this case is concerned, there invariably was. There is nothing, however, in these characteristics to distinguish him from the considerable (I mean numerically considerable) class who seem to think that popularity, hilarity, and good-fellowship depend mainly upon excessive familiarity and frequent and indiscriminate hospitality at canteens and drinking bars; and though they may indicate a not particularly fastidious disposition, they do not necessarily imply a want of scruple or a tendency to do dishonourable or illegal acts; but some further light is thrown upon his character in the role of an election agent by the evidence of the witnesses Parkin and Adcock, which I believe to be quite accurate and trustworthy. It should be borne in mind that both these witnesses are politically opposed to the petitioner, and are, in that sense, unwilling witnesses in his favour, and not likely to exaggerate any point which is likely to tell against the respondent, with whom they are politically in sympathy. They state that on the day before the poll, Glannan, in Adcock's shop, in the presence of themselves and one or two others—all being, however, of the same political party—displayed a considerable sum of money, saying that that was what he had to "do with" for the election; that Adcock thereupon warned him to be careful of the "Beck Act," and that he then retorted, "I know more about elections than you or your grandfather, and I can drive a coach and four through the Beck Act," or words to that effect. Glannan, it is true, tries to put a different construction on both the production of the purse, which he alleges he produced for the purpose of offering a bet on the result of the election, and that he flourished a five-pound note for that purpose only. He swears that all the money in the purse was his own private money, and that it was no more than £10. He admits that he said he was so keenly interested in the result that he

was prepared to spend the whole of that sum (his private money) on getting the boys (meaning the Uitenhage voters resident in Port Elizabeth) up to vote; and as to the words about the Beck Act, he admits that it was referred to, but that all he gave vent to was something in the nature of a prognostication that people would soon be driving a coach and four through it. As I have intimated, I do not believe him. I do believe Parkin and Adcock, and I do not think that there was any room for a mistake on their part. It should be observed that this conversation took place on the Monday, the day before the polling, when Glannan was on the point of starting for Port Elizabeth. He had gone to that town on Friday, 8th July, and had stayed there, at the Masonic Hotel, until Sunday, 10th July; and on Monday, 11th July, he was starting again for the same place, and did actually go shortly after the episode in Adcock's shop. He wishes the Court to believe that he went to Port Elizabeth, not mainly in connection with electioneering matters, but primarily to collect some rents (apparently of no great amount) which were due to his wife and to an estate in which he was the *curator bonis*, and that he took the opportunity to look up some of the "boys" i.e., Uitenhage electors. He swears that on the Monday he again went in connection with the same business, and he wishes the Court to infer that he was not in such circumstances likely to be thinking much of the Uitenhage election or to be making strenuous and illegal endeavours to get every possible voter to go there. Again I do not believe him. It is to my mind inconceivable that a keen electioneering agent on whom had devolved the conduct of the campaign should be wasting his time, as he would have the Court believe, on the eve of the decisive battle; and I feel certain that he was in Port Elizabeth from the Friday until the election day (with exception of portions of Sunday and Monday) for the purpose of ensuring the presence at the polling-stations of the contingent which he could procure from that town. Now while I believe that he was there for that purpose and that he went from Uitenhage with a considerable sum of money about which he had made the remarks I have detailed in the presence of Adcock and Parkin, and while these things and his general demeanour predispose my mind to believe him capable of committing irregularities, and even likely to commit them; it still is necessary to look for proof, and strict proof, that such irregularities and breaches of the law as are alleged against him were actually committed by him. These charges to a very great extent depend upon the evidence of Edwards, Graham, and Halstead (I am for the moment leaving out of consideration the evidence

of the witness Bubb to which I shall come later). Now with regard to those three men it is not too much to say that in a case like the present they are totally unworthy of credence. Two of them, Edwards and Graham, confess, and apparently without much sense of shame, to a past so disreputable and to actions so disgraceful that in any charge brought by them against a fellow-creature in which their own sordid interests or their own base motives were, or might be, concerned, any judge would warn a jury that they should exercise the very greatest caution before they accepted their evidence or found anything proved from so tainted a source. Not only are they in themselves not worthy of belief, but it is clear that inducements have been held out to them which might be quite sufficient to induce men of that stamp to make false charges which they might be ready to support by perjured evidence. As to Halstead there is not so much to be said against him; but it is significant that he was at the time of the election out of employment—that he was living with Edwards, whose "chum" he is alleged to have been—that he went up to Uitenhage at the time of or immediately after the election and tendered information to the petitioner, that inducements were held out to him by agents of the petitioner, (but there is nothing to indicate that this was done with the knowledge of the petitioner himself), and that since that date he has been living at the expense of the petitioner or of his political adherents. With regard to all these men it has been shown that when they had made their statements—statements on which the bulk of the charges in this petition are based—they could not be trusted by their own side not to vary or change them; that they were in consequence of such fears taken away to the somewhat remote village of Aberdeen, and that they have been there kept in idleness at hotels at the expense of the petitioner or of his political party. Of what use can evidence from such sources be when the result of accepting it would entail such serious results as would necessarily follow? I am far from saying that the things they swear to did not happen. Having regard to their own characters it is quite possible that such illegalities were committed; for they themselves, especially Edwards and Graham, would readily lend themselves as accomplices, if only it were made worth their while; but it is impossible to find so upon their unsupported testimony. Such being my feeling as regards these men and their testimony it follows, upon an analysis of the grounds of complaint against the respondent, and of the evidence supporting them, that they all fail save those which allege that Glannan bribed George James Bubb to vote by a payment of 10s. 6d., and that he also pro-

vided him with 2s. 3d. for his train fare to and from Uitenhage. These charges rest upon the evidence of Bubb himself, but not, I think, entirely—as I shall endeavour to show. Against Bubb personally nothing has been advanced which in any way tends to throw discredit on him. He is a man who resided for some time in Uitenhage, and who has for the last 16 months been in the employ of the Harbour Board at Port Elizabeth as a riveter. His past and his present conduct are therefore well known, and it is certain that if anything could have been adduced to bring him into disrepute or to impugn his veracity it would have been forthcoming. His evidence amounts to this, that on July 8, Glannan, accompanied by one Polson, an ex-publican, who used to reside at one time in Uitenhage, and who seems to have been somewhat active as a sub-agent of Glannan's in Port Elizabeth for purposes of the election, came to him on the jetty, where he was at work, that Glannan began to talk about the Uitenhage election by implication, mentioning the respondent's name, saying that he "had seen Mills about him," and asking him to come down that night to the Masonic Hotel—where Glannan was (as is admitted) staying; that he did not go that night to the hotel, and that next day he received a message purporting to come from Glannan through one Price, who also worked at the same jetty; that in consequence of this message he went on Monday night, July 11, to the Masonic, where he saw Glannan, and had a short, but significant, conversation with him, Glannan asking him if he was going to Uitenhage the following day, to which he replied, "Yes, but what about my day's pay?" to which Glannan rejoined by asking how much it was, and Bubb informed him 10s. 6d. for the day's pay and 2s. 3d. for train fare; whereupon, he swears, Glannan said that those sums would be paid to him. He further deposes that immediately thereafter he saw Glannan give into the hand of Price a sovereign and silver, of which he concluded he was to get half, or at all events 12s. 9d. (for he seems to have drawn the inference that Price had made a similar bargain with Glannan). He further relates that he and Price then left that bar and went to another in the neighbourhood, and that Price there handed over to him the exact amount of 12s. 9d. It is true that the word "election" was not used, but if Bubb's evidence is correct this money could have reached him for no other purpose than to induce him to go to the election and record his vote for Mills. Taken in conjunction with Glannan's remark on the jetty that he had spoken to Mills about him, his next remark a few days later, "Are you coming to Uitenhage to-morrow?" and what immediately followed could bear

only one interpretation. Again, Bubb admits that he did not hear Glannan say to Price that he was to pay over any of the money to him, but he quite understood in his own mind that he was to have some, viz., 12s. 9d. of the money which he saw passing from Glannan to Price. Now, if the whole of Bubb's story were contradicted or if only that portion of it which narrates that Price handed over 12s. 9d. at the next bar to him were contested, I should not be inclined to find this matter proved as against Glannan. But Price, who was called as a witness for the respondent, was obliged to admit, or, in fact, he never denied, that at the next bar he handed the exact sum of 12s. 9d., part of the money he had just received from Glannan, over to Bubb. What is the inference to be drawn from such evidence? To my mind, it seems to be clearly proved that money which was admittedly paid over by Glannan to Price was—as to the sum of 12s. 9d., a part of it—within a few minutes passed over by Price to Bubb. It is also clearly established that Bubb went next day to Uitenhage and voted, and that he lost 10s. 6d., a day's pay at his ordinary work. These facts, taken in conjunction with Bubb's evidence, which I saw no reason to doubt, or to think was given dishonestly, lead me irresistibly to the conclusion that the money passed in the way described from Glannan to Bubb, on the understanding and for the considerations as detailed by Bubb. My feeling is strengthened rather than weakened by the evidence given by Glannan and Price to account for the facts (which they could not deny) that money passed from Glannan to Price and from Price to Bubb. To explain all this, Glannan and Price swear that on the Saturday night, Glannan, finding himself running short of money, had met Price, and asked him for a loan of £3. Price, it is alleged, was at the time walking in the street with his wife and four small children. The family (which we are told has within the last month or so received an increase). Price was supporting on a wage of about £3 a week. Nevertheless, it is said that Mrs. Price, to whom the week's wages had been given, made no difficulty about letting Glannan have £2, all she could spare, on loan until the Monday night. This, of course, is possible, though improbable; but if such a thing really did happen, it seems wholly unlikely that Glannan and Price would differ as to what immediately followed. Glannan swears that as soon as the money was lent, he and Price and Mrs. Price went into the back bar of the hotel and had a drink together—what became of the children he does not say—while Price is positive that his wife went into no bar and had no drink with him and Glannan. This peculiar story,

suspicious in itself, is told to account for Glannan's having to hand money to Price on the Monday night; but it is obvious that the handing of the 12s. 9d. part of that amount to Bubb immediately afterwards must also be explained away, and for this purpose another loan (again from the open-handed Price) is brought forward. Price states that on the Monday night his wife sent him to the Masonic to fetch the £2 from Glannan (an action on her part extremely likely, if she had ever parted with it in the manner described). He adds that on the way he met Bubb, who told him that he was on his way to the Masonic to see Glannan, and that he and Bubb waited for Glannan at the Masonic. Presently Glannan arrived, and it is at this time that Bubb alleges that he had the conversation with Glannan. Glannan and Price, however, both swear that Bubb had no conversation with the former, and we are asked to believe that a man who had just told Price he was going to the Masonic to see Glannan, and who had waited for Glannan, left the place without a word of any kind passing between them. That, however, is by the way. What we know is that Bubb and Price left the Masonic together, and Price alleges that Bubb then wished to treat him and a couple of others to drinks, and that he said: "If I had my day's pay, I would stand drinks." Price adds that he then said, "How much do you want, then?" to which Bubb replied, "10s. 6d. for my day's pay and 2s. 3d. for my railway fare." And Price says that he thereupon agreed to lend Bubb the sum of 12s. 9d., and handed over that exact amount to him then and there. This whole story seems to me to bristle with improbabilities. If ever Bubb said anything about his day's pay, there was no necessity for Price, who worked with him at the Jetty, and who knew it exactly, to ask how much it was. Nor can I conceive how, in answer to the question of how much he wanted, put in such circumstances, Bubb could possibly have replied, "10s. 6d. for my day's pay and 2s. 3d. for my railway fare." Price says he lent Bubb that exact sum, understanding how it was arrived at, thinking that someone had promised him a day's pay and his fare to Uitenhage; but he would not say who he thought had made such promise; in fact, he says that Babb had told him that same day that some one had promised him his day's pay and his fare to go to Uitenhage and vote. The impression made by the whole of the explanation, and the story of the double loan, upon my mind, is that it is a tissue of inventions, and I believe that the true history of the 12s. 9d., which undoubtedly reached Babb's hands very shortly after it left Glannan's, is that set forth in Babb's own evidence. If, therefore,

this matter depended upon my sole verdict, I should feel constrained to hold that the portions of the petitioner's case which set forth illegal practices in connection with procuring Babb's vote, and his attendance at Uitenhage had been proved. I cannot say there is no room for doubt, for that exists *ab initio* from the fact that Babb admits that he was willing to fall in with an illegal and immoral bargain, whereby he was to receive a pecuniary consideration for going to Uitenhage to record his vote; that he received the money; and that he did in consequence go to Uitenhage and record his vote. Still, his evidence is so strongly corroborated by the concomitant circumstances, that in my opinion a jury trying this matter as a criminal charge would have been justified in returning a verdict of guilty. But I am bound to bear in mind that I am only one member of the tribunal which has to deliver a verdict on this important matter—a matter which it is right to treat as strictly as a criminal trial, and upon which there should, if possible, be unanimity—at all events for the purpose of finding corrupt practices proved—a finding which would entail the consequence that in the opinion of the Court Glannan had been guilty of criminal acts subjecting him to serious disabilities and considerable pains and penalties. These considerations have weighed with me, and, though they have not affected my own conviction, and though I shall not on that account shrink from carrying my finding to its logical and legitimate conclusion, still, I feel that I am constrained to approach the question of what the verdict of the Court should be from a different standpoint, and to examine the result I have arrived at in relation to the effect produced by the evidence upon the mind of my learned colleague on the Bench, and to the sentiments entertained by him upon the whole of the case. My learned brother entertains grave doubts as to the sufficiency of the evidence to establish any of the charges, including the two as to which I personally am ready to find for the petitioner; and though I have laid my views on these before him as strongly as I was able to do, I have failed to remove those doubts, which still remain in his mind of so serious and substantial a nature as to render it impossible for him to find these charges proved. In view of the great experience of the learned judge, and of the care which he has devoted to this case, I cannot but feel that his opinion is entitled to the highest respect, that, in fact it raises very strongly a presumption that possibly my own feelings may be too absolute and my finding beyond what is warranted by the evidence. I cannot abandon my own view, but I am faced by the fact that in the eyes of a judge of great ability and experience the evidence is not satisfactory, or sufficient to enable him to find

that the petitioner has made out any portion of his case. In the face of such doubts, so seriously entertained in such a quarter. I feel bound to inquire whether I should be justified in persisting that my own view must necessarily be the right one, and that our verdict shall be in accordance with conclusions which I can arrive at, but which my colleague finds it impossible to reach. In similar circumstances at Criminal Sessions where there has been a conscientious difference of opinion among sensible men composing a jury. I have always advised that portion of the panel which favoured a conviction that it was their duty to respect, and probably to yield to the opinion of those who favoured an acquittal. I can draw no distinction, in principle, between such circumstances and the present case, and, adopting the rule which I am ready to lay down for the guidance of others and applying it to myself, I feel that I should acquiesce in a verdict for the respondent.

Mr. Burton said that he would like to address their lordships in regard to the matter of costs. He would ask the Court under the circumstances disclosed, and the view which the Court took of the whole case, to say that it was not a case in which the petitioner should be saddled with the costs. He founded the application substantially upon two grounds. One was the extremely unsatisfactory conduct throughout the history of the case of the sub-agent of the respondent (Glannan), upon whose acts the petition was founded. He submitted that Glannan's conduct had been of such a nature as to justify the claim of the petitioner that there should be no order as to costs. There was a precedent for such a course. In the case of *Burton v. Rhodes and Hill* (9 Sheil, 2)—he was sorry to have to mention this case—one of the agents of the respondents had issued a false statement in the form of a circular, setting forth to the electors on the very eve of the election that the respondents had thrown open certain diggings with a view of influencing the electors. That a false statement was issued was proved; but the Court found that it did not come within the terms of the Act as to bribery, but disapproved of the conduct of the respondents' agent. There was also another charge against the agent, but this also was not held to be bribery. Although the petition failed on strict legal grounds, the Court expressed its very strong dissatisfaction with the conduct of the agents, and, on that ground, disallowed the respondents their costs, and no order as to costs was, therefore, made. The second ground on which he (Mr. Burton) asked their lordships to follow this precedent was that, although the petition failed on the finding of the Court, yet the circumstances were of such a nature that it was in the public interest that the investigation should be proceeded with, and that the

suspicious nature of the circumstances justified the investigation. In such circumstances, it had been held both in England and in our Courts that there was a just and proper ground for disallowing costs to the successful party. Counsel cited the cases of *De Waal v. Sircwright* (9 Sheil, 12) and *Harding v. Sauer* (9 Sheil, 51). He added that he pressed the question of costs, especially in view of the difference of opinion expressed by their lordships in regard to Babb's evidence. He submitted that it was a clear case in which the Court should say that, although the petitioner had failed, the petitioner should not be saddled with the respondent's costs.

Maasdorp, J.: We have come to the conclusion that this is a case where we ought to follow the ordinary rule, viz., that the unsuccessful party should pay the costs. It has been stated that we ought to vary the rule to some extent, because of the unsatisfactory conduct of the respondent's agent; but I think we might look at the case from another point of view, and, in inquiring whether it was a proper case to bring before the Court, we ought to ascertain how this case does come before the Court. We have both expressed our opinions that the manner in which the witnesses were brought before the Court was not such as to commend itself to the Court, and I think that, after the petitioner had become aware, or his advisers had become aware, of the character of those witnesses, and the necessity there was to safeguard them in such a way as to prevent them failing the petitioner, the petitioner should himself have said that this was not a proper case upon which to go into court. I think that when the advisers of the petitioner saw what unsatisfactory witnesses they were, he should have said, "It is not in the public interest upon such evidence to try to unseat the man who has been elected." Upon those grounds, I think that, though there may be some unsatisfactory points on the part of the respondent, this, in my opinion, is not a case in which it was in the public interest to come into court.

[Petitioner's Attorneys: Michau and De Villiers; Respondent's Attorneys: Van Zyl and Buissinne.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

CIVIL APPEALS.

MULLER BROS. V. LOMBARD. { 1904.
Nov. 24th.
" 30th.

Power of attorney to sue—Signature by trustee for self and co-trustees.

Where an action is brought by two or more trustees of an insolvent estate, the power of attorney to sue must be signed by or on behalf of all the trustees, but where one of the trustees produces a power signed by his co-trustee or co-trustees to sign the power to sue on his or their behalf, it is not a sufficient objection to such power to sue that it is signed by only one trustee "for self and co-trustees."

The cases of Trustees of Dodds v. Watson (1 Menz. 140) and Walker v. Beeton's Trustees (Buch. for 1868, p. 225, and for 1869, p. 38) distinguished.

This was an appeal from a judgment of the Resident Magistrate of Malmesbury, who had upheld an exception taken by the defendant, Lombard, in the court below to a summons on the ground that it was informal.

From the record it appeared that an action was instituted in the court below by the trustees in the insolvent estate of Muller against the respondent to recover a certain debt. The power of attorney was signed by one of the trustees (Koetze) on behalf of himself and the co-trustee, and an exception was taken by the defendant to the summons on the ground that the power was not in order, as it was signed only by Mr. Koetze. The defendant's attorney cited the cases of *Trustees of Dodds v. Watson* (1 Menz., 140), and *Walker v. Beeton's Trustees* (Buch. 1868, 225, and 1869, 38. In reply, the plaintiff's attorney stated that the power of Attorney from Foot (the town trustee) to Koetze and the appointment of both trustees were handed to the Clerk of the Court before the issue of

the summons, and that Koetze had repeatedly shown these documents to the Resident Magistrate of the court, and he tendered that he had authority, including the authority of Foot, to sue.

The Magistrate, in his reasons for judgment, said that in view of the clear ruling of the Supreme Court in the case of *Walker and Co. v. Beeton's Trustees*, he did not feel justified in dismissing the exception, as the attorney for the defendants objected to the informality being cured by the production of documents which had not formed part of the record. If the power of attorney had been signed twice by Koetze, once for himself and once q.q. for his co-trustee, the document would have been in order. The defendant's attorney insisted upon claiming a dismissal of the summons, and he (the Resident Magistrate) had no option but to uphold the exception.

Sir H. Juta, K.C., was for the appellant; Mr. Burton was for the respondent.

Sir H. Juta submitted that the Magistrate in this case might very well have rectified the informality, if any, in the summons. The power of attorney was not signed by the trustee alone. It was signed by one trustee for himself and for the co-trustee, and therefore it simply became a question of evidence whether or not the person signing had the authority to sign for the other. This case differed from the others, inasmuch as in the others there was no proof either given or tendered that the one trustee had the power to act on behalf of his co-trustee, whereas in this case, as was stated, the power of attorney from the one trustee to the other and the appointment of both were handed in to the Clerk of the Court before the issue of the summons. Counsel cited the case of *Dodds, King and Co. v. Watson* (1 Menz. Reports, 140). As to the case of *Walker v. Beeton's Trustees* (Buchanan's Reports, 1868, 225), he submitted that that case differed entirely from the present matter in appeal, because in that case there was no authority from the one trustee to the other. He submitted that the Magistrate was in error in the present instance.

Mr. Burton contended that the Magistrate was correct in his judgment, because, although, as he (the Resident Magistrate) had pointed out in this particular case, no prejudice could occur, for subsequently the necessary documents were produced, still the question for him was that an exception had been taken to the summons with the power attached and filed in the suit. Up to that stage the summons was clearly out of order, because the decision in the case referred to in the Magistrate's reasons showed clearly that the phrase "for self and co-

trustee" involved no authority from the co-trustee to the trustee who was suing. "For self and co-trustee" really meant nothing. The plaintiff came into court with a summons which was clearly not in order. He did not attempt or apply to amend the summons, but he maintained it was enough. He submitted that the plaintiff's attorney was negligent in not seeing that those documents were in proper order. If the appeal were upheld, he suggested that the question of costs should be referred to the Magistrate for determination.

Sir H. Juta having addressed the Court in reply,

De Villiers, C.J.: The Magistrate very properly refused to give any decision that would run counter to what he conceived to be a decision of the Supreme Court. Therefore, if he was right in assuming that the decision of the Supreme Court was that a warrant to sue signed by one of two trustees is not sufficient in any case to support a summons for provisional sentence, then he was right in allowing the exception. The whole mistake, in my opinion, arose out of the fact that the head-note of the case reported in *L. Menzies*, 140, is not quite correct. The Court did not decide, as the head-note says, that "a warrant of attorney to sue, signed by one of two trustees, for self and co-trustee, is not sufficient." It should have been added: "In the absence of proof that the trustee so signing was authorised by his co-trustee to sign on his behalf." Unfortunately, the report itself is very brief, but it is there: "Against the plaintiff's claim for provisional sentence, the Attorney-General, for the defendant, objected that the power of attorney authorising the attorneys in this case to sue the defendant, was signed by one only of the two trustees." But it does not stop there. "And that his assertion, annexed to the signature, that he signed 'for self and co-trustee,' was not sufficient to obviate the objection." That is clear. Mere assertion is not enough. If there was proof adduced, however, that as a fact one trustee had authority to sign the warrant on behalf of his co-trustee the objection would vanish. If the trustee had signed twice, first for self and then for co-trustee, there can be no doubt that the warrant would be sufficient. But there is no particular virtue in two signatures, provided, of course, that there is authority to sign on behalf of the co-trustee. The case of *Walker v. Beeton's Trustees* (Buch. for 1868, p. 225, and for 1869, p. 38), does not carry the matter much further. The case of the appellant was merely put by Mr. Porter in his argument. "The second exception," he says, "is a good one. It raises this question: whether it is competent for

one of two trustees to file a warrant to sue, as required by the Rules of Court for himself and his co-trustee, without producing some specific authority, in writing, from the co-trustee, authorising him to do so." That was the point. It is not whether these words are sufficient, but whether they are sufficient in the absence of a specific authority. I am quite satisfied that if the specific authority had been produced, the Court would not have allowed the exception.

But there was no authority whatever. The co-trustee was away in England, and the reasons given by the learned Judge, for the judgment, are reported in the reports of 1869—Sir Wm. Hodges had died before the formal judgment could be delivered, but he had written out his judgment before his death—are: "The objection urged by the exceptors is that the action had been improperly brought by Gowie, that the power of attorney ought to have been signed by Hall, and that it was not competent for Gowie to sign on his behalf. It was argued that the 56th section of the Insolvency Ordinance of 1843 authorised the trustees to commence any action in their own names, and that it was not competent for any of them to do so without the assent of the other, which consent ought to appear by his signing the warrant to sue. The objection to the sufficiency of a warrant of attorney to sue signed by one of two trustees 'for self and co-trustee' was held to be fatal in the case of the trustees of *Dodds v. Watson* (Menzies' Reports, 140), and I entirely concur in that decision. Many reasons may be urged for requiring that all the trustees to an insolvent estate should concur in commencing proceedings by action, which may be attended with great expense and loss to the creditors. The trustees are appointed by the Court to represent the interests of the creditors generally, and to see that no improper use is made of the funds which come to their hands as trustees." And Bell, J., said: "In regard to the second exception, that the power to sue was void, inasmuch as Gowie had no power to sign it for 'self and co-trustee,' without authority for so doing, it would seem to me that that also was well taken." Seeing that he had no authority, the power clearly was invalid. In the present case, it appeared that the proper power had been exhibited to the Magistrate. The power to sign was clearly proved. Clearly, there was sufficient power in Kotze to sign for himself and his co-trustee. The appeal must be allowed, and allowed with costs, because the exception was insisted upon by the defendant. He has failed now to support the exception on appeal. As to the costs in the court below, they must abide the result, because both the defendant and the Magistrate were misled by the erroneous head-note in the case reported in Men-

sies. The appeal will be allowed with costs in this court, and the case remitted to the Magistrate to be tried on its merits, the question of costs in the court below to abide the result.

Hopley, J., concurred.

[Appellant's Attorneys: Berrange and Son; Respondent's Attorneys: D. Tennant, Junr.]

MULLER V. HOBBS.

1904.
Nov. 24th.
" 20th.

Guarantee—*Actio quanti minoris*—
Patent defect—Purchase and sale.

The plaintiff selected and bought several sheep out of the defendant's flock, and some of them were subsequently found to be infected with scab.

Held, that in the absence of any guarantee by the defendant that they were free from scab, he was not liable in the action, quanti minoris, and that, as he had no knowledge of the fact that the infection existed, he was not liable in damages for the expenses incurred by the plaintiff in dipping all the sheep by order of the scab inspector.

This was an appeal from a judgment of the Resident Magistrate of Cathcart, dismissing an action brought by the appellant in the Court below for damages for alleged breach of warranty.

The summons was in the following terms: "The plaintiff complains that he (the defendant) owes him for damages £13 13s. 6d., on the following grounds: (1) On the 13th April, 1904, plaintiff purchased from defendant at the Dohne Stock Fair, by public auction, 300 sheep; on the 19th April he purchased from defendant, at defendant's farm in Cathcart, 350 sheep, by private treaty; and on the 27th April he purchased, at the Dohne Stock Fair, from defendant 201 sheep, by public auction. (2) Defendant led the plaintiff to believe that the abovementioned sheep were clean, and not infected with scab, on which representations plaintiff purchased the aforesaid 851 sheep from defendant. (3) That on the 11th May, 1904, Scab Inspector Frederick Fuller, of Stutterheim, examined the said sheep, and found scab amongst them two months old, and ordered plaintiff to have same dipped, whereby plaintiff incurred expenses of £13 13s. 6d., costs

of dip, labour, etc. He now claims this amount as damage for breach of contract, which defendant refuses to pay."

At the hearing of the case, the defendant excepted to the summons on the ground that it was vague and bad in law, and disclosed no cause of action; that it did not state in paragraph 2 that the representations alleged to have been made by the defendant to the plaintiff in regard to the condition of the sheep were fraudulent, and that no time was stated when these alleged representations were made. The exception was over-ruled.

The Magistrate, in his reasons, said the plaintiff claimed a refund of the cost of dipping certain sheep bought from the defendant, on the ground that the sheep were infected with scab when he bought them. It was proved that the sheep were sold as alleged in the summons, and that two lots of the sheep were pronounced clean by the sheep inspector. The plaintiff had every opportunity of examining the sheep before they were removed. It was not alleged that the defendant knew that the sheep were infected with scab when he sold. The evidence went to show he had no such guilty knowledge, and that he had complied with all the regulations. It had not been proved that the vendor knowingly or wilfully deceived the vendee. The defendant appeared to have acted in a *bona fide* manner, and if the plaintiff were entitled to succeed, it would create a very dangerous precedent. There would be judgment for the defendant, with costs.

Mr. McGregor was for the appellant; Mr. Uppington was for the respondent.

Mr. McGregor said the appeal was brought on two grounds: in the first place, that a warranty was given by the defendant that the sheep were free from scab, and, secondly, that the defendant must have been taken as having guaranteed the sheep. He submitted that in this case the scab was patent when the sheep were sold. There was not a title of evidence to show that anyone noticed the scab between the sheep's legs. He submitted that the evidence of the plaintiff was perfectly positive on the point that a guarantee was given by the defendant. This was more particularly the case in reference to the sheep bought by private treaty at the farm. Counsel commented on the fact that the defendant, although warned of the appearance of scab in the sheep bought from him by the plaintiff, ignored the letters sent to him. The evidence showed that in the case of six of the sheep the scab was of some standing. Counsel quoted a number of authorities in support of his contention on the guarantee, mentioning the cases of *Redgrave v. Herd* (20 Chancery Div., 12), *Newbiggen v. Adams* (34

Chancery Div., 582). He also quoted Anson (pp. 167-9) and Voet (21, 1, 10).

Without calling upon Mr. Upington, De Villiers, C.J. [After stating the facts.] In my opinion the evidence is not sufficient to prove that the defendant guaranteed the sheep sold privately to be free from scab, and the question remains whether such a guarantee is implied by law. The disease—if it be indeed a *morbus*—is caused by a minute insect, but the effects are perceptible to the naked eye, and cannot be regarded as latent. According to the Digest (31, 1, 3, and 4), where a slave was suffering from itch or scab, the defect being patent, was held not to entitle the purchaser to the redhibitory action. *A fortiori* in the case of sheep selected and caught out of a flock by the purchaser himself, it would be impossible to hold that on subsequently discovering that they are suffering from scab, he would be entitled to claim a return of part of the price. The action, however, was for damages on the ground of the expense incurred by the plaintiff in dipping all the sheep bought by him from the defendant. In the absence of any guarantee, express or implied, the defendant cannot be held liable for such damages unless he knew that the sheep were suffering from scab and improperly withheld the information from the plaintiff. The evidence, however, is clear that the scab inspector had pronounced the sheep to be free from scab and that the defendant fully believed that such was the case. The appeal must be dismissed with costs.

Hopley, J., concurred.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Dold and Van Breda.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

CIVIL APPEALS.

VERSTER V. FLETCHER. { 1904.
 { Nov. 25th.

Letting and hiring — Waiver —
Restoring premises to former
condition.

*The plaintiff leased certain
premises to the defendant for a*

term and the defendant undertook to deliver the premises, at the expiration of the term, in like good order and repair. During to the currency of the lease, the Town Council required, as a sanitary measure, in consequence of the plague having broken out, that a cement floor should be substituted for a wooden one, and the defendant, at his own expense and with the knowledge of the plaintiff, made the requisite alterations.

Held, that the defendant was not released, on the expiration of the term, from the obligation of restoring the premises to their former condition.

This was an appeal from the judgment of the Resident Magistrate of Cape Town, the appellant having been sued in the Court below for £15 damages for alleged failure to deliver up a certain shop which he had hired from the respondent Moses Fletcher, in the "like good order and repair" in which he took it over.

From the record, it appeared that the appellant, Verster (managing director of the Federal Cold Storage), had hired the shop at 52, Caledon-street, Cape Town, from Fletcher. The wooden floor of the shop was renewed in the course of the tenancy, in consequence of the regulations of the City Council, and a cement floor was substituted. The appellant carried on a butcher's business at the shop, and the alterations were required by reason of certain trade regulations passed by the City Council. The plaintiff said that it had cost him £15 to restore the shop to the condition in which it was let to the defendant, and he claimed this sum, saying that the alterations were made by the defendant on his own responsibility. The defendant said that the plaintiff assented to the alterations, and he repudiated liability for the present claim. The lease, it seems, was entered into on the 3rd July, 1900, and the tenancy terminated on the 14th July last, the defendant having exercised his option under the lease to extend the tenancy. The plaintiff complained that the cement floor, as left by the defendant, was actually nine inches lower than the level of the wooden floor had been. The defendant had offered to lower the door of the premises, but otherwise he denied all the allegations of the plaintiff.

The Magistrate, in his reasons for judgment, said that with regard to the contentions of the defendant that

he was a sub-tenant of the premises, he thought it was now too late to set up such a defence. He considered that the defendant had failed to prove that he was not liable to replace the floor. If there was a definite arrangement absolving him from liability, he would not, he (the Magistrate) thought, have agreed to lower the door to the floor level. In the process of putting the wooden floor down, a sum of £12 10s. 11d. had been fairly expended, and judgment would be given for that sum, with costs of suit.

Mr. Schreiner, K.C. (with him Mr. Rainsford) for appellant. Mr. Burton for respondent.

Mr. Schreiner: In this matter an unforeseen circumstance occurred and that was that the Town Council ordered a cement floor to be put down. The lessor agreed to the lessee putting in a cement floor at his own expense. But if the plaintiff did not agree to that particular floor there would have been no actual agreement as to the substitution of one floor for another. A lessor is bound to give quiet possession to his tenant and he was therefore bound in this case to put in such a floor as the Town Council required. Vorster would have been entitled to judgment in his favour, and yet after paying £30 for a cement floor the lessor demands £12 from him for a new wooden floor. The lessor promised quiet possession of these premises to be used for the purposes of a butcher's shop.

[Mr. Burton: That nowhere appears on the pleadings.]

It was understood between the parties. Of course the tenant must pay his rent, but the landlord has his obligations also. Here the landlord first allows his tenant to put down a cement floor and then insists on a wooden floor being restored.

[De Villiers, C.J.: The landlord did not contemplate the shop being always used as a butcher's shop. It was the tenant who wanted it for that purpose. Let us suppose that the Town Council had ordered the walls to be lined with tiles.]

That would have been unreasonable, but the regulations as to the floor were not. My point is that both the landlord and the tenant knew that these premises were to be used as a butcher's shop, and the landlord had to make them suitable for that purpose.

[De Villiers, C.J.: Then he was bound to provide suitable fittings?]

No, that would have been unreasonable; but it would have been perfectly reasonable that the landlord should have provided a cement floor. However, the tenant does that, and then the landlord insists on his wooden floor being replaced.

[De Villiers, C.J.: The Court would never have ordered the landlord to put in a cement floor.]

Surely the Court would not have held that had he failed to comply with the Town Council regulations the tenant would be obliged to pay rent for years for premises from which he could derive no benefit.

[De Villiers, C.J.: He might have been justified in abandoning his lease.]

Several reported cases show that he cannot do that. Even if premises are closed on account of plague, the tenant is still liable for rent. *De Jong v. Kaplansky* (11, C.T.R., 203).

[De Villiers, C.J.: Suppose in that case the tenant had been allowed to carry on his hotel business on condition of certain structural alterations being made, would the landlord have been bound to make them?]

Surely, if they were reasonable—*Salisbury Building Co. v. British S.A. Co.* (14, C.T.R., 369) shows that if the property leased be destroyed the tenant is not bound to pay rent. The locking up of a place by the local authority is on the same footing with the destruction of the property. *Joe v. Mahomet* (11, C.T.R., 816). Then the Magistrate is not correct as to his facts. Vorster's offer to lower the door sill was without prejudice and the Magistrate should not have attached so much importance to it. As to the Common Law on the duties of a lessor see *Van der Linden* (1, 15, 12). Here we could not get quiet possession without making this alteration as to the floor, and we should have been justified in deducting the cost from the rent, see cases cited vol. 2, Nathan's S. African Law, 814, and also *Foulger v. ...ermann Bellated and Co.* (12, C.T.R., 24).

Mr. Burton was not called upon.

De Villiers, C.J.: The shop in question was let to the defendant for a period of twelve months with an option of renewing the lease for a further period of three years. The last clause of the agreement is as follows: "Upon the expiration of this lease the said lessee undertakes to deliver the premises hereby leased in a like good order and repair as received originally by the S.A. Biograph and Mutoscope Company, reasonable wear and tear alone excepted." It is common cause that the shop was not delivered in like good order, and the only question to be decided is whether there has been any consent or waiver on the part of the plaintiff that it should not be so delivered. In point of fact, considerable alterations were made during the tenancy. There had been a wooden floor; and that floor was converted into a cement floor in consequence of the requirements of the Town Council during the plague period. Now it has been very ingeniously argued by the learned counsel for the appellant that, inasmuch as the lessee was bound to pay the rent, the lessor on his part

was bound to make such structural alterations as would enable the lessee to use it for the purpose for which he hired it, namely, as a butcher's shop. But the answer to that argument is that there is nothing in the lease to show that the lessor undertook that these premises should be in a fit state to be used as a butcher's shop. The premises were let and the landlord under the lease took no obligation whatever upon himself to place the premises in such a state as to render them fit for a butcher's shop, consequently the analogy of the roof being destroyed breaks down altogether. The destruction of the roof would prevent the house being used for any purpose, whether for a shop or a habitation; but the requirements of the Town Council did not prevent the use of these premises. The place could still be used; it was habitable. The Salisbury case which has been cited does not apply, because there the premises had ceased to exist altogether. There is only this requirement of the Town Council that it shall not be used as a butcher's shop unless certain alterations are made. If the parties had intended that the lessee should be released from the obligation of restoring the premises to the condition in which he received them, the simplest thing in the world would have been to reduce an agreement to that effect to writing. The lessee did not object to the alterations, which did not prejudice him during the currency of the lease, but he might have reasonably have expected that on the expiration of the lease the premises would be restored to their former condition. He did not want a butcher's shop; he wanted his premises in the condition in which he had let them, and it did not matter to him what was done in the meanwhile. It was to the advantage of the lessee to have a cement floor, and the landlord could not object to that. There is nothing to show that he agreed to the alteration or that he waived his right. The question as to whether there was a verbal agreement was a pure question of fact. There is evidence on either side, but the Magistrate believed the witnesses for the plaintiff, and I see no reason to disturb the decision of the Magistrate on the question of fact, notwithstanding the very ingenious argument of the learned counsel for the appellant. In my opinion there has been no waiver by the plaintiff to insist on the condition which was inserted. The appeal will be dismissed with costs.

[Appellant's Attorneys: W. G. Coulton; Respondent's Attorneys: S. J. Mostert and Son.]

KONIGSBERG V. STANISLAUS AND ANOTHER.

Defamation — Summons — Averment of publication.

In a summons for damages for defamation in a Magistrate's Court, it is not a sufficient averment of publication to allege that the defamatory words were contained in a letter written by the defendant addressed to a third person.

This was an appeal against a decision of the Resident Magistrate of Mafeking in a case in which the plaintiff unsuccessfully sued the respondents for defamation of character. The attorney for the respondents excepted to the summons on behalf of the first defendant that the allegation of publication was an essential in the summons. The Court upheld the exception and dismissed the case with costs. The case against the second defendant was then withdrawn. The alleged defamatory words were contained in a letter written by the first defendant and addressed to one Falk Rosenfield, of Mafeking, and which contained the following false, scandalous, malicious, and defamatory words of and concerning him, the said plaintiff, to wit: "I heard a competent man had come . . . and was staying at the Mafeking Hotel. On making enquiries I was told to apply to you. I did so, not thinking for a moment of Mr. Konigsberg, as it would be very inconsistent to solicit the services of a man whom we dismissed some short time ago for incompetence." The second defendant then caused to be inserted, printed and published, in the issue of the "Mafeking Mail," the following false, scandalous, malicious, and defamatory words concerning the plaintiff: "Piano Tuning—A thoroughly competent pianoforte tuner is expected to arrive at the convent on Wednesday to do special work. Any persons desirous of availing themselves of his services should send in orders to the 'Mail' office as soon as possible," thereby meaning that the plaintiff was incompetent. Mr. Gardiner (for the appellant) said the point was whether or not the summons sufficiently alleged publication. He submitted that the word "address" meant directly transmitted, in the sense it was used. One did not expect excellent English in the Magistrate's Courts. He submitted the proper course for the Magistrate was to get evidence of publication.

Without calling on Mr. Benjamin (for the respondent),

De Villiers, C.J., said in his opinion the exception was a good one. It is

quite consistent with the averments in the summons that the defendant after writing the letter addressed to a third person may have kept it in his pocket without acquainting anyone with its contents. There was no application for an amendment. There was no allegation of publication, and the appeal would be dismissed with costs.

Hopley, J., concurred.

[Appellant's Attorneys: Findlay and Tait; Respondent's Attorneys: G. J. O'Reilly.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

CIVIL APPEALS.

DE LANGE V. THERON. { 1904.
Nov. 28th.

Cattle — Trespass — Illegal impounding.

This was an appeal from a judgment of the Resident Magistrate of Stockenström in an action brought by the respondent in the court below to recover damages for the illegal impounding of his cattle.

The appellant was sued in the Court below for £5 damages by reason of his having unlawfully and wrongfully impounded certain cattle of the respondent. Respondent also claimed 2s. 1d. for an alleged overcharge for trespass, and 6s. 4½d. pound fees. The plaintiff said that on the 15th June he paid under protest 7s. 4½d., for the release of the said cattle. The parties, it appeared, belonged to Balfour, in the district of Stockenström.

The Magistrate, in his reasons for judgment, said the defendant admitted that the plaintiff paid him 9d. per head, but from the evidence it would appear that 4d. per head was the correct charge. It seemed that the Divisional Council had altered the trespass fees payable. As to the claim of £5 for illegal impounding, he took it that a legal tender was made. The defendant was Mrs. Green's caretaker, and it was upon her land that the cattle were trespassing when the alleged impounding took place. He was perfectly satisfied that a *bona fide* tender was made by the plaintiff. In regard to the claim in reconvention, one could see at once that it was an impossibility to award any damages, seeing

that the defendant nearly a month afterwards had only had the damages assessed, and there was no proof that the damage done was caused by the plaintiff's cattle. Judgment would be given for the plaintiff for £3 8s. 5½d., and the claim in reconvention would be dismissed.

Mr. Gardiner was for the applicant; Mr. Upington was for the respondent.

Mr. Gardiner said that there were two trespasses alleged, viz., by three head of cattle on the 15th June last, and by five on the 16th. The more important was the first trespass, because the cattle were then impounded. As to that, the evidence of any tender having been made, depended simply on the statement of a native boy, who said that he tendered the trespass money. An important question in the case was whether the trespass fee payable was 4d. per head, or 9d. The ground trespassed upon was cultivated. He submitted that the land was sufficiently fenced as required by the Act. If the ground had been properly fenced, he contended that the tender of 4d. per head made by the plaintiff was quite insufficient. He submitted that the appellant was entitled to demand 1s. 6d. per head on the assumption that the land was cultivated, and enclosed. If the land had been cultivated, and was not properly fenced, then the defendant was entitled to demand 8d. per head. Counsel intimated that he did not propose to press the claim in reconvention brought by the appellant in the court below. He submitted that as the same cattle trespassed twice within a fortnight, the respondent was entitled to double trespass fees.

Mr. Upington contended that as no notice was given at the time to the plaintiff of the claim for double fees through the same cattle having been twice on the defendant's land the defendant could not now come and say that he was entitled to double fees. Double trespass fees had never previously been demanded, and the sole question had hitherto been whether, the land was enclosed or unenclosed. The defendant, whatever he had hitherto claimed, had only claimed single trespass money. He must be taken to have waived any right to claim double trespass fees. There might have been illegalities on both sides, but the fact remained that the defendant illegally claimed the cattle. Counsel submitted that apart from the sufficiency of the tender, the impounding in itself was illegal, because the cattle were impounded to be released on payment of the fees.

De Villiers, C.J.: It seems a pity there should be any further expense, but I confess I don't see my way clear to do justice in this case without further evidence. Everything depends on the question whether the same cattle had previously trespassed within the farm. If there was trespass, eightpence was payable, and then there

was not sufficient tender. The Court will remit the case to the Resident Magistrate for further evidence, whether the three head of cattle impounded on the 15th June, 1904, were the same cattle that trespassed within the place fourteen days previously in terms of the 34th section, of Act 15, of 1892. When that evidence is taken the Court will consider the case without hearing further argument if the point is clear.

Hopley, J., concurred.

LOBASCHER V. MCFARLANE.

This was an appeal from a decision of the A.R.M. of Wynberg. The plaintiff sued for £10 damages, by reason of the defendant's breach of contract to lend him £50 on the 26th July, 1904, and the Magistrate gave judgment for £1 17s. interest, the plaintiff to pay the costs of the day, and it was against that order as to costs the appeal was brought. The defendant, on the 26th July, agreed to lend the plaintiff £50, in consideration of a promissory note for £57 10s., payable on the 26th November, 1904; but although the plaintiff delivered to the defendant a promissory note, the defendant failed to pay the £50 on the 26th July, 1904, and only did so on the 22nd August, 1904. Plaintiff contended that if he had had the money, he would have made £10 clear profit on a transaction over certain furniture.

The Magistrate, in his reasons for judgment, said the plaintiff originally sued the defendant on a dishonoured cheque for £50. On the 26th July, Lobascher went to McFarlane to ask him if he would lend him £50; he said he would make a profit on the transaction, and offered £57 10s., payable at the end of three months. McFarlane gave him a cheque for £50, but subsequently he learnt that Lobascher was on the verge of insolvency, and he foresaw there was scant probability of the note being paid, and he stopped the cheque. Lobascher sued him on the dishonoured cheque, and judgment was given for the full amount. In this case Lobascher claimed £10 as damages for breach of agreement by the defendant, and he based his claim for damages on an estimated profit over a certain transaction, six guineas special fees to his attorney, three guineas loss of his own time, and £1 17s. interest from the time of the promise to the date the money was actually handed over. The only damage awarded to the plaintiff was the loss caused to the plaintiff. Seeing that the defendant had tendered £2, he submitted that the plaintiff should pay the costs of the day.

Mr. Benjamin was for the appellant, and Mr. W. P. Buchanan was for the respondent.

Counsel contended that the plaintiff was entitled to all the costs of the day. There were no further costs after the time of the tender, and he submitted the Magistrate was wrong in making the plaintiff pay the costs of the day.

Without calling on Mr. Buchanan.

De Villiers, C.J., said that a certain amount of discretion must be left to the Court. As to the question of costs, although the reasons given by the Magistrate might not be perfectly sufficient, yet there appeared to be a sound reason why the plaintiff should not have had his full costs, and he was doubtful whether the plaintiff should have had any costs whatever, seeing that he spent up his action into two cases. When the plaintiff sued the defendant on the cheque, it was quite competent for him to sue the defendant for the damages sustained. On the whole, the appeal must be dismissed, with costs.

RUDIGER V. MULLER. { 1904.
{ Nov. 28th.

Bailment—Tender to re-deliver—
Consignment—Negligence.

The plaintiff delivered a bicycle to the defendant for the purpose of having it fitted with new tyres. A dispute afterwards arose between them as to whether the plaintiff should pay for the work before or after the tyres had been fitted. The parties not being able to agree, the defendant told the plaintiff to remove the bicycle as it was, but the plaintiff refused to take it without the new tyres. The defendant remained in possession of the bicycle, but on removing to new premises, he left the bicycle on the old premises, to which strangers had access. The bicycle having been removed by one J., the plaintiff sued the defendant. The plaintiff brought an action for damages for non-delivery.

Held, that the offer by the defendant to re-deliver the bicycle did not relieve him from the obligation of taking due care of it.

This was an appeal from a judgment of the Resident Magistrate of Britstown, in an action brought by the respondent Muller in the Court below for

£5 damages for non-delivery of a bicycle entrusted to the appellant for repairs.

The Magistrate, in his reasons for judgment, said that he found the following facts proved: That the cycle was duly delivered to the defendant for repairs by Muller junior, the minor son of the plaintiff, that the cycle was received by the defendant and retained in his possession from February, 1903, to March, 1904; and that on removing to his new premises later on the defendant left the cycle in his yard, which was kept closed and locked, and from there it was removed by and went into the possession of one Joubert, in whose possession the cycle still remained. The defendant failed to deliver the cycle upon demand, and he was liable for the value thereof. Judgment would be given for the plaintiff for £5.

Mr. Gardiner was for the appellant; the respondent was not represented.

Mr. Gardiner said that the plaintiff was repeatedly told to take his bicycle away, but he would not. The machine and parts were ready for fixing on one occasion when Muller called, and the latter said he would come with the money on another day, but Muller did not return and claim the cycle. Rudiger had received no money whatever; he had tendered back the machine to the plaintiff. He submitted that Rudiger took the proper course when he tendered the bicycle to Muller.

[De Villiers, C.J.: Had the defendant the right to throw the machine into the street, for instance, if the plaintiff did not come with the money and demand the cycle?]

Mr. Gardiner: He puts it into the possession of the plaintiff by abandoning it. Counsel went on to urge that the plaintiff or his father entered into a contract to pay the cost of repairs upon claiming the machine, and that he failed to fulfil the contract within a reasonable time. The defendant then abandoned possession in the shop.

Hopley, J., put it to counsel what the position of Joubert was. Was he a thief?

Mr. Gardiner said he would not use such a hard term as that, Joubert was a schoolboy.

[De Villiers, C.J., He looked upon it possibly, as derelict.]

Mr. Gardiner was addressing the Court further, when

De Villiers, C.J., asked if the appellant tendered the bicycle, with tyres fixed, to the respondent?

Mr. Gardiner: He says he had it ready, but he had not the opportunity to tender because they did not bring the money. Counsel went on to contend that there was no responsibility upon the defendant to deliver the bicycle when the plaintiff or his father failed to claim the machine and pay

the cost of repairs within a reasonable period.

De Villiers, C.J.: The plaintiff took a bicycle to defendant's place for the purpose of having it fitted with new tyres. The defendant undertook to fit on the new tyres, but a dispute arose between them as to payment. It is quite clear that the defendant was prepared to do the work, but he wanted to be paid for it. The bicycle remained in the possession of the defendant as the lawful custodian, and he was subject to all the obligations of a bailee, and the only question is has anything happened to relieve him from those obligations? Well, the only thing that he relied upon was that the plaintiff called at his premises, and he then told the plaintiff, "You may take the bicycle," but the plaintiff did not take it, and the defendant remained in possession of the bicycle. The mere offer or tender to re-deliver the thing is not sufficient to release the bailee from the obligation to exercise care in the custody of the thing. (See Voet 46, 3, 28). There was nothing in the nature of a consignment to discharge the defendant from that obligation. It is true he himself remained in possession, but he does not pretend to have retained the bicycle as a depository under a consignment. It so happens that this is a bicycle of very little value, but it might have been valuable jewellery, for instance, and under those circumstances, no jeweller would be justified in saying, "I shall leave this jewellery here to be taken away by whoever may." It was clearly the duty of the defendant to take proper care of the bicycle. He did not take proper care of it, he left it on his old premises, and went to his new premises, leaving it to Joubert to take possession. In my opinion, the plaintiff was justified in saying, "I gave it to the defendant, he is the bailee, and I request him to deliver it back to me." The Magistrate was, therefore, in my opinion, right in his judgment, and the appeal must be dismissed.

Hopley, J., concurred.

[Appellant's Attorneys: Van Zyl and Buissinné.]

SKELTON V. SHELVOKE AND S. 1904.
SMITH. { Nov. 28th.

Surety and principal debtor—
Guarantee—Giving time—
Novation.

The plaintiff obtained judgment in a Magistrate's Court against H. for £60, but a stay of execution was ordered on his undertaking to pay off the debt in monthly instalments of

£5, and the defendants guaranteeing the due payment of such instalments. On the debtors failure to pay the first instalment, a decree of civil imprisonment was obtained against him, to be suspended pending payment by him of £1 per month.

Held, in an action against the defendants for the payment of the first instalment of £5 under their guarantee, that they were not discharged by reason of such order suspending execution.

This was an appeal from a decision of the A.R.M. of Cape Town, in an action brought by Mrs. Skelton, on behalf of the estate of her late husband, against the two defendants, as sureties for one W. S. Herbert for £5, being an instalment of a debt of £60 due to the estate.

The defendants pleaded that the action was premature, as the principal debtor had not been excused. The Magistrate gave absolution from the instance, with costs, and in his reasons said that the plaintiff, as executrix of her late husband, obtained judgment on the 5th April against Herbert for £60, and there was a stay of execution, on Herbert undertaking to pay £5 a month, and to get a guarantee for the payment of such instalments. On the 25th July Herbert was arrested on a writ of civil imprisonment, and the Court suspended the decree on the payment of £1 per month, and there being no binding obligation on the defendant to pay more than £1 a month, there could be no obligation on the sureties to pay more than that.

Mr. W. P. Buchanan was for the appellant, and Mr. Benjamin for the respondents.

Mr. Buchanan said that the effect of the Magistrate's ruling was that the original undertaking given by the two sureties was suspended, and he submitted that there he was perfectly wrong. The suspension of the decree of civil imprisonment was merely a personal matter to the defendant.

Mr. Benjamin having been heard, De Villiers, C.J.: The plaintiff obtained judgment against Herbert, the principal debtor, for £60, but a stay of execution was ordered on the debtor's undertaking to pay £5 a month, and to obtain a guarantee from the defendants for the payment of the instalments. On the debtor's failure to pay the first instalment a decree of civil imprisonment was obtained against him, but the

Court suspended execution of the decree pending payment by him of £1 per month. The plaintiff then sued the defendants who had signed the guarantee for the payment of the plaintiff of £5 per month until the whole debt should be discharged. The defendants pleaded that the action was premature, inasmuch as the principal debtor had not been excused, but the judgment of the Court below was for the defendants, on the ground that the obligation as sureties had been superseded by the giving of time to the principal debtor. The only sense, however, in which time can be said to have been given to the debtor is that he was not to be imprisoned so long as he paid £1 a month in diminution of the debt. In other respects the debt remained unaltered in quality and quantity, and there was certainly nothing in the nature of a novation in which the defendants as sureties could rely. Even if the transaction could be regarded as a novation, it took place by order of the Court, and apparently not at the desire of the plaintiffs, and it would therefore not extinguish their rights under the guarantee (*Foot* 46, 2, 1). The transaction was rather in the nature of a *rescriptum moratorium* granted to the principal debtor which, according to *Foot* (46, 1, 39) would not absolve the sureties from their obligation under their contract of suretyship. The Magistrate, in my opinion, erred in his judgment, and the appeal must consequently be allowed with costs in the Court below.

Hopley, J., concurred.

[Appellant's Attorney: C. Brady;
Respondent's Attorney: A. W. Steer.]

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

SABER V. KANSLEY. { 1904.
Nov. 29th.
Dec. 12th.

Agent and principal—Brokerage
—Referee

This was an application arising out of an action brought by Alfred Emanuel Saber broker, Cape Town, against Adam Henry Kansley, fish dealer, Cape Town, to recover £466 3s. 1d., balance of account, came on for hearing. The matter, it will be remembered, was of a most complicated character, dealing with transactions be-

tween agent and client over a period of two and a half years, and it was remitted by the Court to Mr. Close for report. Counsel for the defendant now moved for judgment on the report.

Sir H. Juta, K.C. (with him Mr. Van Zyl), was for the plaintiff; Mr. Gardiner (with him Mr. J. Jones) were for the defendant.

This was an action in which the plaintiff claimed £466 3s. 1d., and the defendant in re-convention claimed an account. The declaration stated that the plaintiff was a commission agent and broker, and the defendant was a fish dealer. The plaintiff claimed £466 3s. 1d., with interest and costs, being the balance of account of moneys paid to and for and on behalf of the defendant from October, 1901, to March, 1904, inclusive, in accordance with accounts duly rendered. The defendant denied that anything was due to the plaintiff, and pleaded that he had received no accounts except the last one. He said that in August, 1901, the defendant, who was a wholesale fishmonger, appointed the plaintiff as his agent, and that the latter continued so to act until February, 1904. The plaintiff failed to render an account and the defendant said he was unable to arrive at a true statement of accounts, and he was willing to pay any money found to be due, supported by vouchers. The defendant claimed an account, debate, and judgment for such sum as might be found to be due to him. Sir H. Juta said it would appear that the Kansleys were uneducated people, and they put their money affairs in the hands of the plaintiff, and moneys were paid out by Saber, and moneys were also received by him. The plaintiff, in replication, said that he had rendered accounts from time to time, and these had been approved, and that differences then arose. The matter was, by consent of the parties, referred to an accountant (Mr. Steytler), and in the alternative, to Mr. Close. Mr. Steytler, counsel understood, was unable to accept, and Mr. Close accepted the reference. The matter now came before his lordship upon Mr. Close's report.

In his report Mr. Close said, *inter alia*: I am not prepared to recommend that such a large amount as these (Saturday bearer) cheques aggregate should be disallowed. I feel convinced that a large portion of them, if not the whole, may have been paid, and had the circumstances surrounding the whole treatment of this account created a more favourable impression on my mind, I might have suggested that they should be passed. I regret, however, to have to report that the books, accounts, and vouchers of the plaintiff have left a most unfavourable impression on my mind. Indeed, the plaintiff's evidence, in my opinion, was

considerably tainted, and I found him a most unreliable witness, so much so, that I fear lest any recommendation of mine should, in the absence of facts which may still have to be discovered, benefit him to the disadvantage of the defendant. In the course of further remarks, the referee observed: "The Kansleys are, in my opinion, liable to suffer for such unbusiness-like trust, where money passed so frequently from one to the other—they showed negligence, which weakens their case. As a result of the hearing of the evidence, I cannot but sympathise with them. But what shall be said of the man in whom such trust was reposed, and whose duty it was to be doubly careful, not only to safeguard himself, but those placing such blind faith in him, when we find bearer cheques amounting to several hundreds of pounds unsupported by any voucher to show who received the money? In support of the allegations as to the unreliability of the plaintiff's evidence the referee specially directed attention to the following instances: (1) item 8, £40, fish account, 7th December, 1901; (2) item 11, £100, fish account, 10th January, 1902; (3) item 18, £35 2s. 5d., fish account, 5th July, 1902; (4) item 28, £50, fish account, 17th January, 1903; (5) item 39, £25, Jasio (fish account), 8th June, 1903; (6) item 40, £21 7s. 3d., Thompson Bros., 18th July, 1903. Coming to the credits claimed by Kansley, which had been omitted from the account, the referee said he found here the worst instance of all, viz., credit not given for £61 10s. on the 14th October, 1901. In the cash book he found the following entry: "1901, 14th October, Commission, £61 10s." The report went on: "This had been posted to his commission account, and the Kansleys had accordingly not received credit for it. Had this entry been clearly made there might even then have been some chance of offering an explanation. But I found that there had been a previous entry which had been most carefully erased with a penknife right across the page, so as to leave absolutely no trace of what had been erased. If the previous entry would have led to a correct posting to the Kansleys' account or would have enabled an examining accountant to find that such an amount had not been credited, then the erasure and the subsequent entry was an act of fraud. Saber stated that the writing of the word "commission" over the erasure was not his. I am of opinion that it is his. Even if it is not, he is responsible for the erasure, which was of such a marked nature that no one could miss it in the most casual examination." In regard to an item of £150 alleged to have been received by plaintiff on behalf of the defendant for sale of a business at Maitland, and

stated by Saber to have been paid over by him to Kausley, the referee said that the evidence was too conflicting to enable him to come to a conclusion, and he was, therefore, unable to allow the credit claimed. The referee summed up thus: "As a result of the reference proceedings and investigations, I attach an adjustment account marked 'G,' which shows that Saber's claim against Kausley has been reduced from £466 3s. 1d. to £206 19s. 6d. I must, however, ask the Court not to award this amount to Saber for the following reasons: (1) The plaintiff, his account, books, and evidence are wholly unreliable; (2) the seven instances given above, which have come to light, point to my mind to the probability of others not disclosed which might convert Saber's claim into a debt due by him; (3) Saber's treatment of his client and the manner in which he conducted the duties of his fiduciary position seem to me to demand the most ample proof of every payment on his client's behalf. The receipt for £150 (re Fig and Blumberg) bears the mark of Kausley without a witness, and Saber's initials alone are at the foot. The bearer cheques, aggregating over two thousand pounds, may have been for the actual amount paid to Kausley, or they may have included other items. I would therefore recommend the Court to dismiss the claim, with costs against the plaintiff. Counsel for the defendant recommended absolution from the instance in view of my difficulty that, though the payments by bearer cheque were not properly vouched, great injustice might be done to the plaintiff by the disallowing them from the account. But this would involve a position which would be unfair to Kausley by keeping him in fear of a future lawsuit, when plaintiff might be of opinion that he is able to provide further proof. He has had ample opportunity to get that proof, and the matter should, in my opinion, now be closed. As to my recommendation that plaintiff should bear the costs of this case, I think I have furnished very clear reasons for my doing so. Saber alone is really to blame for all the trouble that has been caused. He could have saved it by a proper regard for the trust he held." In closing, Mr. Close recommended that the customary tariff charges should be allowed to the accountant (Mr. Thomas) employed by Kausley, and also to the shorthand writer. Mr. Thomas, he added, "was the means of affording protection to a man who needed it, and his work, which was well done, should be paid for by the plaintiff, whose conduct rendered it necessary."

Sir H. Juta read certain affidavits in regard to the item of £25, Jasio, fish account, June 8, 1903. The plaintiff said that he was ill at the time he made this

payment, and he was given a cheque to pay the account by Mrs. Saber. He said that he afterwards gave a cheque to Mrs. Saber. The reference said: "At first blush this seemed a very feasible explanation; but, on subsequently comparing the documents, I find there is a difference of one year and eight days between Mrs. Saber's advance to Saber and his refund to her. Her cheque is dated May 31, 1902, and as the bank "paid" impression was illegible obtained from the Standard Bank the annexed letter dated October 8, 1904, which gives the date of payment as May 31, 1902. This put such a different complexion on the evidence, and the explanation given, that I cannot but believe there is something wrong about the account, and I accordingly disallowed the item. I can only infer that plaintiff, in his desire to get vouchers to fit the cheques, has omitted to notice the year in which the cheques were dated." Counsel read affidavits bearing upon this incident by Mrs. Saber, and Miss Saber, who was employed by her father as his typist. He submitted that the referee had entirely erred in his duties.

Mr. Gardiner read a supplementary report upon the incident by the referee.

Counsel afterwards addressed his lordship upon the report generally.

Mr. Gardiner said that the referee reported that the balance (being the amount to which Saber's claim was reducible, on the evidence before the referee and upon the facts disclosed thereby), was £206 19s. 6d. He recommended, however, that this should not be allowed, because he was not satisfied, on the proof before him, that Saber had expended the moneys alleged to have been expended on the defendant's behalf. Therefore, he (counsel) applied for judgment for the defendant, as recommended by the referee, on the claim in convention. Coming to the claim in re-convention, he said that there arose the question of the "bearer" cheques. The defendant claimed an amount, supported by proper vouchers. The referee said he left it to the Court whether these bearer cheques should be adhered to or not. The cheques were made out, "Pay Kausley, fish account," or "Pay bearer." Nothing appeared in Kausley's writing on the cheques. Certain of them were endorsed by the son, Tom Kausley. Those were admitted. This amount of £2,490 which the referee put in a separate column represented the bearer cheques. Saber was in this position; he was a man trusted to manage the defendant's accounts, he was paid for the work, and it was his duty to keep proper accounts and receipts. The defendant claimed an account duly supported by vouchers, and Saber tendered to give an account duly supported by vouchers. The referee found that these were not proper vouchers. Counsel submitted that, as the

plaintiff had failed to supply them with proof, the defendant was entitled to claim the amounts represented by the bearer cheques, and that there was a balance in favour of the defendant of £2,263 2s. He submitted that the defendant was entitled to that amount on the claim in re-convention. If one took away the amount of these suspicious cheques, there was an amount due to the defendant of about £18. Counsel admitted that if the defendant got judgment for £2,286 odd, he would be receiving some money that he had had before. But the plaintiff must suffer for that, it was his own fault. Either the plaintiff must suffer or the defendant must, and if one of two people must suffer, it was the man whose duty it was to keep the account, the man who was the bookkeeper, the broker, the man who was paid for his services.

[Hopley, J.: The accountant finds nothing one way or another on that.]

No; he says they are not properly vouched.

Hopley, J., remarked that the defendant may have been an ignorant man, but still it was partly his fault that things were in such a state.

Sir H. Juta said he thought the referee had entirely mistaken what the duties of a referee were. Instead of acting as a sort of legal assessor, recommending to his lordship what kind of judgment should be given, or how his lordship should exercise his judicial discretion as to costs, he had cast rather broadcast insinuations. The duty of a referee was to find facts. Here was an action of account, one of the parties claimed balance of an account, and the other party said, "You have not rendered an account, render an account, let us debate it, and, whoever is found to have a balance against him, he must pay it." That was what they wanted; they wanted Mr. Close, the referee, to find on whose side was the balance, and they were months after, according to his learned friend, no further than when his lordship referred the matter. The referee, according to his learned friend, found nothing. To whom was the money due?

[Hopley, J.: He states that the affairs are in such a position that no man on earth could find anything, except absolution from the instance. Can you blame the referee for not coming to a positive conclusion, when you cannot suggest any way now of coming to a conclusion?]

Oh, yes, I can. The simple remedy is to find what the facts are; the same as the Court has to do. Supposing we had not gone to a referee, your lordship would have found one way or another. The referee must find one way or another. The facts must be found; it does not help your lordship to say: "I don't know what

the facts are." Your lordship has not heard the witnesses; surely the referee must say: "I believe this, or I don't believe it." He says he believes a large amount has been paid. So it has; it has been proved up to the hilt. There was Muller, for instance, who spoke to having received large amounts from Saber on account of fish. It was all very well to say that Kansley was an illiterate man, but he did not run the business. His wife could both read and write. Then, curiously enough, nothing was said in the report about his son, Tom Kansley. Tom Kansley had kept books. There were two witnesses who spoke to having seen certain books, which were not produced at the hearing. Tom Kansley said that he kept pocket-books, but not one was produced.

Hopley, J., remarked that the cheques were made to "order" or "bearer," and the plaintiff might himself have drawn the amounts.

Sir H. Juta said that there was plenty of evidence to show that a large sum of money was received by Kansleys on those "bearer" cheques. It was all very well to say that the fault was the plaintiff's. But here they had people who could read and write and keep books, and yet no books were produced. It was no use trying to throw the blame upon any particular person, and saying that the plaintiff ought to have had vouchers and everything else, whereas the people themselves, not being illiterate, could easily have kept their own books, and did, in fact, keep books. This young man, Tom Kansley, had had most to do with the books and money. Curiously enough, on that part of the case, the report of the referee was absolutely silent. Counsel confessed that he could not understand the report. The referee said that the balance, reducible on the evidence before him and upon the facts disclosed thereby, was £206 19s. 6d. If his report did not mean that that was the balance due to the plaintiff, then the whole of the reference was nothing, and it must go back to somebody who would find facts. Counsel discussed the referee's reasons for recommending that the claim should be dismissed, and contended that the referee had not adopted a fair method of putting things. His submission was that this was not a final report, that there were no findings of fact, and that his lordship was not in a position to give judgment. He contended that the referee, with all respect to him, had entirely failed in grasping what the duties of a referee were in such an action. The whole point in dispute was this question of bearer cheques. The plaintiff could not supply more vouchers; there were none, and the

question was: how much of this amount had Kamsley received and how much had he not received? He submitted that no judgment could be given on this report of the referee's, and that the only solution of the matter was that the question of the bearer cheques should be referred back to some one to find one way or the other. In regard to the costs, he contended that the ordinary rule should apply.

Mr. Gardiner pointed out, in reply, that it was the duty of the referee to report to his lordship, and he had given the Court his opinion of the evidence, but when it came to a question as to what conclusion it led to in law he left it to the Court. There was argument about a book missing that had been kept by Tom Kamsley, but where was the missing ledger kept by Saber, who was a competent bookkeeper? Saber could give no explanation of the alteration in the folios, and Harrison had said that it was Saber's handwriting. Counsel submitted, if there were missing books, they were missing on both sides, and as to the question of the erasure, Saber no doubt never dreamt of the case coming into court. The referee had piles of evidence in Saber's handwriting to be convinced that the alteration over the erasure was his. If the suspicious cheques were disallowed there would still be a balance for the defendant for £18. Surely, after such scandalous dealings on the part of Saber, the alteration of vouchers and the reckless way of putting them in, costs should not be allowed to the plaintiff.

Sir H. Juta said his lordship would see that the ledger ran on quite in order, and if there was a mistake he would suggest that it occurred through taking a page of the cash-book into the ledger, in which the items were posted. If there had been any attempt at fraud, the simplest thing in the world would have been to put holes through the files of accounts.

Cur. Adr. Vult.

Postea (December 12th).

Hopley, J.: I have endeavoured by looking through the mass of papers connected with this matter, to see if I could come to any definite conclusions, but find myself at a loss, and, as at present advised, must confess my inability to do so. Since the referee's report, further evidence has been tendered on behalf of the plaintiff, and embodied in affidavits which, with accompanying annexures, have been laid before me, and in answer to these the referee has made a further report; but I feel that it would be more satisfactory if the referee were again to go into the matter and personally examine the witnesses, and any further evidence which the parties may wish to adduce. The referee has had a difficult and arduous task, and it is possible that the further consideration of the questions at issue may pre-

sent further difficulties; but it is obvious that he, who has had the advantage of seeing and hearing the witnesses, is the proper person to arrive at such results as, in his opinion, the whole of the evidence warrants. He seems to have taken great pains, and to have done his best to elucidate matters, and I have no doubt that he will approach the matter in a judicial spirit, and come to a conclusion, or such conclusions as are possible in view of and with due consideration of any new facts and any new arguments which may be laid before him. When he has duly weighed everything which the parties can lay before him it will be necessary for him to arrive at such results as he feels enabled to do, and to report finally to the Court the conclusions he has come to, as regards the due adjustment of the figures, and the amounts in dispute between the parties. The matter is remitted to him for such further report. The question of costs he may leave to be dealt with by the Court.

Mr. Gardiner asked his lordship if he could give some direction as to the lines on which further evidence should be taken?

Hopley, J., said that the referee could inform counsel upon what points he had made up his mind, and he could direct counsel on what points his mind was settled. He could not come to any conclusion upon the referee's report. He would rather that the referee came to a final, definite final report, of which he could make use.

Postea (March 9th, 1905).

Sir H. Juta moved for judgment in terms of a recommendation in the referee's report for the plaintiff for £206 18s. 6d., on a debated account between the parties.

Hopley, J. said, when he last sent back the papers, as far as he could make out, the main cause of his embarrassment was that he did not get before him the ledgers and the books, so that he could not quite understand the comments of Mr. Close on the matter. He had since looked into these books, and he must say that they did not show at all favourable to Mr. Saber in his dealings with these ignorant people. Personally, he felt the greatest difficulty, after looking into these books, in concluding that there was this sum owing to the plaintiff.

Counsel having been heard in argument,

Hopley, J.: I don't think the parties in this case can complain of the zeal on the part of their advocates in their endeavours to clear up the case to the referee and to this Court. The plaintiff should certainly have kept a proper account of his client's money. We find that he immediately put all money he received for his client into his own banking account, and frequently used such funds for his own purposes, as the books will show. He speculated in

shares, and drew the money from the same fund. He simply wrote out bearer cheques, which convey nothing to anybody who has to investigate the case. These bearer cheques might have been for his client, or they might have been for himself. The referee, who has had a very troublesome task in the matter, after taking the greatest care, seems to have arrived at something like a fair result between the parties. If he has failed, it is because of the course pursued by the plaintiff in this case, who had the whole conduct of the business in his hands. The books were kept in a very slovenly and reprehensible manner. There are erasures and alterations which make me feel inclined to endorse the words of Mr. Gardiner that they were kept in a disgraceful fashion. In regard to the claim, I don't wonder that the referee should have been unable to make up his mind whether to allow or disallow these amounts. I would not have quarrelled with the referee if he had disallowed entirely these suspicious items in the account. The referee is unable to make up his mind, and as the Court has got to lean on him, there will be absolution from the instance, with costs. The plaintiff being responsible for the whole of these proceedings, will be ordered to pay the costs of this action. The referee's remuneration will be fixed at 80 guineas.

[Plaintiff's Attorneys: Van Zyl and Buissanè; Defendant's Attorneys: Harsant and Harsant.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

REX V. ENDRIES. { 1904.
{ Nov. 30th.

Brothel—Landlord—Knowledge
—Act 36 of 1902.

The appellant was the lessor of a house, the lessee of which was convicted of keeping a brothel therein. Notice of this conviction was given by the police to the defendant, and he was warned that if the house should continue to be used as a

brothel he would be prosecuted for a contravention of the 24th section of Act 36 of 1902. The appellant took no notice of the warning; and the house continued to be used as a brothel. Held, that there was sufficient proof of knowledge on the defendant's part to support a conviction of keeping a brothel after such notice.

This was an appeal brought by Ismail Endries, who had been convicted of brothel keeping at 76, Commercial-street, Cape Town, and sentenced to a fine of £100, or in default three months' imprisonment, with hard labour. The prosecution was brought under the Act 36 of 1902 (section 22).

The record showed that the defendant lived at Kimberley, and was a Malay. The police had watched the place, and had seen it used as a brothel. The defendant denied any knowledge that the place had been used, or was being used for that purpose. He admitted that the rent was £18 a month, and that the house contained five rooms.

Mr. Gardiner was for the appellant; Mr. Howel Jones was for the Crown.

Maasdorp, J., enquired how long the lease was for.

Mr. Gardiner said that the defendant let the house to one Cohen, on the 1st April, 1904, for twelve months. In argument, counsel said that the charge alleged that the accused, during the past six months, and at or near Cape Town, did keep a brothel, etc. The notice was served by the police upon the accused on the 7th June last, and counsel took it that it would not be necessary to deal with evidence referring to prior to that date. He would take the evidence in so far as the alleged brothel-keeping took place, after the service of notice. He submitted that there was no evidence that the rent, as compared with other rents in the neighbourhood, was excessive. There was evidence that the rent was £18, but no evidence had been led to show what the rents of other houses in the street or neighbourhood were. The accused had all the time been in Kimberley, while this house was in Cape Town. The first two convictions from the house were on the 7th May and the 7th June. Then there was a conviction in August, but this time the woman prosecuted was quite a different person. Counsel also pointed out that Endries received no rent, and that, as a matter of fact, the lease was in the name of his mother-in-law. It was quite evident that there had been a change of the women in the house. Under all the circumstances, he submitted that the Crown had not discharged the onus of proving knowledge

by the appellant. After receiving the police notice, the accused wrote to Cohen, calling his attention to the complaint, but he said he received no reply. The accused might have been careless, but it had not been shown that he had knowledge of the purposes for which the house was being used.

Without calling upon Mr. Jones,

De Villiers, C.J.: The 24th section of the Act 36 of 1902 enacts that the following persons shall be deemed to be keepers of a brothel, viz., (c) Any person who, being the lessor or the lessor or landlord, or owner, of any such house, room, or premises, or the agent of such lessor or landlord, lets the same or any part thereof, or allows the same or any part thereof to be let, or to continue to be let, with the knowledge that such premises or part thereof, are, or is to be used, or are or is being used as a brothel." I quite agree with Mr. Gardiner that the prosecution must prove knowledge, and the question is whether there is sufficient proof adduced in the present case. The Court has, in all similar cases, attached considerable importance to a notice being given by the police to the landlord as to prosecutions and convictions, for keeping the house as a brothel. Accordingly, we find that in the present case a notice was given on the 3rd June, 1904, to the appellant in the following terms: "Sir,—In inviting your attention to the appended copy of sections 22 and 24 of Act 36 of 1902, having reference to the keeping of brothels, I beg to inform you that the occupier of house, 76, Commercial-street, Cape Town, has been convicted under the said Act of keeping a brothel therein, and to warn you that should the house in question continue to be kept or conducted as a brothel, proceedings will be instituted against yourself as agent or landlord, and thus keeper of the said brothel." Then the section, of which I have read a portion, is reproduced in full in this notice. The appellant had, therefore, full notice of the conviction, and he had clear warning that if this continued he would be prosecuted. Now what does he do upon that? His evidence is that he wrote to Cohen, to whom he is supposed to have let the house: "I wrote to Cohen a few days later about the complaint, but I got no reply." He does not say what he wrote; he may have written anything for aught we know. He may have told Cohen to take care that these premises were conducted in such a manner that the police could not discover for what purpose they were being used. And further on, he says that, besides writing the letter, he made other inquiries about the house. Well, in my opinion, it is clear that, after receiving the notice, it was his duty to take active steps to prevent the further use of the house as a brothel, and as he did not take such steps it may fairly be presumed that he

did not object to such use. According to the police it was patent to everyone that the place was being used as a brothel, and within two months of the notice being served, there was actually a conviction of a woman named Deschamps. In my opinion, there is sufficient evidence of knowledge in this case to justify the decision of the Magistrate. The appeal must be dismissed.

Maasdorp, J., concurred.

REX V. BLOEM.

{ 1904.
{ Nov. 30th.

Witness—Committal for contempt
—Hard labour.

Where a person duly summoned to give evidence in a criminal case before a Resident Magistrate fails to attend without any lawful excuse allowed by the Court, and having been fined in the sum of £5, admits his inability to pay the fine, the Court may commit him to gaol under Ordinance 6 of 1839, but no hard labour can be imposed.

This was an appeal from a decision of the A.R.M. of Cape Town, in which the accused was sentenced to pay a fine of £25, or undergo seven days' imprisonment, with hard labour, for failing to attend the Court after being duly summoned. The accused stated she was unable to pay the fine. The appeal was brought on the ground that the alternative sentence of imprisonment was contrary to the law, and could not be supported. Mr. Rainford (for the appellant) contended that under Act 20 of 1856, or the Rule of Court, the Magistrate had no power to impose the alternative sentence of seven days' imprisonment, with hard labour. The Magistrate was, in any case, clearly wrong to impose hard labour. His proper course was to endeavour to levy the fine in the ordinary way. The accused stated that she was unable to pay the fine, but the Magistrate, counsel submitted, should have asked her if she had any goods sufficient to meet the fine.

[De Villiers, C.J.: What do you say on the question of hard labour, Mr. Jones?]

Mr. Jones (for the Crown): I admit there is no authority for the hard labour my lord. Continuing, counsel said the imprisonment was quite in order, under the Ordinance of 1839, or under the 13th rule of Court.

De Villiers, C.J.: The appellant was found guilty of non-attendance after be-

ing duly summoned, and she was sentenced to pay a fine of £5. The Record adds: "The accused states that she is unable to pay the fine," and thereupon the Magistrate sentenced her to seven days' imprisonment, with hard labour. The 75th Rule of the Magistrate's Court authorises the Magistrate to impose on the offender the same fine as is provided for in such default in civil cases. In civil cases the Magistrate may sentence a defaulter to pay a fine of £5, and for non-payment, may commit such person to the gaol for any time not exceeding fourteen days. The 75th Rule, however, refers only to the fine, and not to the alternative of imprisonment, and therefore if the Court had the power of imprisonment it was under Ordinance 6 of 1839. Under that statute, however, there must be a levy in execution for the fine unless the Magistrate is satisfied that the offender had not sufficient goods and chattels. In the present case the appellant confessed her inability to pay the fine, and the Magistrate was justified in committing her to gaol for seven days. He ended, however, in ordering hard labour, and the sentence must be amended by striking out that portion of the sentence.

Maasdorp, J., concurred.

[Appellant's Attorney: W. G. Coulton.]

REX V. HAYES.

} 1904.
} Nov. 30th.

**Native Territories Penal Code—
Fraud—False pretences.**

The appellant was charged with a contravention of the 196th section of the Native Territories Penal Code, 1886, and the fraud relied upon was the giving of cheques on a Bank in which he had not sufficient funds. It appeared, however, that he had made arrangements before giving the cheques for the sale of some property, which afterwards fell through, but which at the time he believed would enable him to supply the necessary funds to the Bank in time to meet the cheques when presented.

Held on appeal against the conviction, that there was not sufficient proof of fraud to justify a conviction under the 196th section, which applies to

fraud, not amounting to a false pretence.

This was an appeal from a decision of the Assistant Resident Magistrate of Maclear, in which the accused was convicted and sentenced on two counts to six months' imprisonment, with hard labour for obtaining credit by fraud, under section 196 of Act 24 of 1866. The 196th section reads as follows: "Whoever obtains any money, or things, or who, incurring any debt or liability, obtains credit by means of any fraud, though not amounting to a false pretence hereinbefore defined, may be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or a fine, or both." The indictment set out that about December, 1903, at or near Northbrooke, in the district of Maclear, the said Hayes wrongfully gave out to one Botha, a certain cheque for £356 10s., drawn on the Cala branch of the Standard Bank, as a good and valuable cheque, and stated that there were funds at the bank to meet the cheque, or he would at his option change it at a later date for cash, and he did there and then, and by means of false pretences, induce Botha to sell to him 380 sheep, and to accept the cheque as part payment; whereas, in truth and fact, Hayes well knew that the cheque was not a good one, and that he had no funds, or insufficient funds, to meet it, and that it would not be paid on presentation." The cheque was dishonoured, and although Botha obtained judgment for the amount, he had not yet received any money. The second charge was similar to the first, except that the amount was £306 for eighteen oxen, sold by one Poultney, and the accused stated that he would cash the cheque, if necessary, in eight days. Mr. W. P. Buchanan (for the appellant) said the question was whether the accused obtained these things by a fraud, though not amounting to false pretences. The evidence showed that the accused had farms and other goods and stock, and the point was whether the magistrate was justified in finding that he committed a fraud. In Poultney's case, a writ of execution was issued, and £148 was recovered, and if it was a fraud, the complainant had done an act which amounted to condonation of the offence; and in Botha's case, there were cross accounts running at the time. Counsel submitted that at the time the appellant made the promise to pay afterwards. He did not make it fraudulently. He contended that the telegrams that had passed showed that the appellant had acted *bona fide* in the matter. He admitted that the appellant had only himself to blame for the position that he was in, but dark as his conduct afterwards might appear, the question was really whether he did intend to defraud these people at the time. The magistrate

seemed to have gone solely on the fact of this giving of cheques at a time when he had no funds at the bank. The man might have been perfectly honest at the time he entered into the contract, and afterwards, with the fall of prices, he might have been unable to carry out his contract. When he bought the oxen, he believed that he had a purchaser at a price that would leave him a good profit, and afterwards he found that he could not pay, the sale having failed to go through. The whole question, he urged, was whether the inability of the appellant, on account of the stress of circumstances subsequently, to carry out his contract, amounted to fraud. That was what the Magistrate seemed to have held. Counsel also pointed out that the appellant actually had farms when he was alleged to have committed the fraud.

Mr. Howel Jones (for the Crown) submitted that it was clear that the appellant had brought himself within the 196th section. The appellant said: "If you will send the cheque to the bank at Cala, you will find the money." The money was not there. Beyond the mere statement of Hayes, there was nothing to show that he was intending to sell the cattle to Hill, and that he was expecting to get the money. He thought it was very unfortunate that they had not the assistance of the Magistrate's reasons for judgment. In the absence of the reasons, they could only assume that the Magistrate could not accept the version given by the accused.

Mr. Buchanan, in reply, pointed out that Poultney had said that the appellant asked him if he would wait eight days, and then he would call at a farm and bring the cash, so that he got the cheque on the understanding that he would get the cash in eight days.

De Villiers, C.J.: There are two counts in the indictment against the accused. In the one, he is charged with having falsely and fraudulently given out and pretended to one Botha that a certain cheque, to the value of £356, was a good cheque, whereas in point of fact there was no money to meet it, and on the second count in almost similar terms, only that the amount is different, being a cheque for £306 that was given to Poultney. In both cases strangely enough, the accused is charged with contravening the 196th Section of the Native Territories Penal Code. The 196 section reads as follows: "Whoever obtains any money or things, or who incurring any debt or liability obtains credit by means of any fraud, though not amounting to a false pretence hereinbefore defined, may be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or a fine, or both." This section clearly should be applied only to a case of obtaining money or things by fraud, in which there is no proof of false pre-

tences, because if the fraud amounts to a false pretence the 192nd section would apply. The framers of the indictment must have assumed that the accused was guilty of some fraud, not amounting to a false pretence. As I read the evidence however, there could have been no fraud if there was no false pretence. The fraud is alleged to have consisted in the statement that the accused had funds to meet the cheques which he gave. In the case of Botha no such statement was made by the accused, and in the case of Poultney such a statement was indeed made, but a week's time was subsequently given to the accused to pay the price of the cattle. Although the accused had not sufficient funds in the bank at the time, he gave the cheques, he seems to have been fully convinced that by the time the cheques were presented, the money would be there. In neither case does there appear to me to have been sufficient proof of fraud to justify a conviction under the 196th section. The appeal must therefore be allowed, and the conviction quashed.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

APPEALS.

REX V. DU TOIT.

{ 1904.
{ Dec. 1st.

This was an appeal from the R.M. of Cape Town.

From the record in the Court below, it appeared that the appellant was charged with contravening the Liquor Laws. Appellant was the holder of the licence at the Bricklayers' Arms, in Waterkant street. One condition of the licence was that no liquor should be sold to any aboriginal native without a permit signed by the Resident Magistrate, a medical practitioner, or some other person in authority. Appellant was charged with selling one bottle of Cape beer, valued 4d., to two natives without the latter having produced the required permit. Appellant pleaded not guilty, and he was convicted and fined £3. The appeal was based on the ground that there was not sufficient evidence to support the conviction, and that the Court,

holding that the permit produced was not a permit in accordance with the requirements of the law, because it had not written on it the signature of the person giving the same, was not in accordance with fact.

Mr. Gardiner appeared for the appellant, and Mr. Howel Jones for the Crown.

After hearing Mr. Gardiner on the facts, and without calling on Mr. Howel Jones,

Mr. Justice Maasdorp said it had been proved that the appellant sold liquor to the natives in question without a permit being produced by them signed by any of the persons specified in the conditions by which the licence was held. The appeal would be dismissed.

Hopley, J., concurred.

REX V. TORR.

Act 5 of 1890—Adulteration.

The appellant had been charged in the Court below with selling adulterated vinegar. A small label on the cask from which the vinegar was drawn stated that it was "an artificially prepared fluid."

Held, that by reason of the small and inconspicuous type in which this notice was printed, the vendor was not exempted from prosecution under Act 5 of 1890.

This was an appeal against a conviction of the R.M. of Komghe for an alleged contravention of section 6. of the Food and Drugs Act, Act 5 of 1890. The appellant was a European storekeeper, and he was charged that on July 2, 1904, with wrongfully and to the prejudice of the purchaser, selling a quart bottle of malt vinegar drawn from the cask, which was not of the substance and quality demanded by the purchaser. The appeal was based on the grounds that there was no prejudice to the purchaser, and that from the label the fact was disclosed to the purchaser that it was an artificially prepared fluid, and that it was not a genuine vinegar.

Mr. Upington was for the appellant, and Mr. Howel Jones was for the Crown.

Without calling on Mr. Jones,

Maasdorp, J., dismissed the appeal, and in doing so held that the smaller type was not of such a description as to prevent deception. He took the same view as the Magistrate, that the label conveyed the idea that the purchaser was getting pure malt vinegar, which was the article asked for. It was

not necessary under the section to find that there was an actual attempt on the part of the seller to deceive.

Mr. Justice Hopley concurred.

DU PREEZ V. STOMAN.

Principal and agent.

This was an appeal from a decision of the Resident Magistrate of Prieska.

From the record in the Court below it appeared that plaintiff (now appellant) had sued for £1 for work done and labour done at the special instance and request of the defendant. The plaintiff, in his evidence, said defendant asked him to do certain work (to take four donkeys out of the Orange River), for which he undertook to pay £1. He (plaintiff) instructed his servants to do the work, and they accordingly did it. Subsequently, defendant took up the position that another man named Lootz was responsible for payment for the service. According to the evidence, Lootz offered one of the plaintiff's servants a goat by way of payment for the work. The case for the defence was that the work was performed on behalf of the man Lootz, who employed defendant and instructed him to get men to get the donkeys out of the river. Lootz stated in evidence that Stoman was responsible to him for the safe delivery of the donkeys, and that he did not give Stoman orders to employ men. The Magistrate found for the defendant, with costs, being of opinion that defendant was Lootz's servant, and that Stoman was authorised to get help. He considered Lootz had told deliberate untruths in order to escape liability.

Mr. Gardiner appeared for the appellant; there was no appearance on behalf of the respondent.

Maasdorp, J., in giving judgment, said that in the court below the plaintiff sued for the recovery of £1 for services rendered, and the defendant denied that the debt was due, and further alleged that in the transaction which he entered into with the plaintiff, he acted as agent for a man called Lootz, and that Lootz was really the debtor in this matter. The Magistrate was correct in his statements of the points upon which he found in this case. The Magistrate said that the defendant was a servant employed by Lootz to drive his wagon and fetch his family and trek, and the points for decision were: Defendant was authorised by his employer Lootz to obtain assistance to rescue these donkeys, and did the defendant, when he engaged assistance, make it clear that he was doing so on behalf of his employer? Both these points were decided by the Magistrate in the affirmative, and judgment was given for the defendant, with costs. He (the learned judge) thought

there was abundant evidence to justify the Magistrate in his finding that the defendant was dealing with the plaintiff as Lootz's agent, and that the plaintiff was aware of this, and consequently could not hold the defendant personally liable. The appeal must be dismissed.

Hopley, J., concurred.

PEVERETT V. GOVA.

Wood-cutting—Power of forest officer.

This was an appeal from a decision of the Resident Magistrate of Engcobo, in a case in which the appellant sued the respondent for £23 12s., damages alleged to have been sustained by reason of the wrongful act of the defendant. In his summons, the plaintiff stated that on the 4th July he procured a permit to cut a wagon-load of wood in the district of Ingava. He proceeded to cut wood, but was prevented from doing so by defendant. Defendant pleaded that he was a duly appointed headman and a forest officer within the meaning of the Proclamation. Acting on instructions received from a superior officer, he prevented the plaintiff from cutting wood in a specially-preserved part of the forest, but pointed out another spot where plaintiff might cut wood. The Magistrate gave judgment for the defendant, with costs. In his reasons, he stated that he found that the defendant was a forest officer, and acting as such and under the instructions of his superior, he was justified in preventing the plaintiff from cutting down wood in the reserved patch; and having acted in good faith, no prosecution could lie against him. The Magistrate further found that the permit given to the plaintiff to cut wood was subject to conditions, one of which was that he should not cut in the reserved patch.

Mr. Gardiner for appellant.

Mr. W. P. Buchanan for the respondent.

After hearing Mr. Gardiner, and without calling upon Mr. Buchanan, the Court dismissed the appeal.

Maasdorp, J.: The case of the plaintiff amounts in substance to this: that he received a permit from the forester to cut firewood in a certain forest, and he thereupon proceeded to procure this firewood. Upon arrival at the forest, he says he was prevented from cutting this firewood, and in consequence of the wrongful act of the defendant in preventing him from taking the firewood, he suffered damages. It appears from the evidence that a permit was given by the forester to the plaintiff, and upon arriving at the forest and preparing to cut wood there, he

was told by the forest officer in charge of the forest that he should confine his operations to a certain portion of the forest, or, rather, that he should not interfere with a certain part of the forest, which the officer had been instructed was to be preserved. It seems that this officer was the defendant, and he had received instructions from Human, the chief forester, who gave this permit, that no cutting was to be allowed to take place in this particular part. Now, it is quite clear that these permits must be subject to the instructions given to the forest officers for the protection of the forest, and that some authority must be reserved to these officers, in order to ensure that no damage is done to the forest. These instructions, we are told by the forester, were given by him to the defendant, and he (the forester) also says that the defendant, in excluding the plaintiff from the particular part of the forest where he desired to cut, was only doing his duty and carrying out his instructions. Consequently no wrong was done by the defendant to the plaintiff, and further than that, it would have been difficult, even if there was some slight prejudice in not allowing the plaintiff to cut wood in that particular part of the forest, for him to prove that he had sustained any damage at all, because there was a sufficiently large portion of the forest available to him. The appeal must be dismissed, with costs.

Mr. Justice Hopley concurred.

REX V. JOE LIS.

This was an appeal from a certain judgment of the Assistant Resident Magistrate of Cape Town in a case in which the appellant was charged with contraventions of certain sections of the Act of 1902, in that during the past three years he knowingly lived wholly or in part on the earnings of prostitution, and, alternatively, that he kept certain brothels. He was convicted on the charge of having kept brothels, and was sentenced to three months' imprisonment with hard labour. The grounds of appeal were that the summons was vague and embarrassing, and bad in law, and that certain evidence was illegally admitted.

Mr. Gardiner (instructed by Mr. W. G. Coulton) appeared for the appellant; Mr. Howel Jones for the respondent.

Mr. Gardiner read the record of evidence, which was very voluminous. The first point of objection was with regard to the admission of an affidavit made by one Bernstein, who gave evidence for the prosecution, and whom the Magistrate granted leave to the Public Prosecutor to treat as a hostile witness. Bernstein stated in his evidence that certain statements made in

the affidavits were not correct. Witnesses gave evidence as to the connection of accused with brothels at Bloemfontein, and to the admissibility of this objection was also taken. Records were put in showing convictions against Lis (alias Silver) for assault at Bloemfontein, and for assisting in the management of a brothel there, while the evidence was adduced of a Kimberley police officer, who deposed that the defendant used to associate with thieves in Kimberley, and lived at a brothel.

Mr. Gardiner, in argument, contended that the parts of the record referred to were illegally admitted as evidence. This illegal evidence must, he submitted, have influenced the Magistrate to some extent, and throwing aside this evidence he urged that there was insufficient evidence to justify a conviction. Apart from this there were only the statements of a police spy, which were wholly uncorroborated in the material points. Counsel submitted that there had been so much prejudice in the case that prisoner ought to have been given the benefit of the doubt, and the conviction ought to be quashed.

Mr. Jones urged that the evidence complained of as being illegal was necessary in order to show guilty knowledge on the part of the accused.

Mr. Justice Maasdorp: How do his acts at Kimberley and Bloemfontein help you to show that he knew these places down here to be brothels?

Mr. Jones said that it might be the case that a man would profess not to know these places were brothels, and in that case the evidence that he had been associated with brothels elsewhere would be of value, and would be admissible as showing that he had knowledge that these places were brothels.

Mr. Justice Hopley: Take a case where knowledge is the essence of the crime—the case of a man charged with receiving stolen goods knowing them to be stolen. Would you be permitted to bring evidence showing that he had received stolen goods in Kimberley, in Bloemfontein, in Johannesburg, and Natal?

Mr. Jones: I submit it would as a fact showing a system.

Mr. Justice Hopley: You would not be allowed to bring such evidence. Any judge would stop you.

Mr. Jones cited *Archbold's Criminal Practice* (p. 353, 32nd edit.) and the judgment of Coleridge, L.J., in *Reg. v. Francis* (12 Cox, 612) on the point of the admissibility of evidence showing knowledge. A man could not be convicted on such evidence, but he urged that it was admissible.

Mr. Justice Maasdorp said the question was whether there was not sufficient evidence without this evidence complained of as being illegal.

Mr. Jones contended that there was ample evidence independently of this

to justify the Magistrate in his finding.

Maasdorp, J.: The accused was charged with contravening section 22 of Act 36 of 1902, "in that he, during the past eight months, and at Cape Town, wrongfully and unlawfully kept certain brothels at No. 9, Sydney-street, and 28, Longmarket-street, at Cape Town aforesaid." He was found guilty upon this charge, and sentenced to three months' imprisonment with hard labour. A good deal of evidence was taken in this case, and there can be no doubt that a large portion of it was wholly illegal. I refer to the evidence which dealt with the previous bad character of the accused and with allegations that he had been guilty of similar criminal conduct on previous occasions, and also that he had been prosecuted for such criminal conduct. There can be no doubt that this evidence was irregular; that it was altogether illegal, and should not have been admitted, and if it now appeared to the Court that it was of such a character, irrespective of the other admissible evidence, that it must have weighed largely with the Magistrate in his decision of the case, then I think the Court would have been bound to quash the conviction as being founded upon illegal and inadmissible evidence. Although there is a large amount of this evidence, still it seems to a great extent similar in its nature, and it does not strike me that it was prejudicial to the prisoner's case from different sides, because, as I say, it dealt almost solely with his previous bad character. Now, upon reference to the other admissible evidence, it would seem that there is very strong and clear evidence in the case pointing at the guilt of the accused. Now the question is whether, in our opinion, that evidence is so clear and so strong that the Magistrate would have founded a conviction upon it if he had not taken the other inadmissible evidence. Upon referring to the evidence of Levi, we have a very detailed statement of an interview which Levi had with the accused in July last, when negotiations took place between them for the sale of this property. It seems that they visited both places, where it is alleged that brothels were carried on—No. 9 in Sydney-street, and No. 28 in Longmarket-street—and there the accused pointed out to Levi the advantages possessed by these places for the business of ill-fame, which was then being practised there. He accompanied Levi to the house No. 9 in Sydney-street, and there pointed out to him the adaptability of the place for the business, showing him the safeguards, which had evidently been put up to meet any attempts at detection that the police might make, in the shape of a peep-hole, which was found in the door, and bars which were put up

to keep out any unruly people who might try to get into the place, and when he was asked by Levi what he would charge for the property he said it could be had for £1,300. From this place, they proceeded to No. 28 in Longmarket-street, and there, it appeared, a conversation took place with some of the women in the place, who were evidently prostitutes, in the course of which the accused pointed out to Levi, from statements made by these women, how fond they were of their landlord, indicating himself. Consequently, he dealt with this property in July as his own, as at his disposal, and he called himself the landlord with respect to the property, No. 28, Longmarket-street. At this period the defendant says that the properties had already been disposed of, and that in July they were transferred to a Miss Lemont and a Mr. Cohen. He was unable to put the police on the track of these people, and he seemed to be wholly ignorant of their whereabouts, and I think the tendency of the evidence is to prove that this pretended sale in June was entirely a sham. Now, if the Magistrate believed the evidence of Levi, then in July this place was kept as a brothel to the knowledge of the accused. But the evidence of Levi was corroborated, first by a witness called on behalf of the defence, who says he was present when the negotiations were started in respect of the sale of this property in July, and, although he was unable to say to what property the conversation that then took place referred, it is clear it is a corroboration of the statement of Levi that they were actually negotiating with reference to the purchase of these very properties. Then Davis, the detective, who seems to have watched these places for some time, says they were carried on as brothels from last April to August, and that on one occasion the accused spoke to him of the police watching these places, and pointed out to him that these brothels were carried on in a very respectable manner. All this evidence proves clearly that there was knowledge on the part of the accused that brothels were being carried on at these places. There being this what appears to me to be very clear and strong evidence that the places were used as brothels, that the defendant had knowledge that they were so used, and that he himself was virtually the owner and landlord of these premises, it seems to me that the evidence supporting the conviction by the Magistrate is so strong that I cannot feel any doubt that he would have come to that conclusion without being swayed by such evidence as has been held to be illegal in this matter. The appeal must be dismissed.

Hopley, J., concurred.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

CRIMINAL APPEALS.

REX V. COHEN.

{ 1904.
Dec. 2nd.

Liquor licence—Transfer—Agent.

A bottle licence was granted to S., who transferred it to F., but the Licensing Court refused to ratify the transfer. F. transferred the licence to the appellant, who obtained no ratification of such transfer and did not obtain a bottle licence for himself but continued to sell liquors on his own behalf.

Held, that he was properly convicted of selling liquor without a licence.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town. The appellant, Herman Cohen, had been convicted in the court below of contravening section 75 of Act 28 of 1883, and the liquor laws of 1888 and 1904, in that "upon or between the 7th March and 20th August, 1904, the said Cohen did wrongfully and unlawfully and without a licence on that behalf, and contrary to the provisions of the Liquor Acts, deal in or dispose of for various sums of money certain quantities of liquor (to divers persons mentioned), to wit, wine, etc." The accused was found guilty and sentenced to a fine of £20, or in default three months' imprisonment with hard labour. The ground of appeal was that the conviction was against the weight of evidence.

From the record it appeared that the only bottle licence issued for premises in Commercial-street was in the name of Silverston, and that no bottle licence in the name of Herman Cohen had been issued during the past two years. The defence was that the accused was entitled to sell liquors as he had done.

Mr. Gardiner was for the appellant; Mr. Howel Jones was for the Crown.

Mr. Gardiner said that the premises were licensed, whatever may have been the case of the man. The Act 25 of 1891 laid special stress on the licence for premises, the first section stating that a bottle licence authorized the

sale at the premises herein specified, but not elsewhere, of liquor in bottles, and so forth. The law contemplated the possibility of a manager being put in, and the premises not being carried on by the actual holder of the licence, as appeared from section 11 of Act 44 of 1885. The appellant was acting as representative of Silverston. He contended that the police had taken the wrong remedy. They should have taken proceedings under the 76th section of the Act 28 of 1883, which provided that the holder of any bottle licence, if he should permit any other person to manage, superintend, or permit any other person to manage, superintend, or conduct the business of the licensed premises during his absence for a longer period than one month without the consent of the R.M. the licence would be forfeit.

[De Villiers, C.J.: But that is only an additional punishment; that is the punishment that follows conviction.]

Mr. Gardiner: A manager is contemplated by the Act of 1885. Silverston, by authorising Cohen to go on and subsequently ratifying his acts, practically appointed Cohen manager.

Without calling upon Mr. Jones, De Villiers, C.J.: The accused was charged under the 75th section of the Act 28 of 1883 with selling liquor without a licence. The defence, as I understand, is that he was not really selling liquor, because he was managing for Silverston. He certainly held no licence; Silverston held the licence: He transferred to a man called Fleischer, but then the Licensing Board refused to sanction the transfer. Then, apparently, without Silverston's knowledge, the licence fell back into his hands. He never appointed the accused. He seems not to have known of the accused carrying on business. Anyhow, he never asked the accused to manage the business for him. If the accused had been a manager for Silverston no doubt he would have been protected. But if it was his own business, as it clearly was, then it was his duty to obtain a licence. In my opinion, the Magistrate was clearly right in holding that he was guilty of a contravention of the 75th section. The appeal must be dismissed.

Hopley, J., concurred.

REX V. GRANT.

{ 1904.
{ Dec. 2nd.

Cruelty to animals—Using lame horse.

Although working a lame horse is prima facie evidence of cruelty, such evidence is rebutted by proof that only gentle

and beneficial exercise was given to the animal.

The appeal was from a decision of the R.M., Adelaide, in which the appellant was fined in £1, or to undergo one week's imprisonment, for wrongfully and cruelly working a horse that was unfit. The appeal was brought on the ground that the conviction was not supported by the evidence given in the R.M.'s Court.

Mr. J. E. R. de Villiers (for appellant) said that the appellant in giving the horse exercise was adopting the treatment advised by experts. The police did not warn the appellant, and there was no evidence of overloading. He submitted there was no evidence of cruelty to justify the conviction.

Mr. Jones (for the Crown) submitted there was no necessity to establish an intention of cruelty. Counsel would not say that the appellant knew the horse was being badly treated; the question was whether the appellant should not have known. It did not appear that the appellant actually carried out the instructions given by the experts.

De Villiers, C.J.: The charge against the appellant was that he wrongfully and cruelly ill-treated a horse, his property, by working the horse while being a cripple. The gist of the offence is cruelty to the animal, but a treatment causing some degree of pain does not necessarily constitute cruelty. The horse in question was lame, and I quite accept the proposition that the working of such a horse is *prima facie* evidence of cruelty. But it was proved at the trial that before the appellant used the horse he took the only expert advice available in his village, and the advice he received was that gentle exercise would be beneficial to the animal. The person who gave the advice, it is true, was only a farrier, but his advice was justified by the result, for the animal improved under this treatment. The animal was fresh and frisky enough when led to the water, showing that the pain could not be very great. The load on the gig when the horse was used was light, and the pace at which the horse went at the time when the offence is alleged to have been committed was slow. There was in my opinion no ill-treatment, and consequently no cruelty; and the appeal must be allowed.

WALKER AND JACOBSON V. NORDEN.

Promoters of company—Partners
—Joint and several liability
—Nonjoinder—Plea in abatement.

The defendant and S. and K. employed the plaintiffs, who

were attorneys, to do the professional work in connection with the promotion and registration of a company, and afterwards S. and K. each paid one-third of the professional charges, but the defendant refused to pay his share.

Held, that the promoters of a company are not necessarily partners, and that the defendant could not lawfully object to the nonjoinder of S. and K. as defendants in an action brought against himself by the plaintiffs for one-third of their claim.

This was an appeal, brought by the plaintiffs in the action, from a judgment of the Assistant Resident Magistrate of Cape Town. The suit was for certain charges in connection with the formation of the South African Tin Mines Syndicate, Ltd., the defendant being sued for one-third portion.

The summons called upon the defendant to pay a sum of £20 (reduced from £21 9s. 8d., to bring the matter within the jurisdiction of the Court), owing to the plaintiffs, as and being one-third share of certain costs and charges, amounting to £64 9s., for disbursements incurred, and professional services rendered, for and at the special instance and request of the defendant and Messrs. G. W. Steytler and J. Kets, in and about the formation and registration of a company called the South African Tin Mines Syndicate, Ltd. The other parties had each paid one-third share of the plaintiff's bill of charges, but the defendant had not paid, and he denied liability and pleaded the general issue.

At the hearing before the A.R.M., an exception was taken on behalf of the defendant on the ground that the action had been wrongfully brought, and that there was no contractual relationship disclosed in the evidence, and that nonjoinder appeared from the evidence.

The Magistrate granted absolution from the instance, without going into the defendant's case. In his reasons for judgment, he said that he considered the liability of Steytler and Kets to be a joint one, and that the fact of Steytler and Kets each having paid one-third of the joint debt did not give the plaintiffs the right to sue the defendant for a third share.

Mr. Upington was for the appellants; Mr. Gardiner was for the respondent.

Mr. Upington submitted that the Magistrate had mistaken the law upon the point in question, and that the plaintiffs were entitled to sue the joint debtor for

his pro-rata share of the joint debt. Counsel cited the case of *Auret v. Pienaar* (3, Juta, 40). He took it where the liability was a joint one, each of the debtors could sue for his share of the debt.

Mr. Gardiner having been heard in reply.

De Villiers, C.J.: The defendant and Steytler and Kets were promoters of a Company and as such employed the plaintiffs, who are attorneys, to do the professional work connected with the formation and registration of the Company. After the work had been done each of the two other promoters paid his third share of the plaintiff's charges and disbursements, but the defendant refused, and on being sued in the Magistrate's Court he raised the defence that the Company, which had by that time been formed, was alone liable. The Court seems to have ignored this defence but granted absolution from the instance on the ground that Steytler and Kets ought to have been joined as co-defendants.

Prima facie, the persons who employed the plaintiffs are liable to pay the plaintiffs' charges. The company was not in existence at the time when they were so employed, and there is nothing to show that they ever expressly or tacitly consented to accept the company as their debtors in lieu of the three promoters. The Magistrate, therefore, properly held that the liability of the promoters had not been transferred to the company.

He held, however, as I understand his reasons, that the promoters were partners, and that, being liable *in solidum* as well as *pro rata*, they ought all to have been sued. In my opinion, however, the fact that the defendant Steytler and Kets joined in the promotion of a company did not constitute them partners, nor did it create a solid liability for the obligations incurred by them in such promotion. Steytler and Kets have paid their *pro rata* shares of their joint liability to the plaintiffs, and if they were now sued, they would be entitled to plead payment as a defence to the action. The practice of this Court is well established that a defendant who is liable for his *pro rata* share of a debt may be sued without those who jointly with him incurred the debt being joined as co-defendants. (*Auret's Trustees v. Pienaar*—3, Juta, 40.)

In this view of the case it is unnecessary to decide the question whether, if the promoters had been partners, it would have been necessary to join them all after the plaintiffs had received two-thirds of the debt as full settlement from them. The effect of an affirmative decision would be to deprive the plaintiffs of their recourse against the defendant unless they are prepared to break faith with the two other promoters. As was

pointed out in *Pienaar v. Rattray* (12 S.C.C., 55), the general rule that all parties should be joined in an action for a partnership debt is not of universal application, and it may well be that it would not be applied in a case like the present. The Roman Law (Cod. 3-40-1) and the Dutch Law (Van Leeuwen's Comm., 5-3-11) allowed considerable latitude in enforcing the liability of one of several co-obligors, and the greater strictness of our practice may be ascribable to the influence of English precedents.

The appeal must be allowed with costs, and the case remitted to be tried on its merits.

Hopley, J., concurred.

REX V. PARENT.

Theft from employer—Rules of firm.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town. The appellant, Parent, had been convicted in the Court below of the theft of 4s., the property of Utting and Fairbrother, newsagents, Cape Town Station Bookstall, and fined £3, or, in default, fourteen days' imprisonment, with hard labour. Mr. Gardiner was for the appellant; Mr. Howel Jones was for the Crown.

From the record, it appeared that the accused, who had been suspected of pilfering, had been subjected to a "trap." The accused was an assistant salesman, employed at the Railway Bookstall. The custom was for the assistants to pay over forthwith any money they received from customers to the pay desk. A detective bought certain books at 7s., and handed to the accused a marked half-sovereign, and received from him 3s. change. Accused handed in at the cash desk 3s., and on being challenged a few minutes later, he was found to still have the half-sovereign in his left hand. The defence was that there was no felonious intent, and that accused, during the stress of business, retained the money, intending to pay it over when an opportunity offered. The transaction took place on a mail day, when the bookstall was usually very busy.

The Magistrate, in his reasons for judgment, said he found that the accused was allowed five minutes in which to account for the sale, and that in the interval he had three other sales, and that, although he had paid in other money to the cashier, he had retained the half-sovereign. There had been a lull in the business, and yet the accused had not paid in the money. There was no excuse for not paying in the money; the accused showed no intention of paying over the money.

Mr. Gardiner submitted that there was a doubt in the case, that ought to have been given in favour of the accused. It was a matter of drawing an inference from certain evidence, and he submitted the inference their lordships would draw was that there was a doubt in favour of the accused. The evidence, he contended, was not strong enough to show that the accused did actually intend to convert the money to his own use. It seemed that the 3s. handed over by the accused did not refer to the purchase made by the detective. It was admitted that the general rule as to the paying in of the money forthwith was often broken on a mail day. It must also be borne in mind that the accused had hitherto borne an excellent character.

Without calling upon Mr. Jones, De Villiers, C.J.: The rule of the establishment was that the assistants should, on serving customers, immediately hand over the money to the cashier, and if any change was to be given them, the cashier would give the change. That was the rule, and a very wholesome rule it is. Well, on the occasion in question, a book was purchased, price 7s., and a half-sovereign was handed over to the accused. It was clearly then his duty to hand over that money to the cashier, and get the change from him; but, instead of doing that, the accused handed over 3s. to the purchaser and kept the half-sovereign, and then he handed over 3s. to the cashier. Well, that in itself was an extraordinary proceeding; it was quite contrary to the rule, and there seems to be no object in it. One cannot imagine the object of this proceeding, unless he were going to keep the money. But there were subsequent purchasers, and on each occasion the money was handed over by the accused to the cashier. The Magistrate, from this and other circumstances, came to the conclusion that the appellant's intention was to appropriate the money to his own use. There could not have been a great press of work at the time, because according to his own evidence, he was not then serving customers, but was occupied with his delivery-book. If he had time to attend to his delivery-book, he surely had time to hand over the 10s. to the cashier. No doubt, it is an inference from the facts, but it is impossible to say that the Magistrate drew a wrong inference. The appeal must, therefore, be dismissed.

Hopley, J., concurred.

[Appellant's Attorney: W. G. Coulton.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP
and the Hon. Mr. Justice HOPLEY.]

CIVIL APPEAL.

ESTATE WILLIAMS V. NEL. { 1904.
Dec. 5th.

Rebel—Belligerent rights—Com- mandeering.

This was an appeal brought by Christian Jacobus Nel, of Douglas (defendant in the Court below), from a judgment of the Resident Magistrate of Herbert.

From the record it appeared that Mr. W. L. Strachan, one of the executors testamentary in the estate of the late Isaac Williams, had sued Nel in the Court below for £23, goods sold and delivered. The Magistrate found for the plaintiff for £14 17s. 3d. on the claim, and for the defendant for £11 on a counter-claim, which he had filed. The Magistrate gave judgment for the plaintiff for the difference of £3 17s. 3d., with costs.

The Magistrate, in his reasons for judgment, said that at the hearing the defendant said he was not present when the saddles and bridles were taken. He found that the defendant was present. There were four saddles and bridles taken, including two taken by the defendant. After referring to the case of *Jacobsohn and Others v. Westhuisen*, the Magistrate said that the defendant called a convicted rebel, Warden, who said he was the landdrost at the time, and that he ordered the defendant to obtain the saddles and bridles. So that this was an order from a rebel landdrost to a rebel field-cornet; and the order did not come from the commandant. The capacity of the person who gave the alleged orders had not been proved. He found for the plaintiff as regarded two saddles and bridles.

Dr. Greer was for the appellant; Mr. W. P. Buchanan was for the respondent. There was also a cross appeal in which Mr. Buchanan represented the appellant, and Dr. Greer was for the respondent.

Dr. Greer said that there were two points, mainly, raised in this case. The plaintiff in the action sued for four bridles and saddles, which were entered in the ledger of the deceased as having been bought by the defendant. The goods were obtained during the occupation of Douglas by the Boer Government during the fight at Sunnyside about January, 1900. Defendant said that he did not purchase the goods, but that he commandeered them, acting under orders from a Boer commandant. The other point in dispute was as to a sum of £3,

for which the defendant said he ought to have been credited. The defendant said that this sum of £3 represented a purchase of wood by the plaintiff.

It appeared from the Magistrate's reasons that he had decided that there was no right to commandeering, and, if there was, then the defendant had exceeded his rights by taking two more bridles and saddles than he ought to have taken. He contended that the sum of £6 12s. allowed to the plaintiff on that account ought not to have been allowed by the Magistrate. In the case of *Watson v. Bradley* (13 C.T.R., 596), it was held that a rebel, acting under the orders of a rebel commandant, had the right to commandeering. The test applied in that case was as to whether the goods were commandeered rightfully for the purposes of war, or whether they were taken for one's own personal use. Counsel submitted that that test should be applied in the present case. The first question that arose was, whether these saddles and bridles were taken for the purpose of war? The evidence showed that Nel was with an armed body when he went to the stores, and that it was clear the goods were taken for the purposes of war. On the question of authority to commandeering, he submitted that Warden was appointed landdrost by a duly-appointed person, who had belligerent rights, and that the defendant acted under properly-constituted authority. On the other part of the claim as to the item of £3, counsel contended that two loads of wood were delivered by the defendant, and that he was entitled to a credit of £3.

Mr. Buchanan said that the plaintiff wished to support the judgment on the claim in convention. In regard to the claim in reconvention, he said that the Magistrate ought not to have allowed the £11 claimed by the defendant for mealies that, defendant said, he had supplied to the plaintiff. Counsel also contended that the Magistrate's own judgment revealed a discrepancy in the amount allowed. The Magistrate said that the defendant admitted items to the amount of £14 15s.; then he allowed 4s. 6d. for certain sticks; 12s. for the hotel account; and £6 12s. 6d. for two saddles. That brought the amount up to £22 4s. 9d., whereas the Magistrate only allowed the plaintiff £14 17s. 3d.

Dr. Greer said that the Magistrate's arithmetic seemed to have been correct, because he had allowed a credit in favour of the defendant amounting to £7 odd.

Mr. Buchanan said that he had overlooked that, and the only difference seemed to be, therefore, that the amount totalled up to £14 19s. 3d., while the Magistrate allowed £14 17s. 3d. He would not, however, trouble the Court about the two shillings. On the counter-claim, the Magistrate ad-

mitted that he had some hesitation in allowing the amount of £11. Counsel submitted that there was such an element of doubt as to whether the mealies were delivered by the defendant that the Magistrate ought to have given absolution from the instance on the counter-claim. As to the saddles and bridles, he submitted that the judgment in the case of *Watson v. Bradley* was clearly against his learned friend's contention.

Maasdorp, J.: In this case the plaintiff sued the defendant for an alleged balance of account for goods sold and delivered. The defendant disputes certain items in the account, and admits others. He also sets up a counter-claim. The Magistrate, after going very carefully into the evidence relating to the items in these two counts, and having taken a great deal of pains in dealing with the evidence, concluded that upon the claim in convention £14 17s. 6d. was due, and upon the claim in reconvention, £11. He therefore gave plaintiff judgment for the balance for £3 17s. 6d. Now, upon the bulk of the items contained in this case, there is no necessity to make any remark. The Magistrate's finding upon the items are supported by evidence on either side, and he is satisfied that something is due to the plaintiff on the one hand, and he has accepted the evidence for the defendant on the other hand as to the items in his counter-claim. But there is one item in the case which has been specially dealt with as raising a question of law. It appears that a claim is made for four saddles alleged to have been bought by the defendant from the plaintiff. It is contended by the defendant that these saddles were actually requisitioned through him by the order of the duly-appointed officers of the enemy during war for war purposes. The Magistrate has gone into the evidence on that point also, he has come to the conclusion that two of these saddles and bridles were actually requisitioned by the enemy for war purposes, and consequently he has decided that the defendant is not liable for them; but he has also decided, and there is evidence to support his decision, that two saddles were not requisitioned by the officers of the enemy for war purposes, but were taken by the defendant for his own purposes. On that ground, he has found the defendant liable for the saddles. It is perhaps not quite correct to state in the summons that these saddles were purchased. It would have been more correct to say that they were wrongfully taken, and that the plaintiff desired to recover their value, but the form of the summons will not prejudice the defendant in this case, because it appears he knew what the issue was, and he came prepared to meet that issue. The Magistrate has decided he

wrongfully did take these saddles, and consequently he must be held liable. The appeal on both sides must be dismissed, and there will be no order as to costs.

Hopley, J., concurred.

REX V. WYNNE.

1904.
Dec. 5th.

Liquor licence—Hotel manager—
Summons—Acts 44 of 1885,
Sec. 11, 39 of 1887, 28 of
1898, Sec. 2.

W., a hotel manager, had been convicted of a contravention of Sec. 2 of Act 28 of 1898, by selling liquor by his barman to a native. The barman had not been appointed by W., but by the hotel proprietor: and the summons did not allege that the native was not a registered voter.

Held on appeal, that as under Sec. 11 of Act 44 of 1885, the manager was responsible for the act of the barman, and as it was not necessary that the summons should allege that the native was not a registered voter, W. had been rightly convicted.

This was an appeal from a decision of the A.R.M. of Port Elizabeth, by which the appellant was fined in £25, or three months' imprisonment with hard labour, for a contravention of the conditions of a liquor licence. A wine and spirit licence was issued to Catherine Wynne on the 2nd April, 1904, and afterwards, on the 18th April, the appellant, Daniel Wynne, was duly appointed as manager. During the absence of Catherine Wynne in England in September, Daniel Wynne was summoned for contravening the conditions imposed by the licence by supplying liquor to a native between the hours of 10 a.m. and 6 p.m. without the necessary permit from the authorities required by the section. The Magistrate, in his reasons for judgment, said that the barman denied that he sold the brandy, and brought two witnesses to corroborate his statement. The barman stated he knew the native very well, but in spite of that he went through the formality of asking his name, and if he were on the voters' list. He did not believe the evidence of the barman and his witnesses, as there were certain discrepancies.

Mr. Pyemont (for appellant) based his appeal on four grounds, viz.: (a) That the offence of which the accused was found guilty was no offence in law; (b) whoever was liable, the accused was not liable; (c) that the condition was *ultra vires*; and quite consistent with the hypothesis that accused was innocent. With regard to the first point, counsel said the accused was found guilty of wrongfully and unlawfully, and in contravention to the said licence, selling or supplying or exposing for sale a certain quantity of liquor to a native, and then found guilty on that. Surely that was no offence in law? It was admitted that they were selling every day to registered voters. Had the words "other than a registered voter" been inserted then the summons would have been correct. On the second point was the barman of the licence-holder, and it was competent for the prosecution to proceed against the barman or the principal, but not against the appellant. He submitted that the condition in the licence was *ultra vires*, and, on the question of the evidence, that the liquor might have been sold by the barman to a registered voter who handed it over to the native in question, or it might have been obtained outside the hotel altogether.

Mr. H. Jones (for the Crown) contended that the exception was a bad one. There was no good exception to be taken to the charge at all. If the Court found that the condition was *ultra vires*, then of course the summons was a bad one, but if the conditions were good, so was the summons. The licence was accepted with these conditions on it, and it did not lie with the appellant to say that these conditions were *ultra vires*.

Maasdorp, J.: In this case the defendant was charged with contravening section 2 of Act 28 of 1898, in that, contrary to the conditions imposed on the licence, he sold liquor to a certain native mentioned in this charge. It appears that this native is not a registered voter, and consequently does not fall under the exceptions contained in the Act 39 of 1887. But it would seem that the conditions imposed upon the licence makes no special reference to registered voters, and consequently the charge is in very general terms. It alleges that the liquor was sold to this native without a permit from any one of the persons mentioned in the conditions. Now the question arose whether the charge was sufficient upon the allegations contained in it, considering that it omitted a statement that the native did not fall within the exceptions created by what is called the Hofmeyr Act. But it seems, upon the authority cited by Mr. Jones, that when the exceptions which would exempt a certain class of

persons from the section is contained in another section or in another law, that it is not necessary to allege, that the person or thing mentioned falls under that exception, and upon that authority therefore it would seem that the summons is perfectly good. Now, upon the evidence, it appears that this liquor was sold at this hotel, which was under the management of the defendant, the defendant having been according to the requirements of the law properly appointed manager. It was argued that even though some responsibility would exist for the sale of the liquor, it should fall upon the holder of the licence or upon the barman. It appears, on reference to section 11 of Act 44 of 1885, that special provision is made for such a case. Seeing that it is quite clear that the holder of a licence would have been liable for the penalties imposed for the sale of this liquor in contravention of the conditions of the licence, these same penalties would fall upon the manager. Consequently, it is impossible to hold that under the circumstances the manager should be exempted because the barman was not specially appointed by him. As to the general character of the evidence, the liquor was sold to the native, who produced no permit, such as is required by the conditions, and consequently the section was contravened. The manager being liable for the contravention of this section, the appeal must be dismissed, with costs.

Hopley, J., concurred.

[Appellant's Attorney: G. Trollop.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.O., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

CRIMINAL APPEAL

REX V. ROBBIE AND OTHERS. } 1904.
Dec. 6th.

Evidence—Magistrate's finding.

This was an appeal from a judgment of the Resident Magistrate of Victoria East, the appellants (four natives) having been convicted on the 28th December last of a severe assault at or near the Yantolo Location upon another native named Ootise Robana.

The grounds of the appeal were: (1) That the conviction was not supported by the evidence given before the Court below; and (2) that it was contrary to law.

From the evidence it appeared that the affair had arisen out of a beer drink. A quarrel took place, and the complainant's brother and one of the accused fought. Complainant said he tried to separate them, and it was alleged that he was assaulted by the accused with knobkerries. A half-bottle was also thrown during the fight. The accused were all found guilty, and were sentenced to three months' imprisonment.

Mr. Cloee was for the appellants; Mr. Nightingale was for the Crown.

Mr. Cloee said he submitted with some little confidence that the Magistrate had taken rather a broad view of the evidence given by the complainant, who had charged the four accused with the assault. He had paid no attention to the circumstances corroborating the alleged assault and to the independent evidence which the accused brought. That was particularly the case in regard to accused No. 4, John Nodula. The story of the complainant was only corroborated by an interested person, viz., his brother. Counsel specially drew the attention of the Court to the evidence given by the headman as to the investigation which he made. The complainant's father admitted that accused No. 4 was engaged in separating the combatants. It was clear that there had been a rough-and-tumble fight. The complainant was not the only person injured; one of the accused and a witness had also been hurt. The Court should look at the provocation in this case. The only explanation of the fight given on the record was that one of the accused had been called by the complainant's brother a cow, because he had drunk more than his share of the beer. Counsel submitted that the accused should not have been charged with an assault. They might have been charged with a breach of the peace, but he did not see how they could properly have been charged with an assault. He submitted that the probabilities were in favour of the story given by the accused, and that the Magistrate should have given them the benefit of the doubt.

Without calling upon Mr. Nightingale,

De Villiers, C.J., said that, as far as the number of witnesses were concerned, those who gave evidence on behalf of the defence exceeded in number those who gave evidence on behalf of the prosecution. But the Magistrate was not bound to count heads; he had an opportunity of watching the different witnesses, and he must have come to the conclusion that the witnesses for the prosecution, although less in num-

ber, spoke the truth. Well, if they spoke the truth, there could be no doubt that a serious assault was committed. It was quite possible that the accused might have received considerable provocation, but, whatever provocation they received, there was no excuse for continuing the assault after the complainant was down. The mother of the complainant did not see the beginning of the fight, but she said that when she came to the kraal, she saw her son lying on the ground, and the four accused were beating him with sticks. She said she cried, and said to No. 4, "Why are you killing my son?" She went on to say, "I got in amongst them, and stood over my son to protect him. My son had no stick. He got up. I was struck down by accused No. 3. My son ran away, and the four accused ran after him." Well, if the object of No. 4 was to protect him, he (the learned judge) did not see why No. 4 should have run after the complainant. Then, the mother said that she followed, and she found her son on the floor again. The four accused were beating him. It was true that she was the mother of the complainant, but that would be no reason for her singling out some of these people as being the guilty persons. The Magistrate seemed to have believed her evidence. There were, no doubt, witnesses for the defence who gave a different version of the occurrence, but it was a pure question of credibility. The appeal must be dismissed.

Masendorp, J., concurred.

CIVIL APPEAL.

VOELOO V. MYBURGH.

Interpleader—Onus of proof—Magistrate's inferences from facts.

The Court allowed an appeal in a case in which the Magistrate had based his judgment rather on his inferences from facts than on the facts themselves.

This was an appeal from a judgment given by the Resident Magistrate of Oradock in an interpleader action, in which the present respondent, P. J. Myburgh, was the claimant.

From the record, it appeared that Voeloo and Van Heerden took out writs of execution against the property of one Edward Wilson, under which the messenger of the Court seized a buggy, in the possession of Wilson. Then Myburgh, whose daughter was married to Wilson, claimed that the buggy was his property, and the Magistrate adjudged the buggy to be the property of the

claimant. The story given by Myburgh was that he allowed Mrs. Wilson to have the use of his buggy. Wilson said that he was absolutely without property.

Mr. J. E. R. de Villiers was for the appellant, G. C. Vosloo; Mr. Pyemont was for the respondent.

Mr. De Villiers said it was clear that the only question in this case was whether Myburgh did satisfactorily prove before the Magistrate that the buggy was his property. There was only one other witness who supported his story, viz., his son-in-law, Wilson. Counsel thought it would not be difficult to show that Wilson's story was absolutely bristling with improbabilities and inconsistencies. Wilson admitted that on the 13th March, 1903, he borrowed a sum of £42 from one Van Heerden, of Murraysburg, and then, on the 16th March, he went and bought this buggy from Fitchett and McKenzie. This was a little time before Wilson married Miss Myburgh. Wilson now said that the money with which he bought the buggy, £50, was given to him by Myburgh, and that he bought the buggy as Myburgh's agent, and that it was understood between himself and Myburgh that the property was to vest in Myburgh. Counsel submitted that the fact that Wilson borrowed the money from Van Heerden, and that the receipt was made in the name of Miss Myburgh, showed that Wilson had bought the buggy as a wedding present for his future wife. The burden of proof was upon Myburgh to prove his claim, and counsel submitted that Myburgh had not satisfactorily proved *dominium* in the buggy. The judgment, he submitted, was against the rules and weight of evidence.

Mr. Pyemont said that this was an appeal brought by Vosloo alone. He contended that Vosloo was absolutely without *locus standi*, because the seizure was actually made after the expiry of the writ.

[De Villiers, C.J.: But ought not that objection to have been raised in the Magistrate's Court?]

Mr. Pyemont said he could not speak as to that, but he submitted that the appellant could not now appear, because he was in an illegal position.

[De Villiers, C.J.: But was there not a waiver by reason of what occurred in the Magistrate's Court?]

Mr. Pyemont said that there could be no waiver. Counsel contended that the writ had been superannuated. He submitted that the attachment was entirely irregular, and that the appellant had no appealable interest in the matter. Proceeding, counsel commented on the fact that although the writs were issued, the one in February and the other in March, no steps appeared to have been taken to execute them until the 28th September. He admitted that one buggy was pur-

chased, and that it was afterwards exchanged for another. The buggy belonged to Myburgh; Wilson was the agent acting on behalf of Myburgh; although delivery was made to Wilson, acting on behalf of an undisclosed principal, such delivery was, in point of fact, to the principal. Counsel contended that the execution was irregularly carried out. The messenger did not go to the house of the debtor, and ask him to point out his goods, as it was customary to do. Wilson was an insolvent in 1901, he had not been discharged, and it lay upon the judgment creditor to show that Wilson could rightfully acquire property in 1903. Wilson and his wife were married by ante-nuptial contract, and it had not been shown that Wilson had any right over his wife's property.

De Villiers, C.J.: An objection has been raised on appeal which never was taken in the Court below. The objection is that the attachment took place after the return day of the writ of execution. But no objection of that kind was raised in the Court below, where an interpleader summons was issued by the Magistrate, in terms of the Magistrates' Courts Act, with the object of having it declared whose property this buggy was. That was the sole object of the interpleader. No objection was raised on either side to this question of property being raised, and I consider it is too late now to raise that objection, which was not raised in the Court below. The question is, does the property belong to the respondent, or does it not? If it does not belong to the respondent, then he has no ground for complaint. There is no trespass, as was suggested by the learned counsel for the respondent, if the property does not belong to him. If it does belong to him, then he ought to succeed in this appeal. Therefore, the sole question is whether this property which was attached belongs to Myburgh, the respondent, or whether it does not. It is a question, no doubt, of fact, but the Magistrate has been guided rather by the inference from facts than by any disputed facts in this case. Taking the whole of the evidence, he inferred from it that the proper conclusion is that that buggy belonged to Myburgh. In my opinion, that is the correct conclusion to be derived from the evidence, taken as a whole. The ostensible owner of the buggy was undoubtedly Wilson, who had been left in charge. It was bought, apparently, for him and his wife before the wedding, but the ostensible owner all this time was Wilson. The receipt of the original seller was given to Miss Myburgh, and not to her father, the claimant. After the buggy had been for some time in their possession, it was exchanged by Wilson for another vehicle, and it is this other vehicle, the other buggy, which

was subsequently attached. Wilson took it to a coachmaker's for repairs. The repairs were charged for, not to Myburgh, but to Wilson. It is said that the money was paid by Myburgh, that it was handed by him to Wilson for the purpose of being paid, but, if that be so, it is extraordinary that Wilson did not insist at the time upon the receipt being made in favour of Myburgh. The receipt was given in favour of Wilson, and it was, it appears, while this buggy was being taken back to Wilson's place, for the purpose of again being used by him in the ordinary course, that it was attached. The Magistrate lays stress upon this fact, that the buggy was attached to a wagon belonging to Myburgh. Therefore, he says, this buggy was at the time in the possession of the claimant. But, in my opinion, that is not a correct conclusion. The mere fact of its being attached to his wagon is not proof that it was in his possession at the time. The wagon was being used by Wilson, and he was taking back this buggy to the farm for the purpose of being used by himself. The buggy, therefore, never was in the plaintiff's personal possession. It could only have been held to be in his possession if Wilson is treated as the agent of the purchaser for holding this buggy. But, in my opinion, there is not sufficient proof that for that purpose Wilson was the agent of the plaintiff. He had full control over the vehicle, he was allowed to do really with it as he liked, and it would be a very dangerous precedent if any Court were to hold now that a person, who has allowed another to appear as the ostensible owner, should, upon that person getting into difficulties, be allowed to say, "Although he appeared to be the owner, the property is really mine." In my opinion, in a case of this kind, the onus of proof that the buggy was the property of the claimant lay upon him, he having allowed another person to be looked upon as the owner. In my opinion, the claimant has not discharged the onus which lay upon him. All the circumstances and the documentary evidence tend to disprove the statement that the claimant was the owner. Wilson admits that not long before he stated on oath that this very same buggy belonged, not to the plaintiff, but to somebody else. Under these circumstances, great weight cannot be attached to the evidence given by Wilson. I am of opinion that the appeal should be allowed, with costs, in both Courts, and the property declared to be executable.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

VAN WYK V. TERBLANS. { 1904.
Dec. 7th.

Onus of proof—Magistrate's jurisdiction as to amount.

This was an appeal from a judgment of the Resident Magistrate of Mossel Bay, the appellant having been sued in the Court below upon a promissory note.

The summons called upon the defendant, Van Wyk, to show cause why he should not be ordered to pay the plaintiff £15, with interest from the 3rd May, 1902, which he owed to the plaintiff by virtue of a certain overdue promissory note, dated the 3rd January, 1902. The defendant pleaded that about the 1st April, 1904, he paid to the plaintiff £10 sterling on account of the amount due on the promissory note now sued upon, and that, before the issue of summons, he tendered to the plaintiff and his agent £5, together with interest due thereon, which sum the plaintiff refused to accept. He again tendered to pay the plaintiff the said sum of £5 and costs, and prayed that the plaintiff be ordered to pay costs of suit. For a claim in reconvention, the defendant said that he had been slandered by the plaintiff, and he claimed compensation and damages in the sum of £20. The plaintiff admitted the tender, but denied that he had been paid £10 on account of the promissory note.

The Magistrate, in his reasons for judgment, said that, after hearing the story of the defendant and his son that the latter was sent by his father to the plaintiff to pay the sum of £10, he came to the conclusion that it was a bogus story, and that no such payment had ever been made, and that he could give no credence to the evidence of either father or son. On the other hand, he believed that the plaintiff, who gave his evidence in a straightforward manner, was speaking the truth. His views were materially strengthened when the boy Baron admitted in his examination-in-chief that he told a lie to the plaintiff in regard to a certain sheep transaction between plaintiff and defendant. As to the claim in reconvention, he was convinced that this claim had only been made and had only been set up by the defendant in case he failed to prove the payment of £10 on the promissory note. This brought his claim to £30, and thus placed the

claim beyond his (the Magistrate's) jurisdiction.

Mr. M. Bisset was for the appellant; Mr. Close was for the respondent.

De Villiers, C.J., remarked that no evidence as to the slander seemed to have been given in the Court below.

Mr. Bisset submitted that the Magistrate had erred, inasmuch as the judgment was against the weight of evidence, and because he had held that he had no jurisdiction in regard to the claim of £20 damages for slander. Counsel denied that, according to the record, the defendant's son had admitted having told the plaintiff a lie. He contended that the Magistrate had not given due weight to the evidence of father and son. As to the point of law, he submitted that the Magistrate had clearly jurisdiction to deal with the claim for damages. The Magistrate seemed to have treated the defendant's plea as an exception, and to have taken no evidence as to slander.

De Villiers, C.J., observed that it was clear the Magistrate was in error in treating the defendant's claim as being beyond his jurisdiction.

Mr. Close urged that, apart altogether from other questions, it was very doubtful indeed whether the words complained of by the defendant were slanderous. The plaintiff called the defendant a "schelm"; that certainly was not a pleasant word, but it could not be said to be slanderous. He thought it was really a great question whether it was worth while sending the case back again. It was by no means clear that the Magistrate decided the claim in reconvention solely on the ground of jurisdiction.

Mr. Bisset having been heard in reply,

De Villiers, C.J., said that the plaintiff sued the defendant on a promissory note for £15, and the defence set up was that £10 had been paid on account, and there was a tender of £5. It lay upon the defendant to prove the payment, and, in order to do so, he called his son, who said that the defendant had given him £10 to pay the plaintiff, and that the money was duly paid. The plaintiff denied this payment. No receipt was given. That was a circumstance certainly against the defendant. The Magistrate, in giving judgment for £15, if he believed the plaintiff, was correct. But then there was a claim in reconvention for £20 for slander, and the Magistrate seemed to have been under the impression that, inasmuch as there was a defence of payment of £10, there could not be in addition a claim of £20 damages for slander. The Magistrate clearly erred, because the £10 was not really a claim, it was a set-off against the plaintiff's claim. Therefore, the defendant would have been perfectly justified, if he had a good claim of £20 for slander, in setting that up as a claim in reconvention.

But the difficulty in the defendant's way was that there was no proof whatever that evidence of the slander was taken either at the time when the defendant gave his evidence upon the claim in convention, nor after the plaintiff had given his evidence. Therefore, the Magistrate would have been quite justified in granting absolution from the instance upon the claim in reconvention. It would be possible for the Court to remit the case, so that the Magistrate might try the claim in reconvention, and take some evidence, but it seemed to him (the learned Judge) to be wholly futile. If the Magistrate was right in holding that this was a bogus defence, that the money never was paid by the defendant, then clearly the defendant deserved everything said of him by the plaintiff. The plaintiff would be quite justified in saying that he was a "schelm," if he set up a defence of that kind, and got his son to state falsely that £10 was paid when it never was. Therefore, it seemed to him (the learned Judge) that it would be wholly futile to send the case back to the Magistrate. In order to make the matter quite clear, the Court would grant absolution, so as to make it clear that the defendant would be entitled still to bring his action, if so advised. The appeal would be dismissed, with costs, but the judgment would be altered so as to make it quite clear on the claim in reconvention that, instead of its being dismissed, there would be absolution from the instance.

Mr. Justice Hopley concurred.

[Appellant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Walker and Jacobsohn.]

JACKSON V. HAMMOND.

Mr. P. Jones appeared for the respondent in this matter, which was an appeal from a judgment of the Resident Magistrate of the Cape, and stated that he was instructed that the appellant did not intend to proceed with the appeal. There was no appearance for the appellant. There had been correspondence between the attorneys with regard to the withdrawal of the appeal. Counsel asked that the appeal should be dismissed with costs.

De Villiers, C.J., intimated that, as the appellant did not appear, the appeal would be dismissed, with costs.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP
and the Hon. Mr. Justice HOPLEY.]

REVIEW CASES.

REX V. KORTON AND OTHERS. { 1904.
Dec. 12th.

Acts 43 of 1885 and 35 of 1893—
Stock theft—Lashes.

Where a charge of stock theft is remitted under Act 43 of 1885, the Magistrate cannot inflict lashes unless there is a previous conviction against the prisoner within the preceding three years.

Mr. Justice Hopley said that this matter had come before him by way of review. The accused had been charged before the R.M. of Namaqualand, with the theft of six goats. A preliminary examination was held against them, and the Attorney-General remitted the case, not under the Act 35 of 1893, as he might have done, but under the Act 43 of 1885. The Magistrate thereupon sentenced the accused to hard labour for six months, and to receive 25 lashes with the cat-o'-nine tails. Under the Act under which the case was remitted, lashes could only be imposed in case the prisoners were found guilty of the offence, and there had been a previous sentence within three years immediately preceding, of some sort or other. In this case, as far as the records disclosed, there was no previous conviction against these men. Consequently, that portion of the sentence which imposed lashes was an illegality, and must be quashed. The sentence would, therefore, be quashed, except as to the six months' imprisonment in each case. The lashes must be struck out.

REX V. SAM WILSON.

Boy — Magistrate's jurisdiction under Act 43 of 1885.

A Magistrate cannot sentence a first offender if remitted under Act 43 of 1885 to a flogging if over the age of 14.

Mr. Justice Hopley said that this case had been heard before the R.M. of Worcester. The point raised was somewhat similar to the one in the last case. Remission was made under the same Act, No. 43 of 1885, and in this case a youth

of 15 years of age was the prisoner. He broke into a house, and stole certain goods. The boy pleaded guilty, and the Magistrate sentenced him to receive 19 cuts of the cane. This also was a case of a first conviction, and, further, under the Act 43 of 1885, a boy over the age of 14 years could not be sentenced to lashes. The sentence must, therefore, be quashed as given, and the matter must be remitted to the Magistrate for the passing of a competent sentence. The conviction would be confirmed, and the sentence would have to be changed to something that was competent.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1904.
Dec. 12th.

Mr. Close moved for the admission of Andries Josef van Niekerk as an attorney and notary.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of George Percy Tarr as an attorney and notary.

Application granted and oaths administered.

Mr. Benjamin moved for the admission of Hermanus Lambertus Minnaar as an attorney and notary.

Application granted and oaths administered.

Mr. W. P. Buchanan moved for the admission of Hendrik Louw as an attorney and notary public, the oaths to be taken before the Resident Magistrate, Oudtshoorn.

Application granted.

PROVISIONAL ROLL.

FORD V. MURRAY. { 1904.
Dec. 12th.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £56 13s. 4d., with interest at 6 per cent. from the 5th March, 1904, and that the property specially hypothecated be declared executable. The bond had become due by reason of non-payment of capital.

Granted.

BATON, ROBINS AND CO. V. STRENSMA.

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Granted.

VAN RENNEN V. COWLEY.

Mr. Russell moved for provisional sentence on a bond for £248, with in-

terest at 6 per cent. from 1st July, 1904, and that the property specially hypothecated be declared executable. The bond became due by reason of non-payment of the instalments.
Granted.

ZUIDMEER V. HEYNES.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £200, with interest, and that the property specially hypothecated be declared executable.
Granted.

LEWIN AND SON V. FOURIE.

Mr. Rainsford moved for provisional sentence on a promissory note for £326 18s. 9d., with interest at the rate of 8 per cent. per month from 31st October, 1904.
Granted.

BARRY BROS. V. GOLDSTEIN.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent.
Granted.

HEINAMANN V. BERRY.

Mr. Roux moved for provisional sentence on a mortgage bond for £625, with interest from 1st January, 1904, and that the property specially hypothecated be declared executable.
Granted.

EILENBERG V. ABRAHAMS.

Mr. Gutsche moved for provisional sentence on a promissory note for £135, with interest from 1st November, 1904.
Granted.

HEYDENRYCH V. TAYLOR.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £100, with interest at the rate of 6 per cent.

The defendant said that when he gave Mackie Young the note, they said, as there was a dispute on, they would meet any difference between the bill and an account.

Mr. J. E. R. de Villiers said they only asked for provisional sentence. The defendant could go into the principal case.
Granted.

SCHULTZ V. ROSSOUW.

Mr. W. P. Buchanan moved for the compulsory sequestration of the defendant's estate as insolvent.
Granted.

WILSON V. BOYCE.

Mr. W. P. Buchanan moved for the final adjudication of the defendant's estate as insolvent. The debt was £124 on a promissory note, and there was a return of *nulla bona* by the Sheriff.

The defendant appeared to state that his estate was quite solvent, and if he got a month's time he could settle the amount.

Mr. Buchanan said he was instructed not to agree to that. He was informed that the property was mortgaged up to the hilt. Counsel was instructed that the defendant had seen the Messenger of the Court.

Defendant: I really never saw the Messenger of the Court.

By Maasdorp, J.: His other property was worth about £17,000, and mortgaged for about £12,000.

Maasdorp, J., ordered the matter to stand over until later in the day, the defendant to see the parties in the meantime.

GOEDHALS V. STEGMAN.

Mr. De Waal moved for provisional sentence on certain conditions of sale for the sum of £400, with interest at 6 per cent from 1st March, 1904.
Granted.

BIRD V. PHILIP.

Mr. Joubert moved for provisional sentence for £310, with interest and costs on certain promissory note.
Granted.

LOUW V. WAHL.

Mr. M. Bisset moved for the final adjudication of the defendant's estate as insolvent.

The defendant appeared and stated that his estate was quite solvent.

Mr. Bisset said a writ was issued, and the property was not sufficient to satisfy it.

The defendant urged that he was quite solvent, as all his debts were about £4,000, and the farm alone was worth £5,000. If the Court would let the matter stand over for a month he would be able to meet the plaintiff's claim.

The matter was ordered to stand over until later in the day.

Later on an order was granted as prayed.

HEYDENRYCH V. SONNING.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £330 19s. 11d., with interest on the various instalments at the rate of 6 per cent.

Granted.

OLEWER V. CUMMINGS.

Mr. Sutton moved for provisional sentence on a mortgage bond for £60, and that the property specially hypothecated be declared executable. Granted.

SMITH V. ENGLEBRECHT.

Mr. J. E. R. de Villiers moved for provisional sentence on a Magistrate's judgment for £85, with interest at 6 per cent. from September, 1904, and £2 17s. taxed costs, and that property specially hypothecated be declared executable. Granted.

CROYDON BRICK CO. V. COTTERELL.

Mr. Roux moved for provisional sentence on a promissory note for £430, with 8 per cent. interest and costs. Granted.

LITHMAN, LANDSBERG AND CO. V. BRYARS.

Mr. Benjamin moved for a final order of sequestration against the defendant's estate. Granted.

SMITH V. MARKATESI.

Mr. M. de Villiers moved for provisional sentence for £32 10s., in virtue of a judgment in the Magistrate's Court, with £3 costs, and that certain one-third share in land be declared executable. Granted.

WILSON V. A. M. E. CHURCH.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £2,150, with interest at 6 per cent. from 1st July, 1903, and £9 16s., a premium of insurance, and that the property specially hypothecated be declared executable. Granted.

THORNE V. BATAILLOU.

Mr. M. Bisset moved for provisional sentence for £3,600, with 6 per cent. interest from 1st January, 1904, less £50 paid on account, on two mortgage bonds, and that the property specially hypothecated be declared executable. Granted.

FEDERAL SUPPLY CO. V. COETZER.

Mr. Gardiner moved for a decree of civil imprisonment on an unsatisfied judgment of the Supreme Court for £229 5s. 2d., less £10 paid on account, and costs, £26 2s. 2d.

The defendant appeared, and stated that he signed a contract first of all with the manager of the plaintiff's company, and subsequently, as a matter of form, with his nephew. He had got absolutely no money, and he could not proceed against his partner. The witness went into the box and stated that at the present moment he was a broker. In the Transvaal he had property in his mother's name, which he could not touch until her death. At present he was making about a couple of pounds a week, and out of that he could barely keep a wife and four children.

Cross-examined: He was in partnership with Mr. Kinsley as legal practitioners. Mr. Kinsley had absolutely nothing. Witness had about £800 outstanding debts. For the last four months he hadn't got a penny of that. He had offered £10, but failed to get any money out of his Indian debtors, many of whom he had put in gaol. Subsequently the plaintiff company accepted an offer of £3, but witness found himself unable to even pay that.

Mr. Gardiner suggested that the defendant's watch and chain were surely worth something.

[Maasdorp, J.: What is your watch worth?]

Defendant: Twenty-two guineas, my lord.

Maasdorp, J., said there would be no order, but the creditors could, if they wished, attach the watch.

REID AND NEPHEW V. SELLAR.

Mr. P. Jones moved for costs on a promissory note, which had been paid, and on which judgment had been given. Granted.

SEPEL AND SALBER V. GETZ.

Mr. Benjamin moved for a final order of adjudication against the defendant's estate. Granted.

SACHS V. LEIBENBERG.

Mr. Benjamin moved for provisional sentence on a promissory note for £104 3s. 9d., with 8 per cent. interest per annum. Granted.

PAARL BOARD OF EXECUTORS V. ECKSTEEN.

Mr. W. P. Buchanan moved for provisional sentence for £1,800 on three mortgage bonds, and £1 6s. 9d. insurance premium, and that the property specially hypothecated be declared executable. Granted.

SCHWEIZER V. NGOWABE.

Mr. W. P. Buchanan moved for provisional sentence on a mortgage bond for £100, with interest. The bond became due by reason of non-payment of interest, he also asked that the property specially hypothecated be declared executable.

Granted.

SLADE, ALEXANDER AND CO. AND OTHERS V. LAZARUS.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Granted.

KEUGER V. VENTER AND NAUDE.

Mr. Roux moved for provisional sentence on a promissory note for £24, interest and costs.

Granted.

GENERAL ESTATE AND ORPHAN CHAMBER V. TAHAAR AND SACK.

Mr. P. Jones moved for provisional sentence on a mortgage bond for £100, with interest from 26th August, 1903, at the rate of 6 per cent., and that the property be declared executable, with costs.

Granted.

FURCELL, YALLOP AND EVERETT V. PENTZ.

Mr. W. P. Buchanan moved for a decree of civil imprisonment on an unsatisfied judgment for £77 5s., and costs, £10.

The defendant said if he had a chance he could pay the debt. At present he was out of work, and had nothing at all. Last week he earned 14s.

Cross-examined by Mr. Buchanan: He received £210 for a job at Maitland, and paid Ahlbom, Gullander and Co. £130, and the rest went in wages. He was shortly taking a job at 6s. a day.

An order was granted, to be suspended pending payment of 10s. a month.

ESTATE GOODSON V. INGRAM.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £1,350, the bond having become due by reason of the non-payment of interest, and also for the property specially hypothecated to be declared executable, and costs.

Order granted.

ARDERNE V. SHUNSHUNDIEN.

Mr. Struben moved for provisional sentence for £70, balance due on a mortgage bond, the bond having become due by reason of the non-payment of interest, also for the property specially hypothecated to be declared executable, and costs.

Order granted.

ARDERNE V. FINKINS AND ANOTHER.

Mr. P. Jones moved for provisional sentence on a mortgage bond for £400, the bond having become due by reason of the non-payment of interest, and for the property specially hypothecated to be declared executable, with costs.

Mr. D. Buchanan appeared for the second defendant to confess judgment.

Order granted.

DANVERS AND CO. AND OTHERS V. HEMPEL.

Mr. D. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

VAN DER SPUY V. LAING.

Mr. Rowson moved for provisional sentence on a mortgage bond for £1,000, due and payable by reason of non-payment of interest, and for the property specially hypothecated to be declared executable. Counsel also asked for judgment for rents which might fall due from date.

Judgment was given in the ordinary form, i.e., provisional sentence and property declared executable.

ARDERNE V. BASHAW.

Mr. D. Buchanan moved for provisional sentence on a mortgage bond for £400, with interest, the bond having become due by reason of the non-payment of interest; counsel also asked that the property specially hypothecated be declared executable, with costs.

Order granted.

ARDERNE V. DAUW.

Mr. Sutton moved for provisional sentence on a mortgage bond for £500, with interest, the bond having become due on account of the non-payment of interest; counsel applied for the property hypothecated to be declared executable,

Order granted.

JELLIMAN V. COETZER.

Mr. Sutton moved for the provisional order for the sequestration of the defendant's estate, as insolvent, to be superseded.

Order granted.

THE MASTER V. WIGGETT.

Mr. Howel Jones moved for the usual order against the respondent to file an account in an estate of which he is executor.

Usual order granted.

KENDRICK V. DE BEER AND MAIDMENT.

Mr. D. Buchanan moved for a decree of civil imprisonment upon an unsatisfied judgment of a Resident Magistrate. Since the issue of the writ, £27 had been paid off. The amount now owing was about £15.

Defendants offered £2 a month.

Decree granted, to be suspended on payment of £3 a month, first payment to be made on the 30th January, 1905.

SHEPPARD V. HEYNS.

Mr. Gardiner moved for provisional sentence on certain conditions of sale for £54, balance of purchase price of certain lots of property, with interest, and costs of suit, plaintiff tendering transfer.

Order granted.

OOSTHUYLS AND DE GRAAFF V. VAN HEERDEN.

Mr. Roux moved for provisional sentence on two judgments of the R.M. of Steynsburg, for £19 10s., less £4 8s. 4d., and for an order for the attachment of certain funds and for costs.

Order granted.

MANGOLD BROS. V. KEUN.

Mr. Pittman moved for provisional sentence on a promissory note for £68, and also for judgment, under Rule 329d, for £12.

Order granted as prayed.

LANDS DEVELOPMENT CO., LTD. V. MILES AND BOYD.

Mr. Gardiner moved for judgment upon certain conditions of sale for £126, with interest and costs.

Order granted.

JAGGER AND CO. AND OTHERS V. MYERS

Mr. Sutton moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

SHEPPARD V. VAN REENEN.

Mr. W. P. Buchanan moved for provisional sentence on two mortgage bonds respectively for £250 and £1,000, the bonds having become due by reason of the non-payment of interest; counsel also applied for the property specially hypothecated to be declared executable.

Order granted.

ILLIQUID ROLL.

MOSTERT V. MULLER. { 1904.
Dec. 12th.

Mr. M. Bisset moved for judgment, under Rule 329d, for £90, less £4 paid on account, being rent of premises, with interest *a tempore morae* and costs.

Defendant admitted the debt, but asked for a postponement until after the sale of his house.

Mr. Bisset opposed the application of the defendant.

Ordered to stand over until to-morrow.

Postea (December 13th).

Mr. M. Bisset said he had consulted his attorneys, and found that they were unwilling to grant the defendant an extension of time. He also, on behalf of the plaintiff, now moved for the rule *nisi* interdicting the defendant's goods to be made final.

Mr. Greer (for the defendant) consented to judgment, but applied for a stay of execution for nine days, and said that the defendant hoped to raise sufficient in the meantime to discharge the claim of the applicant.

Judgment was given for the plaintiff, with costs, execution to be stayed until the 22nd inst., and interdict to be made absolute, with costs, to be suspended until the said date upon the defendant giving goods or finding security to the value of £100.

LAITE AND CO. V. SCARLES.

Mr. Benjamin moved for judgment, under Rule 319, for £59 1s. 11d., goods sold and delivered.

Order granted.

NOON V. NOON.

Mr. Benjamin moved (for defendant) for judgment, under Rule 455, to sign judgment against the plaintiff in the

action for not filing his declaration, plaintiff having been barred.
Order granted.

FRIEDLANDER AND DU TOIT V.
GRIFFITHS.

Mr. Roux moved for judgment, under Rule 329d, for £6 17s. 4d., professional services and money disbursed, with interest *a tempore morae* and costs of suit.

Order granted.

FAURE, VAN EYK AND MOORE V.
ESTATE RICHARDS.

Mr. P. Jones moved for judgment, under Rule 319, for £46 13s. 11d., in terms of declaration, being amounts due for professional services, moneys disbursed, etc., with interest *a tempore morae* and costs of suit.

Order granted.

VAN DER BYL AND CO. V. ROSSOUW.

Mr. Sutton moved for judgment, under Rule 329d, for £166 1s. 6d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

SMIT V. LAZARUS.

Mr. J. E. R. de Villiers said that, seeing that the defendant's estate had been provisionally sequestrated, proceedings in this matter, which was an application under Rule 329d, would have to be stayed.

No order.

SCHOONUL AND CO. AND OTHERS V.
CLARKE.

Mr. Gardiner moved for judgment, under Rule 329d, for £43 10s., rent due and payable, with interest *a tempore morae* and costs. The summons, counsel said, had been served upon the defendant's agent, Mr. G. W. Steytler.

Ordered to stand over, pending due service on the defendant or his general agent.

Postea (December 14th).

Mr. Gardiner renewed his application for judgment, under Rule 329d, for £43 10s., with interest, *a tempore morae*, and costs. Counsel put in an affidavit to the effect that Mr. G. W. Steytler, upon whom service had been made, held the defendant's power of attorney, authorising him to prosecute and defend actions for and on behalf of the defendant.

Judgment granted as prayed.

SKEAAR V. WEINTROB AND OTHERS.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for delivery of a certain null and void deed of hypothecation, etc.

Order granted in terms of prayers (a) and (c).

LENNON, LTD. V. SCHAPERA.

Mr. P. Jones moved for judgment, under Rule 329d, for £119 6s., less £120, paid on account for goods sold and delivered, with interest and costs.

Granted.

CAPE AUCTION CO. V. PRIDEAUX.

Mr. W. P. Buchanan moved for judgment, under Rule 329d, for £40 4s., for moneys disbursed by the plaintiff for the defendant, with interest and costs.

Granted.

BOSMAN, POWIS AND CO. V. MIALIA.

Mr. Roux moved for judgment, under Rule 319, for £32, rent due by the defendant, with interest and costs.

Granted.

BLABERG AND CO. V. AJAM.

Mr. Alexander moved for judgment, under Rule 329d, for £30 4s. 11d., for goods sold and delivered, with interest and costs.

Granted.

PURCELL, YALLOP AND EVERETT V.
COSAY.

Mr. P. Jones moved for judgment, under Rule 319, in default of plea, for £308 19s. 1d., less £158 19s. 1d. paid on account, with interest and costs.

Granted.

TULE V. ATTAWAY.

Mr. P. Jones moved for judgment, under Rule 329, for transfer of certain plots of land on the Lansdowne-road, failing that, the defendant to pay £20 as arranged.

Granted.

DREYER AND OTHERS V. DUKE.

Mr. M. Bisset moved for judgment, under Rule 329d, for £71 13s. 10d., for rent due, with interest and costs.

Granted.

GENERAL MOTIONS.

ASTON V. ASTON. { 1904.
Dec. 12th.

Mr. Rowson moved for a decree of divorce. On June 3 an order, calling defendant to return to the plaintiff by the 15th August, was granted, or to show cause by the 31st August, why a decree of divorce should not be granted. Delay had been caused through some little trouble with regard to the passage money which had been tendered to the defendant, but she refused it, and stated her intention of not returning.
Rule made absolute.

Ex parte ROUX.

Mr. J. E. R. de Villiers moved to have a rule *nisi* granted under the Derelict Lands Act made absolute.
Rule made absolute.

Ex parte CARNEY.

Mr. Russell moved to make absolute a rule *nisi*, granted under the Derelict Lands Act.
Rule made absolute.

Ex parte KRIEGER AND OTHERS.

Mr. De Waal moved to make absolute a rule *nisi* granted under the Derelict Lands Act.
Rule made absolute.

Ex parte DIENER.

Mr. Benjamin moved to make absolute a rule *nisi* granted under the Derelict Lands Act.
Rule made absolute.

Ex parte MENTOR.

Mr. Roux moved to make absolute a rule *nisi* granted under the Derelict Lands Act.
Rule made absolute.

Ex parte FRASER AND ANOTHEE.

Mr. Gutsche moved to make absolute a rule *nisi* granted under the Derelict Lands Act.
Rule made absolute.

Ex parte THE DIVISIONAL COUNCIL OF HUMANSBORO.

Mr. P. Jones moved to have made absolute a rule *nisi* granted under the

Derelict Lands Act, with respect to certain erven.

Rule made absolute.

Ex parte COURTENAY.

Mr. Sutton moved to have a rule *nisi* made absolute calling on all persons to show cause to the Registry Surveyor of Deeds why he should not remove certain lots of land and portions of roads at Elsie's River Halt from the plan filed in his office.

Rule made absolute.

MASTER V. WIGGETT.

Mr. Howel Jones moved for an order of personal attachment against the defendant for contempt of Court. The defendant was the sole trustee in an estate, and he failed to comply with the Master's request to file an account.
Granted.

Ex parte SPIERS.

Mr. W. P. Buchanan moved to make absolute a rule *nisi* calling on all persons to show cause why a certain transfer of land at Malmesbury should not be cancelled.

Rule made absolute.

SCANLON V. BERT.

Mr. J. E. R. de Villiers moved to make a rule *nisi* final, calling on the defendant to show cause why certain money should not be declared executable.

Rule made absolute.

Ex parte GOLDSCHMIDT.

Mr. Schreiner, K.C., moved for an order amending the title of certain land at Adelaide. The application was made on behalf of the Dutch Reformed Church, who were anxious to dispose of certain erven. The petition was supported by the chairman of the Municipality. The Registrar of Deeds reported in favour of the petition. The portion of the land in question was by error excluded from a diagram.

Order granted in terms of the petition.

Ex parte GRIPPER AND ANOTHEE.

Mr. Close moved for an order of registration of a certain contract of marriage. A contract was drawn up in England before the bonds of matrimony were entered into by the parties, but it did not correctly set forth the intentions of the parties, which were to

exclude liabilities and all profit and loss, and another contract had subsequently been drawn up in the Colony.

Maasdorp, J., said the matter might be mentioned again. In the meantime, he would compare the two contracts.

Ex parte REYNOLDS.

Mr. Benjamin moved for an order of registration of a certain ante-nuptial contract, which, owing to certain informalities, had not been filed within the requisite time.

Granted.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

Ex parte HIGGS. } 4904.
} Dec. 13th.

Mr. Schreiner moved for an order authorising the executors in the estate of Arthur Frederik Morris to pay to petitioner one-half share of the movables belonging to the said estate. The petitioner was the widow of the late Mr. Morris, and had remarried. The petitioner and deceased had executed a joint will, under which they had bequeathed the property to their son, Henry Ernest Morris, subject to a life interest to the petitioner. The son, Henry Ernest Morris, was twenty-three years of age, and the will provided that transfer of the landed property should be granted to him when he attained the age of twenty-five years. He consented to the present application. The value of the movables was stated to be about £3,000. Under the proposed arrangement, said counsel, the son would at once receive all the immovable property and half the movables, while the petitioner would receive half the movables.

[Hopley, J.: It seems to be a family arrangement that you wish the Court to sanction?]

That is so, my lord.

Hopley, J., said it seemed to be a generous arrangement that was proposed on the part of the petitioner, and one that was entirely beneficial to the son; the executors offered no opposition, and he could see no reason why the prayer of the petition should not be granted. An order would be granted as prayed,

authorising payment to the petitioner by the executors of one-half share of the movables belonging to the estate of herself and her late husband, the other half, therefore, being from this time vested in her son, and also the whole of the immovable property, and all rents and interests accruing from the half of the movables and the whole of the immovable property to be henceforth for the benefit of the son.

Ex parte BARTLETT.

Mr. Russell said that in this matter an order had now been drafted between the Master and the parties, and he applied for this order to be sanctioned by the Court. The petitioner was granted leave to raise a mortgage on certain property for such a sum, not exceeding £2,500, as the Master should deem necessary, subject to certain terms and conditions duly specified.

Order granted in terms of draft order now read.

Ex parte THE WORCESTER BUTCHERY COMPANY.

Mr. W. P. Buchanan presented the report of the liquidators, and moved for the usual order that the report should lie for inspection.

Usual order granted.

HANSEN V. ESTATE HANSEN.

Mr. J. E. R. de Villiers moved, on behalf of Martin Christian Hansen (son of the insolvent, Christian Martin Hansen) for an order for payment of certain costs out of his father's insolvent estate. Notice of the application had been served upon the trustee in the insolvent estate, who, however, did not enter an appearance. The applicant, it appeared, had incurred costs, because the summons in the insolvency proceedings had been served upon him, and he declared that he was then perfectly solvent. If it was claimed that the summons was against his father, then he could not accept service, as his father was detained at Valkenberg, and was ignorant of these proceedings. Counsel (in reply to his lordship) said that the costs, as a matter of fact, would come out of the petitioning creditors' pockets, because there were no funds in the insolvent estate.

The costs were ordered to come out of the insolvent estate, including costs of the present application.

WEINTROUB AND PENKIN V. STEER.

Mr. Struben (for the respondent) applied for a postponement of this matter until the 12th January.

Mr. Burton (on behalf of the applicants) opposed, and said that it would be a great inconvenience if the matter had to stand over for a month. There was a certain dispute in regard to water rights of the applicants' property at Green Point.

After hearing Mr. Struben, Hopley, J., said that the matter would be postponed until the 12th January, upon an undertaking by the respondent to enable the applicant temporarily to overcome his difficulties in regard to water leading, question of costs to abide the result.

Ex parte KOTZE.

Mr. W. P. Buchanan moved for an order authorising the secretary of the Malmesbury Board of Executors to pay the sum of £46 8s. 5d., standing to the credit of the former Agricultural Society, Malmesbury, to the present Malmesbury Agricultural Society. Counsel submitted that the objects of the two societies were identical, and urged that in view of the small amount of the fund an order should be granted. The fund had been lying with the Board of Executors for a period of eleven years.

Hopley, J., said that he was unable to grant an order such as had been applied for, vesting one society with the moneys of another society now defunct, even though their objects were similar, and they were operating in the same district. It seemed to him that any parties concerned should have the opportunity of being heard before money was granted away in that fashion. There would be no order in the present application.

Ex parte SMITHERS AND ANOTHER.

Mr. Benjamin moved for an order authorising the execution of a post-nuptial contract.

An order was granted in terms of the prayer, the parties to be allowed to register the post-nuptial contract, the said registration not to affect the rights of any creditors or parties otherwise interested in either spouse prior to registration.

WALKER V. MARTIN.

Mr. M. Bisset moved for judgment in terms of a consent paper over certain transfer of land at Mossel Bay sold by the defendant to the plaintiff for £1,800. It appeared, however, that in July last the defendant Martin's wife, who was about to sue for judicial separation, took out an interdict restraining him from giving transfer of the land pending the action.

[Hopley, J.: Has the action been brought?]

No, my lord.

[Hopley, J.: Would it not be the proper course to have the interdict set aside?]

Mr. Bisset: Yes, my lord, but I would ask for judgment in terms of the consent paper subject to the understanding that this interdict is withdrawn.

Hopley, J., said there would be judgment in terms of the consent paper, but steps would have to be taken to get the interdict removed before transfer could be obtained.

ELLIS, KISL'NGBURY AND CO. V. BERGL.

This was an application for the appointment of a commission *de bene esse* to take the evidence of the applicants in London.

Mr. Close moved, and stated that his learned friend had a similar application to take the evidence of the defendant and others.

Mr. Gardiner said the respondent consented to the application.

Commission granted to examine the witnesses mentioned in the application, and any others that may be tendered by either side, Mr. J. T. Oliver, of London, to act as commissioner, and costs to be costs in the cause.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

PERL AND CO. V. MCKEN- { 1904.
DRICK. { Dec. 14th.

Mr. Sutton moved for provisional sentence on a judgment of the R.M. of Stellenbosch for £3 17s. 6d., together with £2 5s. 7d., taxed costs, and for an order attaching certain money in the hands of the Colonial Orphan Chamber, which had become payable to the defendant. Negotiations for a settlement had, Mr. Sutton explained, proved unsuccessful.

Provisional sentence granted as prayed.

GENERAL MOTIONS.

VAN NIEKEEK AND CO. V. FABER.

Mr. Gardiner moved for leave to sue by edictal citation, and to attach certain medicines and other movable articles

ad fundandam jurisdictionem. The petitioners were general dealers and hotel keepers in the district of Clanwilliam, and amongst the outstanding claims they had taken over in the transfer of the business was one against Faber, a physician, late of Clanwilliam, to the amount of £115 14s. 10d., for goods sold and delivered, board and lodgings, and money lent and advanced.

Leave to sue was granted, and the goods directed to be attached *ad fundandam jurisdictionem*, rule to be returnable on the 1st February.

BOISSON V. BOISSON.

Mr. W. P. Buchanan moved for leave to sue, by edictal citation, respondent's whereabouts being unknown.

Leave granted, citation to be returnable on the 15th November, personal service to be effected, failing which, publication in the "Government Gazette," and the "Daily Telegraph," London, and upon the parents of the respondent.

Ex parte MEIRING.

Mr. Du Toit moved for the appointment of a *curator ad litem* to represent a minor in the partition of certain property in the district of Oudtshoorn, Mr. Hendrick A. Wepener being suggested as curator.

Order granted as prayed.

FOURIE AND OTHERS V. MOSTERT AND OTHERS.

Sir H. Juta, K.C., moved for an order in terms of a certain consent paper, the parties having agreed to allow the notice of motion to stand as summons, and to go into the principal case.

Order granted in terms of consent paper.

COCHRANE AND CHERRY V. WOODSTOCK COUNCIL AND OTHERS.

Mr. Schreiner, K.C. (with him Mr. Gardiner), on behalf of the applicants, on motion, moved for an order in terms of consent paper, the parties having agreed that the judgment given in the action for the present respondents (Cochrane and Cherry) for £7,000 odd should be varied, and that judgment should be entered for £5,000 and taxed costs, and that the proceedings instituted by the Water Board for a new trial be withdrawn.

Sir H. Juta (with him Mr. Rainsford), for the respondents, assented.

Order granted in terms of consent paper.

In re THE COLONIAL BUILDING CORPORATION.

Mr. Schreiner, K.C., presented the liquidators' report, and moved that the report should lie for inspection, and the usual notices be issued.

Usual order granted, and publication directed to be made in the "Cape Times."

In re THE COLONIAL ASSURANCE CO., LTD.

Mr. P. Jones presented the final report of the four liquidators, and moved for a date limit to be fixed for recognition of claims and for the liquidators' remuneration to be fixed.

Order granted, all claims to be filed within three months, one publication of notice to be given in the "Cape Times" and the "Daily Telegraph" (London), and liquidators' remuneration to be at the rate of 1½ per cent. on the funds distributed (£61,000).

Ex parte MICHELSON.

Mr. J. E. R. de Villiers moved for the release of the petitioner's estate from insolvency. The estate had been sequestrated to the R.M. of Oudtshoorn, but no claims had been filed, and no trustee had been appointed.

Order granted, the estate to be released from sequestration, saving the rights of creditors.

Ex parte VAN BREDA.

Mr. Schreiner, K.C., moved for the appointment of a *curator ad litem* to represent certain minors in an action to be brought in regard to a Bredasdorp estate.

Order as prayed, Mr. Advocate Gardiner to be *curator ad litem*, costs to be costs in the cause.

Ex parte WADDELL AND ANOTHER.

Mr. Uppington moved for an order declaring a certain holograph will, not properly executed in accordance with the Wills Ordinance, to be valid, and directing letters of administration to be issued to the surviving spouse, and the testator's son, Andrew Waddell, who were appointed executors under the will. The testator, Wm. Waddell, had carried on a large business as a butcher at Umata, and the estate was of considerable value. The Master refused to recognise the will, as it had not been properly attested as required by law. The will was in the handwriting of the testator, and left the property to the children in equal shares, subject to usufruct to the surviving spouse. Petitioners submitted that the

will was privileged. Counsel quoted the *ex parte* application of Huskisson and another (Supreme Court reports), in support of the petition.

Maasdorp, J., said that an order would be granted declaring the will valid—in so far as the rights of the children were concerned, without deciding the rights of the wife, and authorising the Master to appoint the executors mentioned in the will.

In re THE GRAND JUNCTION RAILWAYS, LTD.

Mr. Searle, K.C., presented the liquidators' report, and moved for the usual order that the report should lie for inspection, and that publication should be given once in the "Government Gazette," and twice in the "Cape Times" and "Cape Argus."

Usual order granted, with publication as prayed.

In re THE GRAND JUNCTION RAILWAYS, LTD.

Mr. Schreiner, K.C., presented the report of the receivers, and moved for the usual order that the report should lie for inspection. He pointed out that the matter was one of some magnitude, the admitted claims amounting to £93,000, and the claims, which had been fought and so on, amounting to £382,000. Seeing that the range of creditors and claimants was so very extensive, wider publication of the notice than was usually given was necessary, and counsel asked his lordship to direct publication in the "Government Gazette," and once a week for three weeks in the "Times" (London) (failing which, the "Daily Telegraph," London), "Cape Times," "Cape Argus," "South African News," "Eastern Province Herald," and "East London Dispatch."

The usual order was granted, the report to lie for inspection at the office of the receivers until the 14th February, with publication as applied for.

CARTWRIGHT AND CO. V. GRIFFITHS.

Mr. Gutsche moved for the rule, granted on December 3, interdicting certain goods, to be made absolute.

Rule made absolute accordingly.

Ex parte MOSTERT.

Mr. W. P. Buchanan moved for leave to sell a certain farm Glencliffe, in the division of Bedford. The ground set out in the petition for the application was that landed property in the said district was fetching very high prices at present,

and that there were indications that there would be a fall ere long. The Divisional Council's valuation of the farm was £2,767, and the petitioners expected that the property would produce about £3 10s. per morgen, or about £7,000 odd.

The Master, in his report, assented to the application, subject to certain provisions to protect the rights of the minors, and commented on the fact that, while the property market was reported to be depressed in all other parts of the Colony, it should be said to be so good in the Bedford district.

Order granted with leave to sell, the reserve price to be a minimum of £3 per morgen, proceeds to be invested in terms of the Master's report.

PROVISIONAL ROLL.

TURNBULL V. STEWART. { 1904.
{ Dec. 14th.

This was an application for provisional sentence on a certain acknowledgment of debt of £150, less £67 11s. 6d., for which credit had been given, and on a promissory note of £50, less £22 10s. 6d., for which credit had been given.

Defendant's affidavit denied that he was liable to the plaintiff in the sum of £150 or any part thereof. He (the defendant) had executed a deed of assignment in favour of his creditors; although that deed was not signed by the plaintiff, he duly received a dividend under that deed. As to the alleged debt of £50, he denied that he was liable for the said sum or any part thereof, and said that he had signed the bill purely for the accommodation of the plaintiff, who gave him no consideration or value.

The answering affidavit of Reginald Metcalfe, of the firm of Silberbauer, Wahl and Fuller, stated that the defendant had made an offer which would have required over twelve years to extinguish the debt. Defendant had never before raised the defence that the note was an accommodation note.

The replying affidavit of the defendant denied the statements contained in Mr. Metcalfe's affidavit, and Mr. Gardiner (for the defendant) submitted that this was not a case for provisional sentence. He contended that the plaintiff should be ordered to go into his principal case. He submitted that the plaintiff had acquiesced in the deed of assignment.

Sir H. Juta (for the plaintiff) said that the documents showed how little reliance could be placed upon the defendant's statements. The defendant had acknowledged the debt.

Maasdorp, J., said that he had come to the conclusion that there was not a final release, but that

there might be something in the trust deed which continued his indebtedness to the plaintiff. Under all the circumstances, he thought that the plaintiff having produced the liquid document, and there being no proof upon which the probability of success on the part of the defendant was established, provisional sentence would be given as prayed. If defendant could establish the defence which he now merely suggested, without proof, then he would be entitled to succeed. Provisional sentence would be granted as prayed.

KRUGER V. FAEHSE AND CO.

Mr. J. E. R. de Villiers moved for the compulsory sequestration of the defendants' partnership and private estates.

Dr. Greer, having read affidavits, submitted that there was no property left in the estate. He contended that the petitioning creditors should withdraw the application, seeing that there were no assets in the partnership estate or the private estate of Bernhardt.

Order granted for final adjudication.

Maasdorp, J., remarked that no legal ground had been set up by defendant, and the defence was more in the way of an appeal to the creditors.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

CAPE TIMES, LTD. V. MCKEN- { 1904.
ZIE AND CO., LTD. { Dec. 15th.

Discovery — Detailed statements of account.

There is no rule of Court whereby a defendant can be compelled to disclose items on which a tender made by him is based.

Mr. M. Bisset moved for an order compelling the respondents to render particulars of certain items in the applicants' account, which they admitted. The plaintiffs claimed from the defendants £90 odd, for advertising charges, etc., and the respondents had tendered £23 3s. 5d., with costs, but had not specified the items that they admitted.

His Lordship said that the application seemed to him to be quite unusual. He did not see how the Court could compel the defendants to disclose the items on which their tender was made up.

Mr. Bisset said that the particulars would be important, so as to enable the plaintiffs to know what items they would have to prove at the trial. Counsel cited the case of *Hills v. Colonial Government* (12, C.T.R., 951), though he admitted that this was not exactly on all fours with the present application, while similar in principle. He contended that, if the order now asked for were granted, it would result in a saving of costs. Counsel, in reply to his lordship, said that he was not aware of any rule of Court bearing upon an application of this kind. The matter, he argued, was one of practice, and the Court might well, in the interests of the Court and the parties concerned, grant such an order as was now prayed for.

Hopley, J., said that it was perhaps unfortunate that the defendants did not openly show their hands to the applicants, and tell them what items they were ready to admit. He thought it would be wise on their part to do so, and it might save expenses to the parties. At the same time, he was asked now to make an order, which was of a novel character, and which was not supported by any particular rule of Court, and, as far as he could gather from counsel, he could give no precedent for the application now made. Although in this particular case, it might be convenient to make such an order, he could quite conceive that it might lead to a very inconvenient practice in the future. All that he could do at present was to give a warning to the defendants that they had better, unless they had strong reasons to the contrary, discover the items they admitted, so as to save expense, and that if they did not do so they might have to pay costs even upon those terms. He would leave the question of the costs of this particular application to abide the result of the trial. It was quite possible that the costs of this application might have to go against the defendants. He could give no order, but he would give the warning that this seemed to be a reasonable application on the part of the plaintiffs, and, although there was no proper process whereby he could compel the defendants to make discovery, he thought it would be wise of the defendants to comply with the plaintiffs' request. No order would be made.

Ex parte VISSER.

Mr. W. P. Buchanan (in the absence moved for the applicant for leave to mortgage certain property in the estate

of her late husband and herself, in order to make up a deficiency of £223, due to her under a legacy of £1,000, bequeathed under the will.

The matter was ordered to stand over till later in the day.

At a later stage,

Mr. Buchanan informed his lordship that he had had the opportunity of going more carefully into the brief. He now renewed the application.

Hopley, J., said that the petitioner had evidently foregone some of her rights under the will by taking this legacy. Leave would be granted to the petitioner to mortgage the farm for £240.

BATCHELOR V. SOUTH AFRICAN BREWERIES.

This was a motion upon notice calling upon the respondents to show cause why this case should not forthwith be set down for hearing, with or without the evidence of a certain witness, one Polmear.

The petition stated that the case had been adjourned *sine die*, until the evidence of Charles Maple Polmear, of East London, could be taken. Between the 24th November and the 2nd December Polmear was driving about in a dogcart, and apparently able to transact business. Petitioner was being greatly prejudiced by the delay in the hearing of the case. Further, his principal witness (J. Batchelor) informed him that it would be impossible for him to remain out here much longer, and that he desired to return to his business in England.

Certain answering affidavits stated that the witness Polmear was still unfit to give evidence. His medical adviser said that, although convalescent, Polmear was still in a very weak and nervous state. It was imperative that he should have complete rest and change for at least a month, as soon as he was able to travel.

Counsel was proceeding to read certain answering affidavits, when

Hopley, J., said he did not see any need to go further into the question. The affidavit of the doctor was dated the 5th December, and the month was expiring. He thought that the Court might now very properly fix a date. The matter would be set down for hearing before a jury on the 10th January.

Sir H. Juta, K.C. (with him Mr. Gardiner), for applicant; Mr. Upington (with him Mr. D. Buchanan), for respondent.

Mr. Upington afterwards moved for a commission to take the evidence of Alfred Letellier, until lately employed by the South African Breweries as their manager at East London. Letellier was at present out of employment, and it was not improbable that he would shortly be leaving the Colony.

Sir H. Juta submitted that, in view of the early date upon which the case would be heard, there was no need to take the evidence on commission. He complained that obstacles that were not legitimate had been repeatedly placed in the way of his client to prevent him getting his money.

Mr. Upington repudiated the suggestion that his clients were placing unnecessary obstacles in the way of the plaintiff proceeding with his action.

Hopley, J., said that the matter would stand over pending the production of an affidavit by Letellier as to whether he intended to leave the Colony before the date fixed for the trial.

GARDINER AND EASTON V. NEW ZEALAND AND AFRICAN STEAMSHIP CO.

Mr. Close moved for an order authorising the refund of certain money paid into court by the applicants as security for certain cattle which had been released from the custody of the respondent company. The applicants had paid the money on condition that the respondents should forthwith institute an action. The action had not been instituted forthwith.

Sir H. Juta, for the respondents, said that they had not had an opportunity of instituting an action during the November term within the period allowed. Their declaration had now been filed.

Hopley, J., said that the case was not one of urgency, and that it should stand over. In the meantime, he thought that a settlement would, perhaps, be arrived at between the parties.

WILSON AND CATHCART V. YOUNG.

Spoliation—Costs.

Mr. Gardiner moved for an order for the delivery of a certain house at Observatory-road, which had been wrongfully, unlawfully, and forcibly entered upon by the respondent. The plaintiffs were builders and contractors at Observatory-road, and the defendant was Robert Young, trading as Young Bros. The plaintiffs said that they had entered into a contract with the respondent to erect for him certain premises, and that they had completed the work, and supplied the respondent with an account showing a sum of £224 10s. still owing them in connection with the contract and extras. The applicants had retained the key of the premises, but the respondent had broken open and taken possession of the house.

Mr. W. P. Buchanan read an affidavit by the respondent, who denied that he had wrongfully or forcibly taken possession of the premises. He stated that the applicants had not completed the contract in accordance with the plans

and specifications, and that certain work had not been executed in a workmanlike manner. He had paid to the applicants a sum of £1,365, and he had retained the balance of £199 pending the completion of the contract.

An order was granted, requiring the respondents to pay the sum of £224 10s., or to give security to the satisfaction of the Registrar on or before the 29th December, failing which the applicant to have possession of the house, the applicant not to be taken to have parted with his lien on the premises by remaining out of possession in the meantime.

After hearing counsel on the question of costs,

Hopley, J., said that the respondent seemed to have practically dispossessed the plaintiffs of their lien, and he must pay for having taken the law into his own hands. Costs of the application must be borne by the respondent.

RECEIVERS GRAND JUNCTION RAILWAYS V. JOHN WALKER AND SONS.

Mr. Russell, on behalf of the defendants in the action, moved for a commission to take the evidence in London of John Walker and any other persons residing in the United Kingdom whose evidence might be deemed material for the defence in the action brought by the Receivers of the C.G.R. against John Walker and Sons in regard to the transfer of certain property. Certain litigation was pending between deponent and Mr. Arnold Hills in London, and it was desirable that deponent should attend the hearing of the action.

Mr. Schreiner, K.C. (for the respondents), read an affidavit by Mr. Syfret, one of the plaintiffs in the action, who urged that it was of the utmost importance that the said John Walker should be examined before the Supreme Court in Cape Town. The joint venture was entered into in this colony. The defendant had entered a claim in reconvention, and it was highly desirable that the evidence of John Walker should be given in this colony, where the books and agreements were kept. Deponent intimated that he would have no objection to evidence being taken on commission of persons to whom it was alleged payments of interest on debentures had been made by defendants.

Mr. Russell read an answering affidavit by Thomas Cameron Walker (son of the defendant John Walker), stating that his father was not in robust health by any means, and was unable to withstand the heat of the Cape summer.

After hearing counsel in argument on the facts,

Hopley, J., said that no order would be made upon the present application.

It seemed to him not only very desirable that Mr. Walker should be present personally at the trial here, but he should think it very undesirable that he should be absent. It was necessary that the defendant should attend, even at some little inconvenience to himself to help the Court to unravel this tangle which had largely been brought about by his acts. As to the other witnesses, he thought that if the names of such witnesses were obtained and submitted to the other side there would probably be no difficulty in the way of a commission taking their evidence. Leave would be reserved to the applicant to mention the matter to a judge in chambers. Costs of the present application would be borne by the applicants.

VAN DER HORST V. COLEY.

Interdict—Action for declaration of rights.

Where the applicant declared his intention to bring an action for declaration of rights forthwith; the Court granted an interdict to restrain the respondent from transferring certain immovable property.

This was a motion for an interdict to restrain the respondent from passing transfer of the whole or any portion of the estate Rustenburg, at Rondebosch, to the Hon. J. L. Bradfield, pending the completion of a lease under which the applicant had the option of purchasing for the sum of £4,000. Applicant, in his affidavit, said that in response to an advertisement in the "Cape Times," he entered into negotiations with the respondent to take the property. The respondent then was about to vacate the premises. Deponent agreed to take the house for a period of six months from the 1st October, and was given an option of purchase within the currency of the lease for £4,000. Subsequently the respondent made overtures to him to limit the lease to a period of three months, as he had received an offer from the Hon. J. L. Bradfield to purchase the property, and had accepted the offer. The applicant sent to the respondent a form of lease, embodying the terms of the agreement they entered into, but this the respondent had not signed.

The answering affidavit of Arthur Coley, the respondent, denied that he had agreed to enter into a lease with the applicant for six months. He had offered the applicant a refusal. He had agreed to let the house to the applicant, but he did not agree to let him have an option of purchase.

A further affidavit by R. M. Nightingale, broker, Cape Town, was read.

Mr. Burton (for applicant) admitted that, in view of the conflict of evidence on the affidavits, it would be difficult to decide the point in dispute at the present stage; but in the meantime he submitted that the applicant had made out a *prima facie* case for an interim interdict. Mr. Van der Horst was prepared to at once institute an action for a declaration of his rights.

Sir H. Juta (for respondent), said he thought that the mistake made by the applicant was that he had confounded an option with a refusal. There must be a consideration for an option, and no consideration had been alleged by the plaintiff in this case. Counsel contended that the case was not one for an interdict; if Mr. Van der Horst had been given an option, then he had his remedy by way of an action for damages.

Mr. Burton having been heard in reply,

Hopley, J., said that, as far as he could see, the balance of probabilities seemed to be in favour of the applicant, and that the balance of convenience and equity lay in fixing the property down in its present position. The respondent would be interdicted from passing transfer of the property, pending the result of an action for declaration of rights to be instituted forthwith by the applicant, action to be heard if possible during the first week of February, and not later than the 1st March, and costs to abide the result.

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

GENERAL MOTIONS.

LAIDLAW, MACKILL AND CO. { 1904.
V. BAKER, BAKER AND CO. { Dec. 16th.

Removal of bar.

Mr. Burton moved for judgment under Rule 319, for £3,093 15s., goods sold and delivered.

Mr. Rainsford moved, on behalf of the defendants, for leave to remove the bar and file their plea, and also for security for costs. The defen-

dants had a claim in reconvention, £1,031 6s., money paid, and £625 6s. 1d., damages for breach of contract, and £39 13s. 11d., storage of goods. Counsel read an affidavit by the defendants' attorney, W. G. Fairbridge, of the firm of Fairbridge, Arderne and Lawton, from which it appeared that the plaintiffs, who carried on business in Glasgow, Scotland, had tendered as security for the defendants' taxed costs the name of Mr. W. Lawson Browne, the local attorney of the plaintiffs. The defendants said that the security tendered was not such as they were bound to accept. Not only do they require security for costs, but also for counter-claim. Counsel objected to his learned friend reading certain annexures to the replying affidavit.

Mr. Burton read a replying affidavit by George Montgomery Walker, of the firm of Walker and Jacobsohn (the plaintiffs' Cape Town attorneys), from which it appeared that the dispute arose out of certain consignments of Laidlaw's Tobacco Extract from the plaintiff firm to the defendants' house at King William's Town. The transactions commenced in the early part of the present year. The plaintiffs first supplied 250 cases at 82s. 6d. a case, which were duly paid for. Afterwards various other consignments were sent, making a total of 1,000 cases, for which the plaintiffs said that defendants were still indebted to them. Deponent went on to say that, as to the allegations raised by the defendants in the correspondence that the goods were unmerchandise, it was denied by the plaintiffs that the goods were unmerchandise, although, if some of them now were, the loss was the defendants'. In May last, defendants had a survey made of the goods which they now said were unmerchandise, and although repeatedly asked to exhibit the reports and promising to exhibit the same, the defendants has as yet failed to do so.

[Hopley, J.: Surely it was wrong to put such statements on affidavit. The attorneys ought to know better than that.]

It is rather argumentative, no doubt.

[Hopley, J.: Surely he might wait for his counsel's mouth to put these facts forward. How can he swear to all this?]

Well, he says he "respectfully submits."

Mr. Burton concluded the reading of the affidavits, the deponent stating that the security offered was such as the defendants could reasonably claim.

Mr. Rainsford read an answering affidavit by Mr. W. G. Fairbridge, who said that, while he thought it was highly inconvenient at this stage, and he submitted that it was not desirable on an application to remove bar against pleading and requiring security for costs on the counter-claim, that he should

attempt to traverse the affidavit of the plaintiffs' attorney, he annexed three survey reports. These reports, said counsel, were to the effect that the sheep dip supplied was of faulty quality, because the tins in which it was enclosed were faultily constructed.

Counsel having been heard in argument,

Hopley, J., said it did not seem to him that this was a case in which the defendants should be barred from pleading, and that the operation of the 319th rule should be directed to be put into force against them, because it was obvious, before the bar was taken out against them, that the defendants meant to defend the action. The attorneys were not letting the matter go by default, but were in correspondence for some time. It seemed to him that he must allow the bar to be removed, and the defendants would have leave to file their plea forthwith, so that the merits of the case could be proceeded with as soon as possible. But the defendants were not bound to plead or to take any steps which might increase the expenses of litigation, until they were satisfied that they had sufficient security, not only for their costs, but also for the payment of the claim in reconvention that they said they had against the plaintiffs. The plaintiffs were foreigners, in the sense that they were not resident or domiciled in this colony, and under the rules of the Court anybody, not being domiciled in this country, who wished to bring an action against an inhabitant of this country, must give security for costs. It was admitted that the plaintiffs were liable to these rules, and that they must provide security for the defendants' costs and claim in reconvention; but the contention was raised on plaintiffs' behalf that the defendants were sufficiently secured by the stocks delivered to them by the plaintiffs which defendants still had in their possession. His Lordship went on to say that he did not regard security of that kind as sufficient, because it had already been alleged that a large proportion was in an unmerchandise condition, and then there was the danger of deterioration. He could not see, at the present stage, how it would be safe, in case the defendants succeeded, to rely upon the realisation of those stocks for any considerable amount of money. It appeared that the claim in reconvention was something like £600, and the costs of the action must also be taken into consideration. On the whole, he had come to the conclusion that, before the defendants were obliged to plead, the plaintiffs should find security in the amount of £1,000 to the satisfaction of the Registrar. The costs of the present application would abide the result.

NELSON V. NELSON.

Mr. Upington moved for an order committing the respondent for contempt of Court by reason of his non-compliance with an order given in July last in an action for divorce brought on the ground of malicious desertion. The order contained a direction to the present respondent (plaintiff in the original suit), to pay a sum of £3 a month to his wife for the support of each of the two younger children, who were placed in the custody of the wife. The respondent had failed to make any contribution under the order. Counsel read an affidavit by the applicant, Maud Nelson.

The respondent (who appeared in person) said that he was absolutely unable to pay the alimony. The divorce suit would cost him a deal of money. He was now earning £15 a month in the service of a firm of auctioneers.

Cross-examined: He was employed as managing clerk, but he simply received a salary, and had no commission. He had been attempting to raise money on two policies of life insurance, and was expecting to receive £20 to-day, on account of one of the policies. The surrender value of the other policy was £30. He would receive £50, of which amount £10 would go off on account of the unpaid premium, and another £10 to his solicitors. The final order in the present case was made in August, so that three months' alimony was now due. He was leaving his present employers at the end of this year.

By the Court: He owed bills to the amount of £205. These creditors were pressing.

[Hopley, J.: Not more pressing than the orders of this Court. You see, I may send you to gaol to-day or to-morrow. Your creditors could not send you to gaol by so rapid a process.]

In further reply to the Court, witness said that it was not on account of drinking that Behr and Co. had dismissed him; it was owing to the depression. He had been with the firm 18 or 20 years. Witness complained that he had not been allowed access to his children, as ordered by the Court.

Mr. Upington denied this allegation, and said that reasonable facilities had been offered to the respondent.

Hopley, J., advised the respondent to approach his late wife in a civil manner, and then, if he was not allowed access, he should inform the Registrar of the Court, so as to bring his complaint before the notice of the bench.

Order granted as prayed, committing the respondent, to be suspended upon payment of £9 at 10 a.m. to-morrow (Saturday), at the office of the applicant's attorneys, Messrs. Fairbridge, Arderne, and Lawton, and a further sum of £9, at a similar hour on Tuesday. Respondent to pay the costs of the application.

The respondent said that he would be unable to pay the sum of £18, as he had already given a note to his attorneys, promising to pay them £10 when he was paid for the policies.

[Hopley, J.: You should not give these. Your attorneys will have to give the note back to you. They must not get their money before your wife gets hers.]

SUPREME COURT

[Before the Hon. Mr. Justice HOPLEY.]

IN CHAMBERS.

MOTION.

BACHELOR V. SOUTH AFRICAN { 1904.
CAN BREWERIES. { Dec. 23rd.

This was an application by the defendants in an action arising out of an East London building dispute, set down for hearing before a jury on the 10th January, for leave to take certain evidence on commission. Mr. Upington (with him Mr. D. Buchanan) was for the applicants; Mr. Gardiner was for the respondent (plaintiff in the action).

The matter had previously been before the Court, and had been ordered to stand over pending production of a certain affidavit (14, C.T.R., 938).

Mr. Upington moved for a commission to take the evidence of Alfred Letellier,

until lately the defendants' manager at East London. He read an affidavit by Letellier stating that the Court had fixed the 10th January for the hearing of the action. Deponent was the witness referred to in one of the affidavits filed on behalf of the defendants. He was at present out of employment, and might be leaving the country at any time. At present he had no prospect of anything to do, and he contemplated leaving this country before the 10th January.

Mr. Gardiner said that plaintiff strongly opposed the application, as they wished to have an opportunity of cross-examining Letellier in open court. The effect of reading evidence taken on commission was not the same as when the witness was cross-examined before a jury. Counsel contended that it had not been shown that Letellier was going to leave the Colony before the date of trial.

Mr. Upington said that defendants' position was that they had no control over this man. He might go at any moment, and he wouldn't communicate with them. His evidence was important, and unless taken on commission, there was a danger that they might lose it.

Hopley, J., said that what he felt was that it would be a hardship upon defendants if, by the refusal of this application, they were deprived of Letellier's evidence. If the man were still in town, no doubt he would be produced at the trial?

Mr. Upington: Yes; it is only a commission *de bene esse*.

Hopley, J.: I will grant a commission on condition that, if the man is still in the country and is available, he will be produced at the trial, the Commissioner to be Mr. Giddy, K.C., costs to abide the result.



INDEX OF TITLES IN THE DIGEST.

	PAGE		PAGE
Aboriginal Native	720	Amendment of (election) re-	
Abrogation of law	724	turns	79
Accommodation note	893	Ante-nuptial Contract... ..	381
Accomplice	505	Applicant for liquor licence...	882
Account... ..	249, 827	Arbitration... ..	169, 428, 607
Act 15 of 1856	597	Arbitrator... ..	827
" 20 of 1856	312	Architect	109, 268, 747
" 19 of 1861	261	Articled Clerk... ..	27, 765
" 19 of 1861 and 19 of 1877	316	Assignment	510
" 18 of 1864	943	Attachment	509
" 18 of 1873	117	Attorney 223, 233, 341, 496	
" 8 of 1879	369	836,	890
" 9 of 1879	389	Auctioneer	419
" 39 of 1879	865	Award	165
" 6 of 1882	169		
" 27 of 1882	301	Bailment	608, 980
" 28 of 1883	400, 724	Belligerent	998
" 38 of 1884	21	Beficial Occupation	369
" 43 of 1885	1005	Bequest	157
" 44 of 1885	999	Blasting	653, 1018
" 27 of 1887	999	<i>Bona fide</i> defence	946
" 42 of 1887	999	Bond	489, 769, 794
" 28 of 1889	732	Boy... ..	1005
" 5 of 1890	297, 303, 991	Breach of contract	69
" 19 of 1891	231	Breach of lease	236
" 23 of 1891	783	Bribery... ..	646, 949
" 25 of 1891... ..	365, 307	Broker	266, 583
" 34 of 1891	483	Brokerage	276, 982
" 25 of 1892	93, 360	Brothel	987
" 36 of 1893... ..	199, 565	Building Contract 109, 158,	
" 20 of 1894	732	326, 433, 624,	712
" 22 and 25 of 1894 ...	305, 307	Building Loan	55
" 28 of 1896	241	Burial ground	482
" 30 of 1899	193		
" 38 of 1899	906	Cancellation 236, 320, 382,	
" 26 of 1902	12	489,	644
" 36 of 1902... ..	429, 646, 987	Cape Town Municipality...	197
" 47 of 1902	247	Capital and Interest	794
Action	229	Cattle... ..	531
Acts of Regular Warfare	118	Cession... ..	220
Ademption	755	Children	687
Administration	16	Circumstantial evidence	651
Administrator	78	Civil imprisonment	779, 794
Admission... ..	341, 765	Claim in reconvention	35
Adulteration	297, 303, 991	Closing time... ..	600
Adultery	700	Collateral agreement	589
Agency	266, 691	Coloured people... ..	569
Agent ... 328, 418, 610, 691	982	Commission	671, 701
Alien	247	Common wall	180
Amended Title	389	Company... 93, 360, 492, 551,	918
Amendment of Plea	402	Composition	438, 927

	PAGE		PAGE
Conditional purchase	144	False pretences	989
Conditions of sale... ..	84, 419	Fees	296
<i>Consensus ad idem</i>	276	Fixtures	206
Consideration 115, 408, 823,	927	Foreign executor	18
Contempt of Court... ..	988	Forfeiture	39
Construction of Contract	680	<i>Forum citandi</i>	9
Construction of Will	200	Foreign Company	534
<i>Consortes litis</i>	704	Fraud	640, 927
Continuous service	27, 496	Fraudulent insolvency	800
Contract ... 5, 346, 439, 753,	870	Freight	563
Copyright	97	Friendly Societies... ..	607
Costs... ..	295	Funeral expenses	493
"Cover"	583		
Criminal appeal... ..	833	Game... ..	598
Criminal law... ..	374	General dealer	302
Criminal responsibility	425	General denial	631
Cruelty to animals... ..	995	Grandchildren	687, 761
Culpable insolvency	21	Guarantee	72, 124, 975
Custody of children	74, 238		
Curator	386	Harbour Board	351
Custom of trade... ..	439	Hotel... ..	923
Customs Duty	704	Hypothec	240
		Illegal evidence	398
Damages 322, 439, 661, 673,	728	Immovable property	294
<i>Damnum injuriæ</i>	546	Imperial Government... ..	586
Death of partner	20	Independent Contractor	35
Debentures	551	Indictment	785
Debtor... ..	548, 779	Injury to property... ..	629
Defamation 292, 362, 661, 669,	728, 978	Innocent misrepresentation	747
Defective premises	914	Insolvency 129, 140, 457, 510,	744, 901, 902
Delict	639	Interdict 229, 504, 571, 572,	653, 1018
Destruction of premises	369	Interim valuation	354
Discovery... ..	1016	Interpleader	204, 1001
Distribution	761	Interest	680
Divisional Council	355, 905	Irregularity... ..	476, 488, 507
Divorce... ..	169, 619, 814		
Dock agent	535	Joint estate... ..	591
<i>Donatio</i>	408	Judgment... ..	216
Duress... ..	92	Judicial separation	814
		Jurisdiction ... 534, 565, 586,	946
Ejectment... ..	580, 714	Jury	783
Election (Parliamentary) 79,	949	<i>Jus retentionis</i>	675
Encroachment	135, 501		
Engineer	201	Kafir beer	241
Equities	566		
Estoppel	64, 610, 734, 879	Lamp	600
Evidence 195, 374, 487, 505,	632, 833, 1000	Land beacons	389
Exceptions 491, 586, 631, 785	861	Landlord ... 13, 309, 331, 589,	725, 914, 987
Excessive charges	176	Lashes	496, 1005
Executor	438, 591, 610	Law Agent	176, 781
Expenditure... ..	78	Lease	220, 382, 448
Expert	275	Leave to appeal	581, 945
Exposing for sale	398	Legacy	761, 775, 883
Extension of lease	725	Legislative Council... ..	12
Extras	326, 433, 624		

	PAGE		PAGE
Lessor	240, 644	<i>Nudum Pactum</i>	408
Letting and hiring	916	Occupation	883
Liability of partner	237	Onus of proof	1003
Libel	581	Option	239, 823
Licence	197, 483	Ordinance 72 of 1830... ..	506
Licensing Court	215, 822	Ordinance 6 of 1843	21, 742, 744
Lien	675, 900	Ordinance 15 of 1845	132, 617
Liquidated claim	244	Owner... ..	605
Liquidated damages	39		
Liquidation	87	<i>Pactum de non petendo</i>	317
Liquor laws	195, 487, 650	Partnership 20, 97, 237, 249, 393, 457, 574,	601
Liquor licence... 304, 305, 307, 400, 569, 600, 994,	999	Party wall... ..	180, 185
Living on earnings of prostitution	646	Patent defect	975
Loan	608	<i>Pauperies</i>	720
<i>Locatio operis</i>	606	Payment... 288, 357, 438, 472,	819
Loss of goods	808	Pension	902
Lunatic	386	Perjury	507
		Personal injury 458, 576, 894,	898
Magistrate, 244, 295, 316, 476, 491, 651, 652,	1001	Personation	949
Mahommedan marriage	74	Penalty... ..	39
Malicious arrest	946	<i>Peritia artis</i>	747
Malicious desertion	619	Petition	83, 148, 231
Mandate	418	Plans	201
Marriage of Natives	225	Pleading	581, 631, 718, 995
Master and Servant, 69, 117, 204, 297, 504, 546, 597,	639	Police offences	301
Measure of damages	135	Power to sue... ..	492, 973
Medical Council... ..	483	Practice	714
Medical practitioner	296	Pre-emption	408
Messenger of Court	322, 509	Preference... ..	551
Mining Ordinances	171	Prescription	614
Minor... ..	425	Presentment	691
Misconduct... ..	621, 753	Previous conviction	496
Misjoinder	939	Principal and agent 288, 370, 472, 858, 879,	909
Misrepresentation	704	Principal and surety... ..	680
Mistake	563	Procedure... ..	671
Monument	493	Promissory note... ..	357, 691
Mortgage	30, 62	Promotor	851, 995
Motion	580	Proof	296, 301
Municipal... ..	241, 401, 838, 948	Provisional sale... ..	328
Mutual will	157, 392	Provisional sentence 318, 377, 485, 566, 632,	772
		Purchase and sale	271, 861
Native area	724		
Native Territories	980, 989	Qualifications	781
Native Succession	943	<i>Quanti Minoris</i>	609, 975
Natives	193	Quantity surveyor	393
Native law	238		
Native reserve	905	Railway	261, 563
Negligence	980	Rebel	118, 998
Negotiable instrument... ..	64	Receipt	397
Net price	260	Receivers	87
Non-joinder	861	Rectification of register	404
Notice	370, 507, 815	Registration	381, 614
Novation... ..	85, 851	Release	396
Noxal action... ..	720	Remit... ..	312

	PAGE		PAGE
Removal of Bar...	1019	Stock Theft ...	1506
Removal of building ...	136	Subletting ...	331
Removal of trial ...	228, 783	Subscription dance ...	305
Rent... ..	236, 240, 504	Subsidence ...	165
Repudiation of contract ...	38	Substitution... ..	593
<i>Res religiosa</i>	482	Succession (Native)... ..	225
Resident Magistrate	306, 945, 946	Surety	318, 334, 981
<i>Restitutio in integrum</i>	591		
Restitution of conjugal rights	131	Tacit agency	370
Retail sale (of liquor)... ..	650	Tacit agreement... ..	351
Return of goods... ..	754	Theft	728, 997
Review	220, 398, 488	Time limit	658, 712
Right to land	247	Trade-mark	404, 616
Right of Way	320, 946	Trading	302, 699
Right to occupy land... ..	308	Transkei	635
Rule of Court No. 8	939	Treason	118
		Trespass	571, 673
Sale and purchase	105, 115,	Trust funds... ..	590
144, 206, 328, 432, 502,		Trustee	901, 973
606, 609, 658, 729, 752,			
754, 870, 875,	923	<i>Ultra vires</i>	635, 948
Sale by auction... ..	239	Undue preference	129, 140,
Sale of bequeathed property...	755	510, 742,	744
Sale to Non-combitants	699	Usufructuary... ..	78
Salesman	621		
Sanitation	401	Valuation Court	220
Scab Inspector	732	Verbal injury	728
Scots' Law Agent	890	Verbal lease... ..	879
Security	448	Verbal revocation	72
Seller and purchaser	35	Vesting	761
Sequestration	83, 148, 790	Voluntary payment... ..	92
Servant	621	Voluntary winding-up ...	93, 216
Service of Articles... ..	836		
Service of stallion... ..	407	Wages... ..	546
Service short	61	Waiver... ..	205, 916
Service of minors	5	Warranty	303, 609
Servitude... ..	180	Water	214, 865
Set off... ..	244	Whipping... ..	316
Shares	64, 271, 360, 583	Wholesale butcher... ..	296
Short delivery	827	Wholesale licence	307
Slander	138		
Specific purpose	875	Will 16, 17, 18, 62, 132 200,	
<i>Spoliatio</i>	1017	593, 671, 687, 761,	883
Spoor evidence... ..	864	Winding-up	360, 918
Stamp... ..	397	Witness	362, 988
Stay of execution	216	Wood-cutting	992
		Wrongful dismissal	204

DIGEST OF CASES.

VOLUME XIV.—1904.

	PAGE
Aboriginal Native, <i>see</i> Native area	720
Abrogation of law, <i>see</i> Pauperies	724
Accommodation note.	
Warner & Co. v. Impey ...	893
Accomplice, <i>see</i> Evidence ...	505
Account, <i>see</i> Partnership...	249
<i>see</i> Arbitrator ...	827
Act 15 of 1856, <i>see</i> Master and servant	597
" 20 of 1856, <i>see</i> Remit to R.M.	312
" 19 of 1861—Railway bye-laws.	
<i>Where a man was convicted of having been found intoxicated on Railway premises, having been previously convicted of drunkenness some six times within the previous year, and had thereupon been sentenced to twelve months' imprisonment: the sentence was reduced, on review, to one of 30 days' imprisonment or 40s. fine.</i>	
Rex v. Griman	261
Acts 19 of 1861, Sec. 15—Act 19 of 1877—Magistrate's ordinary jurisdiction—Whipping.	
<i>Where a boy, aged 15, was accused of contravening Sec. 15 of Act 19 of 1861, and the case having been remitted to a Magistrate to try under his ordinary jurisdiction, was sentenced to be whipped.</i>	
<i>Held, that as the boy was over 14, and this was a first offence,</i>	

	PAGE
<i>the Magistrate could not, under his ordinary jurisdiction, inflict a whipping.</i>	
Rex v. Baartman	316
Act 18 of 1864, <i>see</i> Native succession	943
" 18 of 1873, <i>see</i> Master and servant	117
" 8 of 1879, Sec. 7, <i>see</i> Beneficial occupation	369
" 9 of 1879, <i>see</i> Land beacons	389
" 39 of 1879, <i>see</i> Water ...	865
" 6 of 1882, <i>see</i> Arbitration ...	169
" 27 of 1882, Sec. 14, <i>see</i> Police Offences	30
" 28 of 1883, Sec. 52, <i>see</i> Liquor licence... ..	400
" 28 of 1883, Secs. 21 and 22, <i>see</i> Native area	724
" 38 of 1884, <i>see</i> Culpable Insolvency	21
Acts 43 of 1885 and 35 of 1893—Stock theft—Lashes.	
<i>Where a charge of stock theft is remitted under Act 43 of 1885, the Magistrate cannot inflict lashes unless there is a previous conviction against the prisoner within the preceding three years.</i>	
Rex v. Korton and Others ...	1005
Act 43 of 1885, <i>see</i> Boy	1005
" 44 of 1885	} <i>see</i> Liquor Licensing Acts 305, 307 and Liquor Licence ... 999
" 27 of 1887	
" 42 of 1887	

	PAGE		PAGE
Act 28 of 1889, <i>see</i> Scab Inspector	732	Act 28 of 1896, <i>see</i> Municipal regulations... ..	241
Act 5 of 1890—Adulteration.		„ 30 of 1899, <i>see</i> Natives ...	193
<i>The appellant had been charged in the Court below with selling adulterated vinegar. A small label on the cask from which the vinegar was drawn stated that it was "an artificially prepared fluid."</i>		„ 38 of 1899, <i>see</i> Divisional Council	905
<i>Held, that by reason of the small and inconspicuous type in which this notice was printed, the vendor was not exempted from prosecution under Act 5 of 1890.</i>		„ 26 of 1902, <i>see</i> Legislative Council Election	12
Rex v. Torr	991	Act 36 of 1902—Application to compel Magistrate to take preliminary examination instead of proceeding with trial.	
Act 5 of 1890, <i>see</i> Adulteration	297, 303	<i>In an application to restrain a Resident Magistrate from proceeding with a trial for a contravention of one of the provisions of Act 36 of 1902, on the ground of the extreme gravity of the offence.</i>	
„ 19 of 1891, <i>see</i> Petition ...	231	<i>Held, that as the Legislature has conferred the enlarged jurisdiction on the Magistrate's Court, the Supreme Court should not interfere to restrain the exercise of such enlarged jurisdiction.</i>	
„ 23 of 1891, <i>see</i> Jury	783	Rex v. Harris	429
„ 25 of 1891, <i>see</i> Liquor Licensing Acts	305, 307	Act 36 of 1902—Living on earnings of prostitution—Bribery—Interpretation of Statute.	
„ 34 of 1891, <i>see</i> Medical Council	483	<i>A public officer charged with the duty of prosecuting or detecting offenders who corruptly accepts money or other valuable consideration for refraining from the performance of such duty is guilty of an offence at Common Law, but is not liable to prosecution for living on the earnings of prostitution in contravention of the 33rd section of Act 36 of 1902.</i>	
„ 25 of 1892, <i>see</i> Companies' Act	93	Rex v. Charteris	646
„ 25 of 1892, Sec. 97, <i>see</i> Company	360	Act 36 of 1902, <i>see</i> Brothel ...	987
„ 35 of 1893 — Constructive possession—Evidence.		„ 47 of 1902, <i>see</i> Alien... ..	247
Rex v. Paul	199	Action, <i>see</i> Interdict	229
Act 35 of 1893—Jurisdiction of Circuit Courts.		Acts of regular warfare, <i>see</i> Treason	118
<i>While increasing the jurisdiction of Magistrates, Act 35 of 1893 in no way reduces that of judges in respect of punishment for offences committed under the Act.</i>		Ademption, <i>see</i> Legacy	755
Rex v. Botha... ..	565		
Act 20 of 1894, <i>see</i> Scab Inspector	732		
„ 22 of 1894 } <i>see</i> Liquor Licen-			
„ 25 of 1894 } sing Acts 305, 307			

	PAGE
Administration, <i>see</i> Will ...	16
Administrator—Removal.	
Beyers v. Gronewald ...	78
Admission, <i>see</i> Articled clerk ...	765
<i>see</i> Attorney ...	341
Adulteration, <i>see</i> Act 5 of 1890...	991
Adulteration of foods—Pepper— Act 5 of 1890—Warranty.	
<i>The defendant, under a prosecution for a contravention of the 6th section of Act No. 5 of 1890, in selling pepper, with which ground olive stone had been mixed, proved that he had bought the pepper, in tins, from L., of Cape Town, and that on the tins was a label of the manufacturers, warranting the pepper to be genuine.</i>	
<i>Held, that there was no such "written warranty" from the person from whom the defendant had bought the pepper, as is required by the 29th section of the Act</i>	
Rex v. Miller ...	303
Adulteration of foods—Vinegar— Act 5 of 1890—Master and servant—Fraud.	
<i>The defendant's servant sold as vinegar a liquid in a cask, from which he was authorized by the defendant to sell vinegar. The certificate of the analyst under the 27th section of Act 5 of 1890, was to the effect that the liquid was composed of 100 parts of vinegar and 17 of water added, and that the original vinegar had been adulterated by the addition of 17 parts of its weight in water. No application was made at the trial of the defendant before the Magistrate for the cross-examination of the analyst.</i>	
<i>Held, that the defendant was responsible for the sale by his servant, and that, although he had not been guilty of fraud, he was liable under the 6th section of the Act.</i>	
Rex v. Fish ...	297

	PAGE
Adultery—Proof.	
Glasgow v. Glasgow and another ...	700
Agency—Broker—Remuneration —Net price.	
<i>The plaintiff, a broker, learning that the defendant had a property for sale, inquired for what price he would sell, and was informed that the price was £12,000 net. The plaintiff introduced to the defendant a seller, who had, however, been previously introduced by L., another broker, and the sale was ultimately effected through the agency of L. for £12,000.</i>	
<i>Held, that even if the plaintiff could be regarded as the defendant's agent, and as the person, through whose agency the sale was brought about, he could not claim any remuneration, inasmuch as the only authorized price was £12,000 net.</i>	
Cohen v. Rawbone ...	266
Agency, <i>see</i> Promissory note ...	691
Agent, <i>see</i> Mandate ...	418
Agent's authority, <i>see</i> Sale and purchase ...	328
Agent, <i>see</i> Executor ...	610
Agent — Commission — Payment by cheque.	
<i>The defendant had instructed plaintiffs (a firm of auctioneers) to find a purchaser for his farm. Plaintiffs introduced one L., who agreed to purchase for a certain sum, and tendered a cheque, which defendant accepted in payment. This cheque having been dishonoured, defendant refused to pay plaintiffs their commission.</i>	
<i>Held, that plaintiffs were entitled to recover the customary commission.</i>	
Bam and Oliff v. Bloom ...	701

	PAGE		PAGE
Agent and principal—Brokerage—Referee.		where the parties reside, to interview the wife and report to the Court whether she understood the nature of the application and consented to it of her free will.	
Saber v. Kansley	982	Ex parte Morum	381
Alien—Right to land—Act 47 of 1902—Certificate of Agent-General.		Applicant for liquor licence: right to be heard	882
<i>The applicant entered into a contract in England with one S., an alien, under which S. engaged to serve him on arrival in the Colony at an adequate remuneration and for a reasonable period, and a certificate to that effect was given to S. by the Agent-General in terms of the 3rd section of Act 47 of 1902. On his arrival in the Colony, the Government refused to allow him to land, whereupon she applicant moved for an order, compelling the Colonial Secretary to authorize such landing.</i>		Arbitration—Act 6 of 1882.	
<i>Held, that as, independently of the Act, an alien has no legal right enforceable by action to enter British territory, and that as the Act confers no such legal right on aliens, the applicant, as employer of S. was not entitled to the order prayed for.</i>		<i>The respondents had contracted to perform certain work for the applicants subject to the condition, inter alia, that should they fail to make such progress with the work as the town engineer deemed reasonable, the applicants should have the right to eject them and take possession of the works. The applicants did so eject them and the respondents having insisted on referring the question as to whether they had made reasonable progress to an arbitrator selected by themselves, the Court granted an order, restraining them from proceeding with the arbitration.</i>	
Raner v. Colonial Secretary	247	Suburban Municipal Waterworks v. Cochrane and Cherry	169
Amended title, <i>see</i> Land beacons	389	Arbitration, <i>see</i> Friendly societies	607
Amendment of plea—Commission <i>de bene esse</i> .		Arbitration—Order of Court.	
De Wet v. Bloom	402	Levy v. Lazarus	428
Amendment of Returns, <i>see</i> Election expenses...	79	Arbitrator — Account — Plant — Short delivery.	
Ante-nuptial contract—Registration—Free consent of wife.		<i>The plaintiff, a Dock agent, sued the defendants for certain sums said to be due in respect of plant sold by him to the defendants, and also in respect of goods short delivered and delivered in a damaged condition by the defendants. The defendants denied purchase of certain portions of the plant named in the declaration, and also that the plaintiff had incurred the liabilities referred to in his declaration by reason</i>	

	PAGE
<i>of any negligence or misfeasance on their part, beyond a certain sum already assessed by an arbitrator, which sum they now tendered. By agreement of parties the question of all claims in convention was referred to arbitration.</i>	
<i>Defendants claimed certain sums in reconvention on their own account, and also certain other sums on behalf of certain clients.</i>	
<i>Held, that all claims on their own behalf, and also all claims on behalf of clients from whom they held powers of attorney, and none other should also be submitted to arbitration.</i>	
McKenzie v. Table Bay Harbour Board	827
Architect's fees, see Building contract	109
Architect—Levels—Negligence.	
Rivas v. Black	268
Architect—Quantity surveyor—Innocent misrepresentation—Peritia artis—Privity of contract.	
<i>W., a building owner, had employed the defendant, an architect and quantity surveyor, to take out certain quantities for a building he had commissioned plaintiff to erect. The defendant's estimate fell far short of the quantities which were actually required, but plaintiff had accepted defendant's estimate as correct, and in consequence made a tender for the erection of the building, which involved him in loss. This loss the plaintiff now sought to recover by way of damages from the defendant.</i>	
<i>Held, that as there was no privity of contract between plaintiff and defendant, the former could not recover.</i>	
<i>Semble: (1) That an innocent misrepresentation made by a person who is under no</i>	

	PAGE
<i>legal obligation to make any representation affords no ground of action. Tait v. Wicht (7 Juta 156).</i>	
<i>(2) Every professional man spondet peritiam artis and is liable to any person who employs him for loss arising from his innocent misrepresentations.</i>	
Skippon v. De Witt	747
Articled clerk—Admission.	
<i>An articled clerk, who had served over two years and nine months to an attorney of the Supreme Court, who was practising in S. Rhodesia, was allowed to complete his period of service with an attorney at Cape Town.</i>	
<i>Ex parte McLeod</i>	765
Articled clerk—Continuous service.	
<i>Where there had been two or three breaks in the continuity of service of Articles, amounting in all to four months: the Court condoned these breaks, but ordered that the applicant should complete four months' extra service, although he had already served five years, and during one of the breaks had been employed by his principal in the management of a branch office.</i>	
<i>Ex parte Kilfoil</i>	27
Assignment, see Insolvency	510
Attachment of property, see Messenger of Court	509
Attorney—Culpable insolvency—Suspension.	
<i>An attorney who had been convicted of culpable insolvency and sentenced to two months' imprisonment, with hard labour, was suspended from practice sine die: but with leave to apply for restoration after one year.</i>	
Law Society v. Greening	223

	PAGE		PAGE
Attorney and Notary—Appointment of extra Colonial examiners.		<i>period of five months should be served. Per incuriam, a copy of certain new articles entered into was not sent to the Registrar of the Court until more than three months had elapsed after execution. The Court also condoned this irregularity.</i>	
<i>Ex parte</i> Edwardes ...	233	<i>Ex parte</i> Bell ...	496
Attorney—Articles—Service outside this Colony—Admission in this Colony.		Auctioneer's commission, <i>see</i> Conditions of sale ...	419
<i>The applicant was duly articulated as clerk to an attorney of the Supreme Court practising in Rhodesia, and was by him instructed in the knowledge of the law for three years. He then removed to Cape Town for the purpose of being further instructed and preparing for the Law examination, and obtained from the Divisional Court an order directing that "fresh articles be entered into with an attorney in this Colony for a year's service, and that the time of service in Rhodesia be allowed to count for the purpose of being admitted by the Supreme Court.</i>		Award of arbitrators—Stay of execution.	
<i>Held on appeal, that there was no ground for disturbing the decision of the Divisional Court.</i>		Federal Supply Co. v. Buffalo Supply Co. ...	165
<i>Law Society v. McLeod ...</i>	836	Bailment—Tender to re-deliver—Consignment—Negligence.	
Attorney—Scots' Law Agent in Sheriff Court—Admission.		<i>The plaintiff delivered a bicycle to the defendant for the purpose of having it fitted with new tyres. A dispute afterwards arose between them as to whether the plaintiff should pay for the work before or after the tyres had been fitted. The parties not being able to agree, the defendant told the plaintiff to remove the bicycle as it was, but the plaintiff refused to take it without the new tyres. The defendant remained in possession of the bicycle, but on removing to new premises, he left the bicycle on the old premises, to which strangers had access. The bicycle having been removed by one J., the plaintiff sued the defendant. The plaintiff brought an action for damages for non-delivery.</i>	
<i>Ex parte</i> Davidson ...	890	<i>Held, that the offer by the defendant to re-deliver the bicycle did not relieve him from the obligation of taking due care of it.</i>	
Attorney—Admission—Registration of articles.		<i>Rudiger v. Muller ...</i>	980
<i>Where a clerk had duly served articles, these articles, owing to a misunderstanding not having been registered, the Court granted leave for the applicant's examination and ordered the articles to be registered; the registration to date back to the date when the service commenced.</i>		Bailment, <i>see</i> Loan ...	608
<i>Ex parte</i> Simpson ...	341	Basis of Municipal valuation, <i>see</i> Interim valuation ...	354
Attorney—Continuous service.		Belligerent rights, <i>see</i> Rebel ...	998
<i>The Court condoned a breach of continuous service where the applicant had been absent for five months on Military service, on condition that a further</i>			

	PAGE
Beneficial occupation — Destruction of premises—Act 8 of 1879, Sec. 7.	
<i>Act 8 of 1879, Sec. 7, does not apply to cases in which buildings have been destroyed by fire or other unavoidable misfortune, and hence in such cases a tenant is liable for the rent of such buildings only in respect of the time during which he has had beneficial occupation.</i>	
Salisbury Building Co. v. British S.A. Co. ...	369
Bequest—Mutual will—Portions payable to daughters.	
<i>A husband and wife, by mutual will, bequeathed to their sons certain land, on condition that they should one year after the death of the survivor pay certain portions to their sisters, and that the testators should retain their full rights over the said land during their lives. The testatrix died, and the survivor relinquished his rights under the will. The respondents obtained transfer and claimed the right to alienate the land without first paying or securing the portions of their sisters.</i>	
<i>Held, that the sisters were entitled to an interdict, restraining such alienation.</i>	
<i>Ex parte Weyers</i> ...	157
Blasting, <i>see</i> Interdict ...	653, 1018
<i>Bona fide</i> defence, <i>see</i> R.M. Court	946
Bond—Interest— <i>Pactum de non petendo</i> .	
Pedersen v. McKay ...	769
Bond—Capital and interest—Payment of interest.	
<i>A mortgage bond passed by the defendant in favour of the plaintiff contained a proviso that the capital should not be called up for five years, provided that the interest be duly paid as it falls due. After the passing of the bond, an</i>	

	PAGE
<i>arrangement was entered into between the parties that the interest should be paid at the office of H., who was the legal adviser of both. The first instalments of interest were duly paid at such office and received by the plaintiff, but on a further instalment falling due, the defendant failed to pay the actual sum at the office, but he had made an arrangement with the attorney for the payment of the amount on his behalf on demand by the plaintiff. The plaintiff, however, did not apply at the office of H. for payment, and sued the defendant for capital and interest, on the ground of failure to pay interest when due.</i>	
<i>Held, that the plaintiff was not entitled to claim payment of the capital.</i>	
<i>Parkin v. Spies</i> ...	794
Bond—Cancellation—Costs.	
<i>The plaintiff had entered an action for the cancellation of a certain bond. The bond had been passed before any money was paid over to the defendant. The Court ordered the cancellation of the bond; but as the matter could have been determined by motion, ordered the plaintiff to pay costs.</i>	
<i>Ashman v. Van Ellewee</i> ...	489
Boy — Magistrate's jurisdiction under Act 43 of 1885.	
<i>A Magistrate cannot sentence a first offender if remitted under Act 43 of 1885 to a flogging if over the age of 14.</i>	
<i>Rex v. Sam Wilson</i> ...	1005
Breach of condition of lease, <i>see</i> Rent ...	236
Breach of contract, <i>see</i> Master and servant ...	69
Bribery, <i>see</i> Election petition ...	949
Bribery, <i>see</i> Act 36 of 1902 ...	646

PAGE	PAGE
Broker—Shares—"Cover"—Damages.	Held, that there was sufficient proof of knowledge on the defendant's part to support a conviction of keeping a brothel after such notice.
<i>The plaintiff bought certain shares in companies through the agency of the defendant, a broker, the arrangement between them being that the defendant should retain the scrip until the price was paid, and that in the meantime, if the market price fell, the plaintiff should pay to the defendant the difference as "cover." The price fell, and the plaintiff from time to time paid sums as "cover." The price having fallen still lower, the defendant demanded further "cover," and as the plaintiff did not pay it, the defendant sold the shares under Stock Exchange regulations on account of the plaintiff.</i>	Rex v. Eddries ... 987
Held, that the defendant, although bound to account for the sums received by him, was not liable in damages as for an illegal sale of the shares.	Building Contract—Breach—Penalty—Extras.
Karriem v. Harris ... 583	Raganalli v. Lipschitz ... 624
Broker, see Agency ... 266	Building Contract—Time limit—Damages.
Brokerage—Failure of broker to obtain purchaser on terms prescribed by principal—Consensus ad idem.	Harpur v. Fincham ... 712
Clark v. Macnamara... 276	Building contract.
Brokerage, see Agent and principal ... 982	Shutte v. Hedley Bros. ... 158
Brothel—Landlord—Knowledge—Act 36 of 1902.	Building contract—Bills of quantities—Architect's fees.
<i>The appellant was the lessor of a house, the lessee of which was convicted of keeping a brothel therein. Notice of this conviction was given by the police to the defendant, and he was warned that if the house should continue to be used as a brothel he would be prosecuted for a contravention of the 24th section of Act 36 of 1902. The appellant took no notice of the warning, and the house continued to be used as a brothel.</i>	Rowe v. Fisher ... 109
	Building contract—Extras.
	Tennant v. Zwaigenhaft ... 326
	Crombleholme v. Marks, Highman & Company ... 433
	Building loan—Mortgage.
	Allie and Others v. Porter and Barsdorf ... 55
	Burial ground, see Res religiosa ... 482
	Cancellation, see Bond ... 489
	" see Lease ... 382
	" of sale, see Right of way ... 320
	Cancellation of mutual liability see lessor and lessee ... 644
	Cancellation of lease, see Rent ... 236
	Cape Town Municipality—Licence.
	<i>Under the Cape Town Municipal Act the Town Council is empowered to impose a licence duty for any vehicle drawn by any horse or plying for hire or profit.</i>
	Held, that a cart and horses used by a building contractor for the purposes of his business are liable to the duty.
	Rex v. Benning ... 197

	PAGE
Capital and interest, <i>see</i> Bond ...	794
Cattle—Illegal Sale by Messenger. Pienaar v. Estate Sluiter ...	531
Cattle — Trespass — Illegal im- pounding. De Lange v. Theron ...	948
Cession, <i>see</i> Lease... ..	220
Children, <i>see</i> Will... ..	687
Circumstantial evidence, <i>see</i> Magis- trate's finding on facts ...	651
Civil Imprisonment <i>see</i> Debtor ...	779
Civil imprisonment—Application for release. Friedman v. Belman ...	794
Claim in reconvention, <i>see</i> Seller and purchaser	35
Closing time, <i>see</i> Liquor licence... ..	600
Collateral agreement, <i>see</i> Land- lord and Tenant	589
Coloured people, <i>see</i> Liquor licence... ..	569
Commission—Procedure.	
<i>A. having sued P. in an action which arose out of a certain prize fight, applied for a com- mission to take the evidence of P., who was about to quit the Colony.</i>	
<i>Held, that no commission should be granted until the declaration (at least) has been filed.</i>	
Austin v. Palmer and others	671
Commission, <i>see</i> Agent	701
Common wall, <i>see</i> Party wall	180
Companies Act—Voluntary wind- ing up—Attachment—Inter- dict.	
<i>After the respondent had ob- tained judgment against a company, a resolution was duly passed and advertised for the voluntary winding up of the company. Notwith- standing such winding up, the</i>	

	PAGE
<i>respondent claimed the right to attach property of the com- pany in execution of the judg- ment.</i>	
<i>Held, that the Court had the power under the 186th section of the Companies Act, 1892, to restrain such attachment.</i>	
Liquidator of Bromley and Co. v. Shenker	93
Company—Winding up—Fraud on shareholders—Prejudice to creditors.	
<i>Where a voluntary winding up of a Company has been de- cided upon, the Court will not order a winding up by the Court at the instance of any creditor whose rights would not be prejudiced by such voluntary winding up, nor at the instance of any shareholder in the absence of proof that the proceedings in connection with the resolution for a volun- tary winding up have been conducted illegally or in such a manner as to constitute a fraud on such shareholder.</i>	
De Villiers and others, Marais and others, Executors Est. Russell v. False Bay Fish Co., Ltd.	918
Company—Power to sue.	
Hack v. Dreyfus & Co.	492
Company—Winding up as insol- vent—Liability of share- holders, past and present— Act 25 of 1892, Sec. 97.	
<i>One T. had entered into a con- tract on behalf of a certain joint stock company with the defendant for the purchase of defendant's business, for which it was agreed that defendant should receive £100 in cash and 100 fully paid-up shares in the company. This pay- ment was referred to in the duly registered Articles of Association of the Company, but the contract for the issue of these shares to the defendant was neither reduced to writing</i>	

nor registered. Thereafter the defendant disposed of 50 of his shares. Subsequently the Company became insolvent, and the trustee now sought to hold the defendant liable for the full value of the 100 shares originally issued to him.

Held, that as there was no evidence that the then holders of the 50 shares he had disposed of were not solvent, he could not be held liable as a past shareholder in respect of those shares.

Held further, that as he had neither paid the full value in cash for the 50 shares still held by him, nor had these registered in the manner provided by Sec. 97 of Act 25 of 1892, he was liable as a contributory in respect of these.

Liquidator of "Ye Mecoa Café" v. Webber ... 360

Company, *see* Debentures ... 551

Composition with creditors, *see*
Consideration ... 927

Compromise or Transaction, *see*
Executor ... 438

Conditional purchase, *see* Sale and
purchase ... 144

Conditions of sale.

The defendant had purchased certain property for £6,000 odd subject to the condition that a Trust Company should advance £5,000 on mortgage on the property purchased, and further £1,000 on certain other property of the defendant. The defendant alleged that the Trust Company subsequent to the sale demanded additional security for the advance of £5,000. This security he refused to provide. Part of the purchase price of the property had been paid by defendant, but a balance of £840 still remained due, and for this sum the plaintiff now asked for provisional sentence.

Held, that provisional sentence must be granted as prayed, with costs.

Kets v. Noorden ... 84

Conditions of sale—Auction sale —Auctioneer's commission.

One of the conditions read at an auction sale of lots of land was that "the purchaser shall pay the auctioneer's commission." Certain lots were knocked down to the defendant, who afterwards refused to sign the conditions, on the ground that he had never bought the lots. It having been proved that the defendant had bid for the lots after hearing the conditions read.

Held on appeal, that the Magistrate was right in giving judgment for the plaintiff in an action brought by the auctioneer to recover his commission.

Taylor and Gibson v. Behr & Co. ... 419

Consensus ad idem, *see* Brokerage 276

Consideration — Promise — Contract—Right of pre-emption —Nudum pactum—Donatio—Remuneratory donations.

The defendant, who owned a farm adjoining that of the plaintiff, on being pressed by the plaintiff to sell the farm, promised, that in the event of his wishing to sell the farm, he would give the plaintiff the first refusal. Thereafter the defendant sold the farm to E. without giving the plaintiff the first refusal, and E. resold the farm at a profit.

Held, that as the plaintiff had given or done nothing in return for the right of pre-emption, and had not even promised to buy at the price for which the defendant could sell to another purchaser, there was no valuable consideration for the promise, and that consequently the plaintiff was not entitled to

	PAGE
damages for breach of contract.	
Mtembu v. Webster...	408
Consideration, <i>see</i> Sale and purchase ...	115

Consideration—Illegal consideration—Composition with creditors—Fraud.

The defendant, being in difficulties, entered into an arrangement with his creditors, by which they agreed to accept five shillings in the pound. The plaintiff was a party to the arrangement, but after he had signed the deed of composition, he obtained a promissory note for the balance of the debt originally owing to him.

Held, that there was no consideration for the note.

The plaintiff alleged that after the arrangement, at which he was present, had been made with the creditors, he changed his mind, and that he signed the deed on condition that the defendant should pass the promissory note for the balance of his claim.

Held, that as the plaintiff did not communicate his change of mind to the remaining creditors, the condition was a fraud on them and did not constitute a valid consideration for the note.

Cohen v. Hermann & Canard 927

Consideration—Offer—Acceptance—Revocation of offer—Option—Contract.

The declaration alleged that the defendant signed a document covenanting to give to the plaintiff the option to purchase certain property at a definite price within a limited time, and that within the time so limited the plaintiff notified to the defendant that he elected to avail himself of the option and was prepared to pay the price. The plea averred that there

	PAGE
<i>was no consideration for the giving of the option by the defendant.</i>	
<i>Held, that, even assuming that there was no consideration and assuming that the so-called "covenant" should be regarded as a mere offer, the acceptance of such unrevoked offer within the specified time created the requisite consideration and gave rise to a binding contract between the parties.</i>	
Scott v. Thieme ...	823
Contempt of Court. <i>see</i> Witness	988
Construction, <i>see</i> Will ...	200
Construction of Contract, <i>see</i> Principal and Surety ...	680
Consortes Litis, <i>see</i> Estoppel ...	704
Continuous service, <i>see</i> Articled clerk ...	27
Continuous service, <i>see</i> Attorney	496
Contract—Bricks—Custom of trade.	
<i>No alleged trade custom can be pleaded against the express terms of a written contract.</i>	
Peek Bros. v. Australian Brickfields, Ltd. ...	439
Contract—Installation of electric lift—Unskilful workmanship—Damages.	
Thomson v. McKenzie & Co.	346

Contract—Sale and purchase—Preferent rights.

The defendants had contracted to supply the plaintiffs with a certain quantity of coal tar per annum at 2d. per gallon. The defendants further agreed to sell all their coal tar to the plaintiffs, over and above the quantity they were bound by contract to deliver at the same price, save and except such small quantities as they might sell to ordinary customers. They had disposed of considerable quantities of coal tar to a certain firm, and

	PAGE
<i>the plaintiffs now sued for damages.</i>	
<i>Held, that under this contract the Gas Company were entitled to supply only old customers and only with the quantity which had been supplied to them during the preceding twelve months.</i>	
B. S. A. Asphalte Co. v. Cape Town Gas Co. ...	870
Contract with parents, see Services of minors ...	5
Contract of service—Misconduct—Dismissal.	
<i>The plaintiff, who had been engaged by the defendant to perform the general duties of a clerk, either in the defendants' store or in the accounting office, used insolent language towards his superior, in consequence of which he received a month's notice, and was transferred from the store to the accounting office. Before the expiration of the month, the plaintiff flatly refused to perform the duties of a ledger clerk, upon which the defendant tendered him his salary up to that date and dismissed him.</i>	
<i>Held, that the tender was sufficient and that the defendant was not bound to pay salary for the unexpired portion of the month.</i>	
Miles v. Jagger & Co. ...	753
Copyright — Plays—Award of arbitrators—Res judicata—Partnership.	
Koenig v. Landeshut ...	97
Costs, see Magistrate's Court ...	295
"Cover," see Broker ...	583
Criminal appeal—Admissibility of evidence—Admission of the defendant's evidence taken under compulsion.	
<i>The appellant, who was an insolvent, was examined at the third meeting of his creditors</i>	

	PAGE
<i>under the 7th section of Act 38 of 1884, and was subsequently charged before the Resident Magistrate with fraud and breach of trust. At the trial the proceedings in insolvency, including the evidence given by the appellant, was admitted as evidence and the appellant's depositions were read. The depositions had an important bearing in the case, for, without them, there was no reasonable certainty of conviction.</i>	
<i>Held, that as substantial wrong was done by the admission of the evidence, the conviction should be set aside.</i>	
Rex v. Williams ...	833
Criminal law — Evidence — Indecent assault—Particulars of complaint made by female.	
<i>Where, on a trial for indecent assault or other kindred offence on a female, it appears that she made a complaint as soon, after the assault, as she met a person to whom she would naturally make a complaint or give an explanation of her condition, the particulars of her statement, so far as they relate to the charge against the accused, are admissible as evidence in corroboration of her evidence upon the main issue.</i>	
Rex v. Jenkinson ...	374
Criminal responsibility, see Minor	425
Cruelty to animals—Using lame horse.	
<i>Although working a lame horse is prima facie evidence of cruelty, such evidence is rebutted by proof that only gentle and beneficial exercise was given to the animal.</i>	
Rex v. Grant ...	995
Culpable insolvency—Ordinance No. 6, 1843—Act No. 38, 1884.	
<i>An insolvent failing to attend any one of the three statutory</i>	

	PAGE
<i>meetings of his creditors may be convicted under the 71st section of Ordinance No. 6, 1843, of the crime of culpable insolvency. (Vorster v. Lilienfield, 5, E. D. C. Rep., p. 254, approved of.)</i>	
<i>An insolvent was convicted of contravening the 71st section of the Insolvent Ordinance in having failed, when thereto required by the Master, to give a sufficient explanation of the causes of his insolvency. The evidence showed that it was the trustee, and not the Master, who had required the explanation. The Crown did not support the conviction, and the same was quashed.</i>	
<i>The 10th section of Act No. 38, 1884, makes it culpable insolvency, when, on being required thereto in writing by the trustee, the insolvent fails to give a sufficient explanation, punishable under the 71st section of the Ordinance.</i>	
Rex v. Greening	21
Custody of children, <i>see</i> Mahometan marriage	74
Custody of illegitimate child, <i>see</i> Native Law	238
Curator, appointment of permanent, <i>see</i> Lunatic	386
Custom of trade, <i>see</i> Contract	439
Customs Duty, <i>see</i> Estoppel	704
Damages, <i>see</i> Contract	439
<i>for wrongful execution sale, see</i> Messenger of Court	322
<i>see</i> Defamation	661, 728
<i>see</i> Trespass	673
<i>Damnum injuriæ</i> — Measure of damages.	
Honiball v. Cape Central Railway	546
Death of partner, <i>see</i> Partnership	20

	PAGE
Debentures—Company—Partnership—Preference—General bond.	
<i>A Company acting under the powers of its trust deed passed a bond in favour of certain trustees for debenture-holders, charging the whole property and assets of the Company (without describing any of such assets), with the condition that the Company reserved the power to deal with any property and assets, provided that the proceeds be placed to credit of capital and not to that of revenue account. Thereafter the Company ceded its assets to a partnership, which took over its liabilities. The Company was ordered to be wound up and receivers were appointed to realize and distribute the assets of the partnership.</i>	
<i>Held, that the debenture-holders had no greater rights in respect of the assets of the Company than those of the holder of a general bond, and that their rights under the debentures did not include a preference against the assets of the partnership.</i>	
Debenture Holders of Grand Junction Railways and others v. Hill and others. Liquidator of Grand Junction Railways v. Hills and others	551
Debtor—Civil imprisonment.	
<i>Ex parte</i> Bowers	779
Debtor and creditor—Liability for debts of predeceased spouse.	
Gourlay, Cavanagh & Co. v. Davis	548
Defamation — Summons — Averment of publication.	
<i>In a summons for damages for defamation in a Magistrate's Court, it is not a sufficient averment of publication to allege that the defamatory words were contained in a</i>	

	PAGE		PAGE
letter written by the defendant addressed to a third person.		Discovery — Detailed statements of account.	
Konigsberg v. Stanislaus and another	978	There is no rule of Court whereby a defendant can be compelled to disclose items on which a tender made by him is based.	
Defamation—Unchastity.		Cape Times, Ltd. v. McKenzie & Co., Ltd.	1016
The defendant, knowing that the plaintiff passed as an unmarried woman, stated to several persons, who also believed her to be unmarried, that she had a son by one M., and was married to him.		Distribution, see Will	761
Held, that the statement, if false, was defamatory.		Divisional Council—Native Reserve—British Bechuanaland Proclamations 29 of 1887, 148 and 432 of 1896—Act 38 of 1899—Ultra vires.	
Knoesen v. Theron	292	The Divisional Council of M. was constituted and its boundaries defined by B.B. Proclamation 29 of 1887, which provided that no Divisional Council should have jurisdiction within any native reserve. Boundaries of the several fiscal divisions of B.B. were fixed by Proclamation 148 of 1896 and the Molopo native reserve, of which the Stad Mafeking forms a part, was thereby included in the division of M. By Proclamation 432 of 1896, the division of M. was divided into six districts, within none of which the Molopo reserve fell. The Magistrate held that the Stad M. nevertheless fell under the jurisdiction of the Divisional Council of M. by Act 38 of 1899, and that the Council had, therefore, power to impose a dog tax within the said Stad.	
Defamation—Damages.		Held on appeal, that as the Divisional Council of M. depended for its local jurisdiction on Proclamation 432 of 1896, and as the Stad M. does not fall within any one of the six sub-divisions of the division of M., the Council has no jurisdiction within the Stad and the imposition of a dog tax therein was consequently ultra vires of the Council.	
De Biasio v. Harrison	669	Rex v. Montsiosa	905
Defamation—Malay priest—Damages.			
Du Toit v. Domingo	661		
Defamation — Verbal injury — Theft—Damages.			
The defendant made a statement to others that the plaintiff had committed theft and qualified the statement by adding that the plaintiff had removed goods of his after they had been duly attached by the Messenger of the Magistrate's Court.			
Held, that although such removal might not constitute theft in the proper sense of the term, yet that as it was, at all events, a dishonourable act, the statement was defamatory and constituted a verbal injury to the plaintiff.			
Steenberg v. Cooper	728		
Defamation, see Witness	362		
Defective premises, see Landlord and tenant	914		
Delict, see Master and servant	639		
Destruction of premises, see Beneficial occupation	369		

	PAGE
Divisional Council—Excavation in road—Negligence.	
Brett and wife v. Divisional Council of Victoria West	355
Divorce—Domicile.	
<i>A petition for leave to sue for divorce by edictal citation must state that the petitioner is domiciled in this colony. A mere allegation of residence is not sufficient.</i>	
Robertson v. Robertson	169
Divorce, <i>see</i> Malicious desertion...	612
„ <i>see</i> Judicial separation	814
Dock agent—Purchase of plant by Harbour Board.	
McKenzie v. Table Bay Harbour Board	535
Donatio, <i>see</i> Consideration	408
Duress of goods, <i>see</i> Voluntary payment	92
Ejectment—Motion.	
<i>B. had purchased certain land from the applicants, had sued them for transfer, and the applicants were ordered to give transfer, or in the alternative, to pay B. £500 damages. They paid the money, which was accepted by B. B., however, remained in possession of the land, as it had never been registered, either in the name of F. or of the applicants. On a motion for the ejectment of B.,</i>	
<i>Held, that an order must be granted as prayed.</i>	
Estate Faure v. Van der Byl	580
Ejectment Motion, <i>see</i> Practice	714
Election petition—Sub-agent—Bribery—Personation—Treating—Paying travelling fares.	
<i>Ex parte Fremantle</i>	949

	PAGE
Election expenses—Amendment of returns.	
<i>Ex parte</i> Zachary Stanley Bayley and others	79
Encroachment on neighbouring land—Removal of building—Measure of damages.	
<i>Where a building which encroaches on neighbouring land has been erected without protest from the owner of the land encroached upon and has stood for a year or more without the owner of such land demanding its removal, it is not the practice of the Court to order it to be removed, but to award damages to the person damaged. In estimating such damages, the Court will not look merely to the value of the land occupied by the encroachment, but will be guided by the loss which such encroachment has caused the owner of the land.</i>	
Stark v. Broomberg	135
Encroachment—Judgment in default of plea.	
Van Boom v. Visser	501
Engineer—Plans—Fees.	
Kilgour v. Sonnenberg	201
Equities, knowledge of <i>see</i> Provisional sentence	566
Estoppel—Misrepresentation—Fraud—Customs duty—Bonded warehouse—Costs—Pro rata liability—Consortes litis.	
<i>The first defendant B., being a bonded warehouseman at Port Elizabeth, received into bond 40 cases of cigars from W., who afterwards wishing to send them in bond by rail to Johannesburg, obtained from B. the cases and the rail-notes which B. had prepared for the carriage of the goods by rail. W. appropriated the cases with cigars to his own use, and brought 39 other cases to the Railway station, marked with</i>	

PAGE	PAGE
different marks, except one case, to which he directed the attention of the Railway officials, saying that it contained another case inside. The officials neglected to check all the marks and signed the Railway receipts which had been previously prepared by B. as being correct. The 39 cases were sent to Johannesburg, where there was no one to receive them, and on their being subsequently opened, they were found to contain only rubbish. The defendant B. being sued with two sureties on the bond which he had given to the Government for the due warehousing of all goods delivered into his warehouse, claimed as damages the amount of the loss sustained by him through the misrepresentation made by the Railway officials in the receipts signed by them.	Evidence — Accomplice — Ordinance 72 of 1830. section 12.
Held, that as the initial act which enabled W. to perpetrate the fraud was the delivery to him by B., of the cigars and rail-notes, the Government was not estopped from denying the correctness of the receipts which the Railway officials, induced thereto by the production of the rail-notes, had given to W.	Two prisoners having been convicted of the theft of an ox, gave evidence that the appellants, their fellow prisoners, had been concerned with them in the theft, and the appellants were convicted.
Held further, that on a simple prayer for costs, the plaintiff was not entitled to claim, that the costs be paid by the defendants jointly and severally.	Held, that as there was clear proof that the ox had been stolen, the evidence of the accomplices was sufficient to support the conviction of the appellants.
Colonial Government v. Bonner and others ... 704	Rex v. Matyolweni and Others ... 505
Estoppel, see Executor ... 610	Evidence, see Criminal law ... 374
„ see Verbal lease ... 879	Evidence, conflict of, see Provisional sentence ... 632
„ see Negotiable instruments ... 64	Evidence—Magistrate's finding.
Eviction, see Lease ... 448	Rex v. Robbie and Others ... 1000
Evidence of "Trap," see Liquor Licence ... 195, 487	Evidence, admissibility of, see Criminal appeal ... 833
	Exceptions, see Magistrate's Court 491
	„ see Indictment ... 785
	„ see Purchase and sale 861
	Exception, see Jurisdiction ... 586
	„ see Plea ... 631
	Excessive charges, see Law Agent 176
	Executor—Account—Joint estate—Inheritance—Discharge—Restitutio in integrum—Mistake.
	In an action brought by the applicant against the executors of his parents' joint estate, the Court declared that he was entitled to one-eighth of such estate, and reserved leave to him, in case he should not come to a settlement with the executors, to apply for an order, that the joint estate be realised for the purpose of ascertaining such eighth share. The applicant did come to a settlement with the executors and accepted

PAGE	
	<i>from them the sum of £1,000 in full discharge of his claim.</i>
	Held, that it was no longer open to the applicant to take advantage of the leave reserved.
	Held further, that even if the matter had been reopened, or if the applicant had proceeded by way of restitutio in integrum, the fact that he had given the discharge with full knowledge of all the facts would have disentitled him to relief in the absence of fraud or any other ground of relief.
Budge v. Budge's Executors	591
Executor—Agent—Authority—Estoppel—Costs.	
	<i>The plaintiff having supplied goods to one B., who purported to buy them on behalf of the executor of P.'s estate along with goods bought by B. for the children of P., rendered an account to the executor, but there was nothing in the account to call the executor's attention to the fact that it included goods for P.</i>
	Held, that the executor was not liable for goods supplied to B. after such account had been rendered to him.
Fryer v. Estate Petersen	610
Executor—Payment of debts—Compromise or transactio—Exception to plea.	
	<i>The plaintiff claimed from the estate of a deceased person the sum of £2,500, alleged to have been a debt owing by the deceased to the plaintiff. The defendant, as executor, disputed the debt, but afterwards compromised the claim by undertaking to pay a certain sum in annual instalments. In an action brought for payment of one of the instalments, the defendant pleaded that no debt was ever owing by the deceased, and that consequently nothing was owing under the compromise.</i>

PAGE	
	Held on exceptions to the plea, that an executor should pay only such debts as were actually owing by the estate, and the exceptions were consequently not allowed, but leave was reserved to the plaintiff to raise the question at the trial whether the compromise was for the benefit of the estate.
Van Heerden v. Estate Van Heerden	438
Expenditure on estate, see Usufructuary	78
Expert, see Negligence	275
Exposing for sale—Municipal market.	
	<i>A market agent, who had authority to sell goods out of hand, placed damaged vegetables, which he had for sale, in public view in the Municipal market.</i>
	Held, that the vegetables were "exposed for sale."
Bex v. Johns...	398
Extension of lease, see Landlord and tenant	725
Extras, see Building contract	326, 433, 624
False pretences, see Native territories	989
Fees, see Medical practitioner	296
Fixtures—Sale and purchase—Damages—Quantum minoris—Acceptance—Waiver.	
	<i>The plaintiff bought a farm from the defendant at a public auction. At the time of the sale there was a kraal on the farm, which admittedly was included in the sale. Inside the kraal was a shed, the roof of which, consisting of corrugated iron sheets, screwed on to rafters, rested in front on poles fixed in the ground, and at the back on the stone wall of the kraal. The shed had been erected by a lessee, who was</i>

	PAGE
<i>still in occupation of the farm at the time of the sale, and who removed the shed after the sale, but before transfer. The plaintiff objected to the removal, but he paid the price and accepted transfer on the defendant's promise to put the matter right.</i>	
<i>Held, in an action for damages for non-delivery of the sheds, that the action was not one of quanti minoris, and that consequently it was not prescribed in six months.</i>	
<i>Held further, that the shed was a fixture forming part of the farm which the defendant, as vendor, was bound to deliver with the farm, and that failing such delivery, the plaintiff was entitled to damages.</i>	
<i>Held further, that the acceptance of transfer under the above circumstances did not amount to a waiver of the defendant's right to damages.</i>	
<i>The case of Irvine v. Berg (Buch. 1879, p. 183) distinguished.</i>	
Cairncross v. Nortje...	205
Foreign executor, <i>see</i> Will	18
Forfeiture, <i>see</i> Penalty	39
<i>Forum citandi.</i>	
<i>The Colonial Government may cite a defendant to appear in any Colonial forum.</i>	
Colonial Government v. Poole	9
Foreign Company—Jurisdiction.	
Maisel Bros. v. Aronstain	534
Fraud on mortgage—Bogus receipt.	
Mihaly v. Moskovik...	640
Fraud, <i>see</i> Consideration...	927
Fraudulent insolvency—Sale by insolvent— <i>Bona fides</i> —Consideration—Illegal seizure.	
<i>Y., a general dealer, sold his shop, fittings, good-will, &c., to one S. At the time of the</i>	

	PAGE
<i>sale Y. was insolvent. The creditors of Y. thereupon attached his premises and such goods as they found. Thereupon S. claimed possession of the shop, restoration of the goods and damages. A jury found that the sale was not bona fide, and returned a verdict for the defendants.</i>	
<i>In the second case, on the plaintiff's default, the Court granted absolution from the instance with costs.</i>	
Sooye v. Lawrence & Co. and others; For v. Lawrence & Co. and others ...	800
Freight—Mistake—Undercharge—Relief—Railway.	
<i>The defendants, on receiving a consignment of drums of extract of malt at B., which had been conveyed on the plaintiff's railway from P., paid the amount of freight charged by the railway official at B. The plaintiff subsequently discovered that the official had by mistake made an undercharge, and, before the defendants had in any way altered their position, the plaintiff demanded the difference. There was no evidence that the railway tariff book, by which the official had to be guided, was needlessly obscure, or that the official had been guilty of gross carelessness.</i>	
<i>Held, affirming the judgment of the High Court of Southern Rhodesia, that the plaintiff was entitled to recover the difference.</i>	
Cave's Brewery v. Colonial Government ...	563
Friendly societies—Settlement of disputes—Arbitration—Appeal.	
<i>The defendant Society was established under Act 7 of 1882, and was never registered under Act 5 of 1892. The plaintiff, a member of the Society, having made a claim</i>	

	PAGE
<i>for sick pay, which the Society disputed, a special meeting of members was called in accordance with the rules of the Society, to settle the dispute. The meeting decided to pay part of the claim, whereupon the action was brought in the Magistrate's Court for the whole amount.</i>	
Held , that the 25th section of the Act of 1892 did not apply and that there was no appeal against the decision of the general meeting which had been properly convened for the special purpose of deciding the dispute.	
Wilson v. Excelsior Benefit Society 607	
Funeral expenses—Authority of executor to erect monument.	
Treurnich and Wentzel v. Estate of De Villiers ... 493	
Game Preservation Act—Notice by owner of land—Best evidence.	
<i>In a prosecution of the appellants before a Resident Magistrate's Court for contravention of the 7th section of Act 36 of 1886, a notarial certificate was produced to the effect that the prosecutor, being the owner of the land on which the appellants trespassed, had published in the A. newspaper, circulating locally, a notice, and warning that he was desirous to preserve the game thereon.</i>	
Held , that proof of the giving or publication of such notice and warning was indispensable, and that, as the best evidence had not been given, namely, the production of a copy of the newspaper, the conviction could not be supported.	
Rex v. Enslin and Moll ... 598	
General dealer, see Trading without licence 302	
General denial, see Plea ... 631	

	PAGE
"Going concern," see Hotel licence 923	
Grandchildren, see Will ... 687, 761	
Guarantee—Actio quanti minoris—Patent defect—Purchase and sale.	
<i>The plaintiff selected and bought several sheep out of the defendant's flock, and some of them were subsequently found to be infected with scab.</i>	
Held , that in the absence of any guarantee by the defendant that they were free from scab, he was not liable in the action, quanti minoris, and that, as he had no knowledge of the fact that the infection existed, he was not liable in damages for the expenses incurred by the plaintiff in dipping all the sheep by order of the scab inspector.	
Muller v. Hobbs 975	
Guarantee—Verbal revocation—Evidence.	
Spilhaus & Co. v. Werner ... 72	
Guarantee, see Purchase and sale 124	
Harbour Board — Regulations — Ultra vires — Negligence — Tacit agreement.	
<i>The master of a ship in the Table Bay Docks, with full knowledge of the Harbour Board regulations, which stated that the Board would not be liable for any neglect of the masters or crews of the Board's tugs, engaged the services of two of its tugs to tow the ship out of the Docks. In the course of the towing, the ship was damaged through the negligence of the master and crew of one of the tugs. The acknowledged usage of the port was that no other tugs than those of the Board were allowed to tow ships out of Dock, and that the masters and crews of the tugs towing had to take their orders as to speed, direction, and so on from the master or pilot of the ship in tow.</i>	

	PAGE
Held, on a case stated by arbitrators, that the regulation was not on the face of it so unreasonable that the Court could, without any evidence that the regulation acted unfairly and without any statement to that effect by the arbitrators, declare the regulation to be ultra vires.	
Held further, that the condition of the regulation should be deemed to have been tacitly incorporated with the contract by which the services of the tugs were engaged.	
T. B. Harbour Board v. Bucknall S.S. Lines ...	351
Hotel licence—Sale and purchase —“Going concern”—Act 28 of 1883, Sec. 55.	
<i>B. purchased from N. “the lease, licences, goodwill, &c.,” of certain two hotels as “going concerns,” undertaking to relet the premises to N. for a term of years. B. now claimed absolute property in the licences.</i>	
Held, that N. had not sold the licences to B., but had only incurred the obligation of applying for a temporary transfer of the licences to B. under Sec. 55 of Act 28 of 1883.	
Held further, that during the currency of his lease B. had no power to transfer the licences to other premises.	
Nordon v. Bosman Powis & Co. ...	923
Hypothec, see Interpleader ...	240
Illegal evidence, admission and rejection of, see Review ...	398
Immovable property — Restrictions imposed on purchaser by vendor—Rights of subsequent purchasers.	
Hattingh v. Robertson ...	294
Imperial Government, see Jurisdiction... ...	586

	PAGE
Independent contractor, see Seller and purchaser ...	35
Indictment — Exceptions — Rules of Court 63 and 64.	
<i>Where exception was taken to an indictment on the ground that it charged a prisoner with crimes of distinct species ;</i>	
Held, that the indictment (as it stood) was bad, and the Crown was put to election as to which class of charges it would prosecute.	
<i>Exception having been further taken that certain persons from whom the accused was said to have received bribes were not specified ;</i>	
Held, that these counts might be amended by the insertion of the necessary particulars.	
Rex v. Charteris ...	785
Injury to property, see Negligence	629
Innocent misrepresentation, see Architect ...	747
Insolvency—Undue preference—Ordinary course of business—Ord. 6, 1843—Sec. 86 and 88.	
Insolvent Estate Goldberg v. Bert... ..	744
Insolvency—Assignment—Undue preference.	
Labe and Meyerowitz v. Paterson and De Heton ...	510
Insolvency, see Partnership ...	457
Insolvency—Undue preference—Contemplation of insolvency.	
Estate of Olivier v. Van Zyl	129
Insolvent Ordinance—Undue preference—Usual and ordinary course of business.	
<i>Within six months of his insolvency, G., who was the agent in a country district of the defendant Insurance Society, paid to the Society the amounts of premiums which he had received on behalf of the Society during the preceding six days.</i>	

PAGE

The payment was made in presence of an inspector of the Society and by means of cheques given to G. by third parties.

Held, that the fact that the identical money received by G. from insured persons had not been paid over by him to the inspector did not constitute the payment an undue preference.

Held further, that the payment was protected as having been made in the usual and ordinary course of business.

Estate of Green v. South African Mutual Insurance Society ... 140

Insolvent — Pension — Trustee — Vesting.

The right to a monthly pension granted by a Harbour Board to an insolvent before his insolvency vests in the trustee of his estate for the benefit of his creditors.

In re Hansen... 902

Insolvent—Right of trustee—Request for maintenance of children.

A testator by his will bequeathed a third of a farm to his son C., and directed that C. should only enjoy the usufruct for the maintenance of C.'s children. After the testator's death, C. became insolvent, and the trustee sold to the applicant all the insolvent's right and title to the farm. The applicant, by motion, applied for ejectment of the insolvent, not even offering to maintain the children.

Held, that the applicant was not entitled to succeed.

Appel and Lipschitz v. Appel 901

Interdict—Action for declaration of rights.

Where the applicant declared his intention to bring an action for declaration of rights forthwith; the Court granted an

PAGE

interdict to restrain the respondent from transferring certain immovable property.

Van der Horst v. Coley ... 1018

Interdict — Trespass — Prescription.

Estate De Jager v. Thyse... 571

Interdict — Action — Notice to third persons interested.

On an application by motion to restrain the respondents from supplying goods to N. in breach of an undertaking not to supply such goods to others than the applicants, it appeared that no notice of the application had been given to N., and that the respondents were quite able to pay damages for the alleged breach.

Held, that the applicants should proceed by action, giving notice thereof to N., to enable him, if so advised, to interrene as co-defendant.

British S. A. Asphalt Co. v. Cape Town Gas Co. ... 229

Interdict — Disposal of surplus funds collected for a specific object by public subscription.

Strydom and others v. Blignault and others ... 572

Interdict—Recurring grievance—Blasting operations.

The defendants carried on blasting operations in stone quarries on the side of a mountain immediately above the town of S. The work was done so carelessly that stones and large boulders were continually rolled down to the land below and to the neighbourhood of houses in the town. The plaintiffs being the Town Council of S., and the private owner of land immediately below the quarries continually protested, but no attention was paid to their protests until an application was made to restrain the work. On the hearing of the application, an

interim interdict was granted to restrain the rolling of stones to the lower land.

Held, in an action for a perpetual interdict, that although since the previous application effectual steps had been taken for minimizing the risk, yet as the previous conduct of the defendants shewed that without an interdict there was reason for anticipating a recurrence of the grievance, the plaintiffs were entitled to a perpetual interdict, restraining the defendants from working the quarries in such a way as to cause stones to roll down.

**Estate Black and Simon's
Town Municipality v. Sir
John Jackson, Ltd.** ... 653

Interdict—Rent.

The Court will not grant an interdict to restrain a tenant from removing his goods unless rent be actually due and unpaid.

Pinn v. Elliott ... 504

Interim valuation—Cape Town Municipality—Basis of valuation.

in making an interim valuation of properties under the 93rd section of Act 26 of 1893, the valuer acted upon the basis indicated by the solemn declaration required by the 88th section, and valued properties belonging to the applicant at the price which they would realise if brought to voluntary sale and not according to the amount actually expended on improvements.

Held, that the applicants' objection to this mode of valuation could not be sustained.

The valuer included properties which had not been improved since the previous valuation by the erection of new buildings or otherwise

Held, that this was a good ground of objection and was

maintainable in the Supreme Court, although it had not been specially mentioned as a ground in the objection lodged by the applicant under the 92nd section.

**Kaiser Bros. v. Cape Town
Town Council** ... 354

Interpleader—Lessor and lessee— Rent—Hypothec—Delivery.

A lessee of premises, while indebted to the plaintiff as lessor for arrears of rent, entered into an arrangement, by which he sold to the claimant all his goods in the premises, but the sale was on long credit, and the lessee remained in occupation of the premises. The lessor obtained judgment, but upon proceeding to execution, the claimant claimed the goods as his. There was evidence to shew that the sale was a colourable arrangement to defeat the lessor's hypothec.

Held, that the Magistrate erred in giving judgment for the claimant, inasmuch as the plaintiff's hypothec could not be defeated by the arrangement, and that even if the arrangement had been made bona fide, the claimant ought not to have succeeded in the absence of proof of delivery of the goods to him.

Bapoo v. Mahomed ... 240

Interpleader—Onus of proof— Magistrate's inferences from facts.

The Court allowed an appeal in a case in which the Magistrate had based his judgment rather on his inferences from facts than on the facts themselves.

Vosloo v. Myburgh ... 1001

Interest *see* Principal and surety 680

Irregularity of proceedings, *see*
Review ... 488

PAGE

Irregularity of proceedings—Appeal—Notice of hearing—Review.

On an application for review of certain proceedings in a Chief Magistrate's Court, it appeared that the applicant had obtained judgment in his favour in a Magistrate's Court, and that the opposite party appealed to the Chief Magistrate's Court without any notice whatever to the applicant. The Chief Magistrate reversed the judgment.

Held, that the proceedings in the Chief Magistrate's Court should be set aside, and the appeal heard afresh after due notice.

Adonis v. Mketshane ... 507

Irregularity, *see* Magistrate's Court ... 476

Joint estate, *see* Executor ... 591

Judgment—Company—Voluntary winding up—Stay of execution.

The plaintiff obtained judgment against the defendant Company on a mortgage bond, but failed to inform the Court of the fact that the Company was being wound up voluntarily. Thereafter the defendant Company applied for a stay of execution.

Held, that a stay of execution should be granted, but on condition that the plaintiff's claim should be satisfied within a fixed period.

Bennett v. Cape Estate Syndicate Limited ... 216

Judicial separation—Divorce—Postponement—Practice.

Plaintiff had instituted an action for judicial separation, and now asked that the case should be postponed, in order to enable her to apply for divorce.

Held, that plaintiff must either apply for an amendment of

PAGE

the original rule nisi, calling upon defendant to show cause or else commence a new action ab integro.

Cohoon v. Cohoon ... 814

Jurisdiction—Imperial Government—Exception.

In an action brought by the Cape Town Town Council against Colonel H., as representing the Secretary of State for War, for an order compelling him to remove certain fences placed by him around certain land claimed by the plaintiffs as a public recreation ground, the defendant excepted to the jurisdiction.

Held, that as the action was in reality against the Imperial Government, and as there had been no direction of His Majesty that right should be done in the matter, the Court had no jurisdiction.

Cape Town Council v. Colonial Government and others 586

Jurisdiction of Circuit Courts, *see* Act 35, 1893 ... 565

Jurisdiction, *see* Foreign Company 534

Jurisdiction, *see* R.M. Court ... 946

Jury—Act 23 of 1891—Removal of trial.

Where a trial by jury in a civil case has been demanded by either party, it is not competent for the Supreme Court to remove the case to trial on Circuit, and thus deprive litigants of their rights under Act 23 of 1891.

Peacock and others v. Bailey Friedman and Odendaal ... 783

Jus retentionis, *see* Lien ... 675

Kafir beer, *see* Municipal regulations ... 241

Lamp, *see* Liquor licence ... 600

	PAGE
Land beacons—Amended title— Act 9 of 1879.	
<i>Notice was duly given to the applicants in terms of the first proviso to the 4th section of Act 9 of 1879, that unless within thirty days after service thereof an objection were lodged with the Divisional Council to the boundaries adopted on re-survey, they would be deemed to have consented thereto, but the applicants failed, not inadvertently but deliberately to raise any objection within the time specified.</i>	
<i>Held, that the applicants were not entitled to an order restraining the Surveyor-General from giving an amended title according to the said boundaries to the owners of the land on whose behalf such notice had been given.</i>	
Estate De Swardt and Others v. Surveyor-General and Others	389
Landlord, <i>see</i> Brothel	987
Landlord and tenant—Defective premises—Damage to goods.	
Dedusey v. Osman	914
Landlord and tenant—Extension of lease — Evidence — Da- mages.	
Hasseris v. Marks	725
Landlord and tenant — Rent — Collateral agreement.	
Estate Rhodes v. Hartigan and others	589
Landlord and tenant—Holding over.	
Duminy v. Day	309
Landlord and tenant — Sub-let- ting.	
Kaiser Bros. v. Rosen	331
Landlord and tenant—Landlord's lien.	
Hardy v. McSweeney	13
Lashes, <i>see</i> Previous conviction ...	496

	PAGE
Lashes, <i>see</i> Acts 43 of 1885 and 35 of 1893	1005
Law agent—Excessive charges.	
Raffaele and Bellantone v. Bindemann	176
Law agent—Qualifications.	
<i>M., an ex-constable and a native, had applied to the R.M. of S. for enrolment under Act 20 of 1856 as a law agent. The applicant produced the necessary certificates as to character, but the Magistrate refused the application on the ground, inter alia, that the applicant's educational qualifications were insufficient.</i>	
<i>Held, that a Magistrate has no power to insist on any educational or professional qualifications in any person applying to be enrolled as a law agent in his court.</i>	
Mayisela v. R.M. of Somers- et E.	781
Lease — Cancellation for non- payment of rent—Waiver of rights under lease.	
Prince v. Myburgh	382
Lease—Eviction—Security.	
<i>The plaintiff sold his chemist's business to the defendants, one of the conditions being that the plaintiff would execute a lease of the premises in favour of the defendants for a period of five years, with a right of renewal for another five years. The defendants took possession of the business and occupation of the premises, but refused to join in the execution of the lease, on the ground that the plaintiff was himself lessee, and that under the terms of his lease he might at any time be evicted. The contingency was that the original lessor might die before the end of ten years, but she was proved to be of middle age and in good health.</i>	
<i>Held, that there was no ground</i>	

PAGE

PAGE

for the defendants' refusal, but on the suggestion of the Court, the plaintiff offered security against eviction, and the defendants were accordingly ordered to join in the execution of the lease subject to such security.

Smiles v. Freedberg, Cohen & Co. ... 448

Lease—Pledge—Cession—Rights of cessionary.

The applicant ceded a sheep lease to L. as security for a debt. L. ceded all his rights to the respondent. Thereafter the applicant tendered the amount of the debt to respondent, who refused to hand back the lease, claiming the right to retain it as security for a promissory note made by the applicant which was not yet due.

Held, that whatever rights the respondent might have had if the applicant had himself ceded the lease to the respondent, he had not, as cessionary, any greater rights in respect of the lease than L. had, and that, therefore, he was bound to hand the lease back to the applicant upon tender by the applicant of the debt due by him to L.

Van der Heever v. Cloete ... 220

Leave to appeal to Supreme Court—Interlocutory order.

Ex parte Pam ... 581

Leave to appeal to Supreme Court,

see R.M. Court ... 945

Legacy—Ademption—Sale of bequeathed property.

A testator by his will bequeathed his farm J. to his son William, and his farms K. and L. to his sons Isaac and the plaintiff, subject to certain intricate fidei commissary substitutions. Attached to the bequest of the farms K. and L. was a direction to the effect that in case the testator should

sell them and buy other ground in substitution for them, such other ground must be looked upon as bequeathed on the same stipulations as mentioned in regard to K. and L. The testator did sell farms K. and L., and he bought two other farms, one of which he gave in occupation to William and the other to the plaintiff, but there was nothing to connect the sale of the former with the purchase of the latter, or to bring such giving of occupation to two of his sons into relation with the direction in the will.

Held, that there was an ademption of the legacies.

Steyn v. Steyn and others ... 775

Legacy to a class, see Will ... 761

Legacy, see Will ... 593, 883

Legislative Council election—Accounts—Act 26 of 1902.

Even if a member is returned unopposed, he is bound to file an account of election expenses within 50 days.

Ex parte Gysbert Henry Stockenström, Paul Willem Michau, and Michiel Jacobus Pretorius ... 12

Lessor and lessee, see Interpleader 240

Lessor and lessee—Cancellation of mutual liability—Construction.

By agreement of lease the lessor was to be allowed to make improvements on the leased premises and to deduct the rent from the amount thus expended. While the lease was running, the lessor and lessee mutually agreed to the cancellation of the contract of lease, and reciprocally agreed to release each other from any further liability in respect thereof.

Held, that the effect of such release was to discharge the lessor from any claim for

	PAGE
<i>expenditure on improvements made before the date of cancellation.</i>	
Tooch v. Le Roux ...	644
Letting and hiring — Waiver — Restoring premises to former condition.	
<i>The plaintiff leased certain premises to the defendant for a term and the defendant undertook to deliver the premises, at the expiration of the term, in like good order and repair. During to the currency of the lease, the Town Council required, as a sanitary measure, in consequence of the plague having broken out, that a cement floor should be substituted for a wooden one, and the defendant, at his own expense and with the knowledge of the plaintiff, made the requisite alterations.</i>	
<i>Held, that the defendant was not released, on the expiration of the term, from the obligation of restoring the premises to their former condition.</i>	
Verster v. Fletcher ...	916
Liability of partner, <i>see</i> Partnership...	237
Libel, <i>see</i> Pleading	581
Licence (Medical), <i>see</i> Medical Council	483
Licence (cart), <i>see</i> Cape Town Municipality	197
Licensing Court—Withdrawal of application for renewal of licence.	
<i>The holder of a licence lodged an application for its renewal with the Magistrate in manner provided by the 42nd section of Act 28 of 1883. An application was made for the sequestration of his estate, and within an hour before the order of sequestration was made he withdrew his application for renewal. A curator bonis was appointed to his</i>	

	PAGE
<i>estate, who at the sitting of the Licensing Court on the following day applied for the renewal of the licence. The presiding Magistrate ruled, that as the holder of the licence had withdrawn the application, his curator bonis had no locus standi.</i>	
<i>Held, that as the holder had withdrawn his application, with the view of defeating the rights of his creditors, his curator bonis should be allowed to revive the application, and that for that purpose the Licensing Court should be authorized to hold a fresh meeting.</i>	
<i>Ex parte Mann in re Moss</i> ...	215
Licensing Court—Right of unsuccessful applicant to be heard.	
<i>The applicant having been refused a club licence without having had an opportunity of replying to objections: the Court (on review) ordered the Licensing Board to sit again and hear the application on its merits.</i>	
<i>Simcocks v. Wynberg Licensing Court</i> ...	882
Lien—<i>Jus retentionis</i>—Artificer—Removal of goods.	
<i>Where an artificer who has manufactured an article from materials belonging to another has voluntarily delivered the article to the owner, he loses his right of retention or lien, and is not entitled to claim an attachment of the article pending an action for his wages, nor is he entitled to an order restraining the removal of the article to another place within the jurisdiction of the Court in the absence of proof that he would be prejudiced in his rights by such removal.</i>	
<i>Ex parte Lewin and others</i> ...	675
Lien—Retention—Title deeds.	
<i>The applicant agreed with A. to pass a bond in security of</i>	

	PAGE		PAGE
<i>his obligations under a lease executed by A. in favour of the applicant and gave a power to the respondent to pass the bond. The power being found to be defective, the respondent requested the applicant to give another power, but the applicant refused and demanded from the respondent the title deeds which he had given to the respondent for the purpose of passing the bond.</i>		<i>he shall not sell liquor to coloured persons without a permit, and another condition that he shall not sell liquor after ten a.m. on the Saturday before Nachtmahl.</i>	
<i>Held, that the respondent was not entitled to retain the title deeds.</i>		<i>Held, that these conditions could not be legally imposed.</i>	
Sindler v. De Villiers ...	900	Orchard v. Bredasdorp Licensing Court ...	569
Liquidated claim, <i>see</i> Magistrate's jurisdiction ...	244	Liquor licence—Condition—Construction—Lighting of lamp—Closing time.	
Liquidated damages, <i>see</i> Penalty	39	<i>A condition was inserted in the appellant's liquor licence that a lamp was to be affixed over the door of the licensed premises and kept lit from sunset to closing time. The hours for which the licence was granted were from 7 a.m. to 9 p.m.</i>	
Liquidation—Receivers.		<i>Held, that as the appellant was not legally bound to keep his licensed premises open until 9 p.m., the reasonable construction of the term "closing time" was the time when he actually closed his premises, and that if he actually closed his premises on any night before 9 p.m., he could not be legally convicted for not keeping such lamp lit until 9 p.m. on such night.</i>	
<i>Ex parte</i> Sedgwick ...	87	Rex v. Hammerschlag ...	600
Liquor Law—Evidence—"Trap"—Conspiracy.		Liquor licence—Hotel manager—Summons—Acts 44 of 1885, Sec. 11, 39 of 1887, 28 of 1898, Sec. 2.	
Rex v. Bathbone ...	487	<i>W., a hotel manager, had been convicted of a contravention of Sec. 2 of Act 28 of 1898, by selling liquor by his barman to a native. The barman had not been appointed by W., but by the hotel proprietor: and the summons did not allege that the native was not a registered voter.</i>	
Liquor Laws—Sale by retail—Liability of salesman.		<i>Held on appeal, that as under Sec. 11 of Act 44 of 1855. the manager was responsible for the act of the barman, and as it was not necessary that the</i>	
Rex v. Jones ...	650		
Liquor licence — Evidence of "Trap" — Irregular procedure.			
<i>T. had been convicted of selling liquor after hours on the evidence of a native "trap" and two policemen. There were certain discrepancies in their evidence, which was contradicted by that of disinterested witnesses. The Magistrate refused to compel the trap to answer an important question.</i>			
<i>Held, that the proceedings must be quashed.</i>			
Rex v. Toooh ...	195		
Liquor licence — Conditions — Coloured people — Prohibition.			
<i>The Licensing Court of B. imposed a condition on a licence granted to the applicant that</i>			

summons should allege that the native was not a registered voter, W. had been rightly convicted.

Rex v. Wynne ... 999

Liquor licence—Transfer—Agent.

A bottle licence was granted to S., who transferred it to F., but the Licensing Court refused to ratify the transfer. F. transferred the licence to the appellant, who obtained no ratification of such transfer and did not obtain a bottle licence for himself but continued to sell liquors on his own behalf.

Held, that he was properly convicted of selling liquor without a licence.

Rex v. Cohen ... 994

Liquor licence—Dealing in liquor.

The tenant of a billiard room, not licensed for the sale of intoxicants, who dispenses to a number of persons present intoxicating liquor brought on the premises by one of those persons, is not guilty of dealing in liquor.

Rex v. Taylor ... 304

Liquor Licensing Act, 1883—Renewal of bottle licence—Objections.

It is a valid objection to the renewal of a licence in terms of the 3rd sub-section of section 52 of Act 28 of 1883, that the business is conducted in an improper manner, although it is not alleged that drunkenness was permitted upon the licensed premises.

Cogill v. Queen's Town Licensing Board ... 400

Liquor Licensing Acts—Subscription dance—Refreshments.

The applicants were promoters of a dance, at which they supplied liquor and other refreshments to the subscribers in consideration of the sum of

eight shillings and sixpence paid by each subscriber. There was a loss on the transaction, which was paid by the promoters, but if there had been a profit they would have been entitled to the benefit of it.

Held, that as the promoters held no licence, they had been rightly convicted of selling liquor without a licence.

Rex v. Walker and others ... 305

Liquor Licensing Acts—Wholesale licence—Unbroken case.

The appellant, being the holder of a wholesale licence to deal in intoxicating liquors, sold to D. half a dozen quart bottles of Ohlsson's beer for 1s. 6d. and half a dozen Castle ale for 3s. 6d., and, after placing them in a case and nailing down the lid, he delivered the case to the purchaser.

Held, that the sale was by retail and not by wholesale as authorized by sub-section 1 of section 7 of Act 28 of 1883.

Rex v. Reece... 307

Living on earnings of prostitution, see Act 36, 1902 ... 646

Loan—Bailment—Negligence.

The defendant borrowed from the plaintiff a horse, which fell ill on the journey. The defendant's servants left it in the field for several days, after which it died, but there was no evidence whether it would have been saved with due care and diligence.

Held, that the defendant was bound to take at least as much care of the borrowed horse as he would have taken of his own, and that as considerable negligence had been shown in the treatment of the horse, the Magistrate was justified in holding that such negligence was the cause of the death.

Botha v. Botha ... 608

	PAGE
<i>Locutio operis</i> , see Sale and purchase	606
Loss of goods —Liability of bailee.	
Behir v. Table Bay Harbour Board	808
Lunatic — Curator — Judicial declaration of lunacy.	
<i>The Magistrate's order for detention of an alleged lunatic, although confirmed by a judge, is not such a declaration of lunacy as would justify the Court in appointing a permanent curator of the alleged lunatic's property. For the purpose of such an appointment it is necessary that a summons should be issued and served in the usual way.</i>	
Ex parte J. I. de Villiers ...	386
Magistrate's Court — Costs — Defamation.	
<i>The plaintiff issued a summons in the Magistrate's Court against the defendant for damages, but omitted the names of the persons in whose presence the alleged defamatory words had been uttered. Before the return day, the plaintiff gave notice to the defendant that at the trial he would apply for an amendment of the summons, by inserting the names which he mentioned. The defendant, however, brought no witnesses for the trial, preferring to raise the objection to the form of summons. The Magistrate allowed the plaintiff's application for amendment of the summons, but ordered the plaintiff to pay the costs of the day.</i>	
<i>Held, that the Magistrate erred in ordering the plaintiff to pay the costs of the day, and the costs were accordingly ordered to be costs in the cause.</i>	
Appolis v. Cister	295
Magistrate's Court — Exceptions — Misnomer — Summons.	
<i>A summons was issued against the defendant in the names of</i>	

	PAGE
<i>R. and M. without any mention of their Christian names. The defendant excepted to the summons in the Magistrate's Court, and upon the exception being overruled, he tendered the amount claimed which he admitted to be owing to the firm of R. and M., carrying on business as tailors.</i>	
<i>Held, that the Magistrate ought to have directed an amendment of the summons, which could not possibly prejudice the defendant, but that the exception was of too technical and trivial a nature to justify the Supreme Court, after what had taken place, in practically setting aside the proceedings.</i>	
Hobden v. Risely and McIntyre	491
Magistrate's Court — Irregularity.	
<i>Where a prisoner had committed a technical assault on M., with which he was charged, and had thereafter committed a serious assault on B., with which he was not charged, but to which most of the evidence was directed and for which the Magistrate admitted he had really sentenced the man. The Court quashed the conviction.</i>	
Rex v. Niekerk	476
Magistrate's Court — Judgment for payment in instalments.	
<i>The power conferred on Magistrates by the 11th section of Act 20 of 1856 should be exercised with discretion and with due regard to the rights of the creditor.</i>	
<i>The plaintiff, to whom the defendant was indebted in a considerable sum for materials sold to him for the building of houses, gave him time for payment, and at the end of that time sued him for the amount. The evidence shewed that the defendant had received a sum of money and sent it to</i>	

his relatives before the further time was given him, and there was no evidence to show that at the time of the trial the defendant had not sufficient assets to pay the debt in full.

Held, that it was not a reasonable exercise of the Magistrate's discretion to order payment of the debt in instalments extending over a period of several months.

Tunstall and Grant v. Paulse 652

Magistrate's finding on facts—
Circumstantial evidence.

Rex v. Myburgh ... 651

Magistrate's inference from facts,
see Interpleader ... 1001

Magistrate's jurisdiction—Set off
—Liquidated claim.

The plaintiff sued the defendant on a promissory note for £63, and the defendant excepted to the jurisdiction, on the ground that he had a valid claim for an amount exceeding £63, but his claim consisted of a number of uncertain and disputed items which had been referred to arbitration.

Held, that the Magistrate had properly disallowed the exception, on the ground that the claim was too uncertain to be capable of being set off.

The defendant, moreover, filed a counter-claim for £57, consisting of items clearly owing to him, which had not been included in the reference to arbitration.

Held, that although the amount exceeded the Magistrate's ordinary jurisdiction, yet as it did not exceed the amount of the plaintiff's claim, the Magistrate had erred in not allowing the counter-claim.

Humphreys v. Humphreys... 244

Magistrate's ordinary jurisdiction,
see Act 19 of 1861 ... 316

Mahommedan marriage—Custody
of children.

Applicant and respondent had been married according to Mahommedan rites: whether by a duly appointed marriage officer or not did not appear. Thereafter the respondent obtained a divorce from the authorities of his church and retained the custody of the children of the marriage. Applicant now asked for their custody.

Held, that as there was no evidence that the marriage had not been solemnised by a marriage officer, the application must be refused.

Laita v. Hessen ... 74

Malicious arrest.

Reed v. Port Elizabeth Town
Council ... 946

Malicious desertion — Divorce —
Willingness to return.

In an action brought by the wife against the husband for divorce on the ground of malicious desertion, it was proved that after the service of the rule on him, he called on the wife and offered to receive her back, but she refused to see him.

Held, in the absence of proof that the offer was accompanied by words or conduct which would justify the plaintiff in refusing the offer, she was not entitled to a decree of divorce.

Hildebrandt v. Hildebrandt 619

Mandate — Agent — Payment of
damages.

The plaintiff, a native, who owned some cattle, left them during his absence from home in charge of his uncle M. During the plaintiff's absence, his brother seduced the defendant's daughter, whereupon M. gave one of the plaintiff's cows to the defendant as com-

PAGE	PAGE
<i>penation for the seduction of his daughter.</i>	Master and servant—Authority—Delict—Damages.
Held in an action by the plaintiff to recover the cow or its value, that under the ordinary law <i>M.</i> had no mandate to give any of the plaintiff's cattle to others for the protection of his brother's honour, and that in the absence of any statement that by native custom in the Native Territory he had such authority, the Magistrate erred in giving judgment for the defendant.	<i>The defendant being sued in a Magistrate's Court for the illegal seizure of the plaintiff's ox, raised the defence that he had committed the act in the performance of his duty as the servant of B.</i>
Tyam v. Kota ... 418	Held, that as the act complained of was in its nature a tort or delict against a third person, the defendant was liable whether or not liability also attached to his master.
Marriage of Natives before 1879, <i>see</i> Native Territories ... 225	Marona v. Blackbeard ... 639
Master and servant—Act 18 of 1873.	Masters and Servants Act—Unlawful detention of child—Right of mother of illegitimate child.
<i>A journeyman mason is not a servant in terms of Act 18 of 1873.</i>	<i>The father of an illegitimate child, four years old, apprenticed it to the appellant without the formal consent of the mother, who objected to the child being apprenticed at that age. The child remained with the mother, and the appellant was informed by the Magistrate of the district, not acting in his judicial capacity, that he was entitled to take possession of the child. He accordingly obtained possession of the child, and the mother claimed the restoration of the child under section 27, chap. 5, of Act 15 of 1856. The proceedings in the Resident Magistrate's Court were in form of a criminal nature, but there was no verdict of guilty and no sentence beyond an order that the child be restored to its mother.</i>
Rex v. Sango... 117	Held, on appeal, that there was not sufficient ground for disturbing the order of the Magistrate's Court.
Master and servant—Breach of contract—Damages.	Rex v. Liebenberg ... 597
Stevenson v. The Liquidators of the Insolvent Estate of W. Stableford & Co. ... 69	Measure of damages, <i>see</i> Encroachment ... 135
Master and servant—Wrongful dismissal—Magistrate's finding on facts.	
Gruneberg v. Schiefelbein ... 204	
Master and servant—Hire of mules—Act 15 of 1856.	
<i>The accused was charged before a J.P. under Act 15 of 1856 with withholding wages for work done by complainant's mules. No section of the Act was specified. Accused was found guilty and fined. Conviction quashed as grossly irregular.</i>	
Rex v. Kriek... 504	
Master and servant—Wages—Magistrate's jurisdiction.	
Mohamet v. Ishmail... 546	
Master and servant, <i>see</i> Adulteration of foods ... 297	

	PAGE
Medical Council—Act 34 of 1891	
—Order for issue of licence—	
Reciprocity.	
<i>On an application for an order that a licence to practice as a dentist be issued by the Colonial Medical Council under the 19th section of the Act, it appeared that one of the regulations framed by the Council under the Act provided that dental diplomas recognised by the British Medical Council shall entitle the holders to registration in this Colony.</i>	
<i>Held, that in the absence of proof that the applicant's diploma was so recognised or that he held a diploma otherwise recognised by the Colonial Council, he was not entitled to the order.</i>	
<i>Another regulation provided that no diploma of a foreign country shall entitle the holder to registration unless equal rights are given in such country to the holder of any British registrable degree, but in the absence of any express authority given by the Act to frame a regulation of this nature, the Court declined to found its decision on this regulation.</i>	
Moore v. Colonial Medical Council 483	
Medical practitioner — Fees —	
Proof of status.	
<i>A medical practitioner, in order to recover fees, must prove that he is duly licensed to practice in this Colony. Production of the Medical register is not sufficient proof of status.</i>	
Louw v. Fryer and Nqumbela v. Culligan followed.	
Bethune v. Key 296	
Messenger of Court—Attachment of private and of partnership property.	
Cressay v. Shaw 509	

	PAGE
Messenger of Court—Sheriff—	
Sale in execution—Damages for wrongful sale.	
<i>The defendant C., a messenger of a Magistrate's Court, having the custody of certain sheep, half of which belonged to the plaintiff, sold them in execution of a judgment obtained by defendant K. against the plaintiff's sons. C. did not know that any of the sheep belonged to the plaintiff, but might have ascertained it if he had made reasonable inquiries. The defendant K. took no part in the sale beyond obtaining the warrant of execution in the ordinary course. The plaintiff had no knowledge of the sale until some time after it had taken place.</i>	
<i>Held, that K. was not liable for C.'s wrongful act.</i>	
<i>Held further, that C. was liable, and that the measure of damages was the value of the plaintiff's sheep at the time when he wrongfully sold them.</i>	
Sieberhagen v. Keller and Chantler 322	
Mining Ordinances of Rhodesia—	
Special registration — Indefeasible title.	
<i>It is a good defence to an action for ejectment from mining claims in Rhodesia alleged to have been acquired by the plaintiff before the passing of the Rhodesian Ordinance 1 of 1895, that a certificate of special registration had thereafter been bona fide granted to the defendant in terms of the 70th and 71st sections of that Ordinance after full compliance on his part with the provisions of such Ordinance.</i>	
Macaulay v. Jumbo Gold Mining Co. and B.S.A. Co. 171	
Minor—Criminal responsibility.	
Rex v. Marais 425	

	PAGE
Misconduct, <i>see</i> Contract of service	753
Misconduct, <i>see</i> Servant	621
Misjoinder of parties—8th Rule of Court.	
<i>The Court refused an application to amend a certain record by substituting the name of L. F. (married out of community to H. J. F.) for H. J. F.; holding that the 8th Rule of Court made it incompetent for the Court to grant the application.</i>	
Feltham v. Schlater	939
Misrepresentation, <i>see</i> Estoppel... ..	704
Mistake, <i>see</i> Freight	563
Monument, <i>see</i> Executor... ..	493
Mortgage, <i>see</i> Will	62
Mortgage bond—Penal clause—Estoppel by conduct—Equitable principles.	
Rimer v. White	30
Motion, <i>see</i> Ejectment	580
Municipal contractor—Town engineer—Progress of work.	
<i>C. and C. had contracted to do certain work for the Municipality of W. The 11th clause of the contract provided that should the contractors, without reasonable or sufficient cause, fail to make such progress with the work as should, in the opinion of the engineers, be proportionate to the total time fixed for the execution of the contract, the engineers should, after having given the contractors 48 hours' notice, in writing, have the power of ejecting them and their employees from the works and taking possession of the works and plans and providing material and labour at the cost of the contractor. When half the time fixed for the completion of the contract had elapsed only one-seventh of the work had</i>	

	PAGE
<i>been completed. The defendants thereupon ejected plaintiffs from the works and took possession. Plaintiffs now sued for damages.</i>	
<i>Held, that it was not within the discretion of the engineer to decide as to whether there had been reasonable and sufficient cause to retard the work, but that he had discretion to determine whether a proportionate amount of work, having regard to the time limit fixed by the contract, had been completed.</i>	
Cochrane and Cherry v. Woodstock Municipality and others	838
Municipal regulations — Governor's approval— <i>Ultra vires.</i>	
<i>The Municipality of M. had enacted a certain bye-law, whereby the owner of any goat who should allow it to trespass on any private property should be liable to a certain fine. This bye-law had been approved by the Governor.</i>	
<i>Held, that the Municipal Act gives no power to a Municipality to make any bye-law, whereby a private injury done by one individual to another is constituted a criminal offence.</i>	
<i>Held further, that the Court has jurisdiction to enquire whether any bye-laws of Municipalities, even though approved by the Governor, are intra vires or not.</i>	
De Lange v. Theron	948
Municipal regulations — Sanitation—Engineer.	
<i>On an application by the Municipal Council of M. to compel the respondent to remove certain earth closets to another part of a building which was being constructed, on the ground that they interfered with the width of a passage on the respondent's land, which, under the Municipal regulations,</i>	

	PAGE	PAGE
ought to be of a certain width, it appeared that the Municipal Engineer, entrusted by the Council with the duty of seeing to the carrying out of the regulations, had pointed out the spot as proper for building the closets, and had visited the place while the erection was proceeding.		
Held, that the applicants were not entitled to succeed.		
Mowbray Municipality v. Muller	401	
Municipal regulations—Kafir beer—Act 28 of 1896.		
The defendant, municipal inspector, purporting to act under the regulations of the Municipality of A., entered the hut of the plaintiff, a native woman, by force, on the ground that he suspected Kafir beer to be concealed in the hut, but no beer was found. The regulation authorized any person thereto authorized by the Council to enter any hut upon reasonable suspicion of an infringement of any regulation, but there was no regulation relating to Kafir beer. The 8th section of Act 28 of 1898 enacts that any owner of land, upon being satisfied that there is reason to suspect the existence of Kafir beer within any hut, may give written authority to any other person to search such hut, but the defendant had no such written authority from any one.		
Held, that the entrance was illegal, and that the plaintiff was entitled to damages for the trespass.		
Ngili v. McLeod	241	
Mutual will, <i>see</i> Bequest... ..	157	
Mutual will—Executors of the same estate appointed under two wills.		
A. and B., married in community, made a joint will, by which they appointed each other as heirs "of our estate until our death, and as executor we appoint the survivor of us and as executors of our joint estate after our death we appoint our sons," the applicants. B., the wife, died, upon which A. admitted and remained in possession of the joint estate. He married a second wife and made a second will, jointly, with her, by which they revoked all previous wills except the one just mentioned, and they appointed the respondent as executor. A. died, and the Master issued letters of administration in favour of the respondent, and the applicants as executors of A.'s estate. There was no application to set aside this appointment, but the applicants asked for an order, declaring that the respondent was not entitled to interfere with the assets of A. acquired before the death of his first wife.		
Held, that in the absence of any proof that the respondent did not intend to abide loyally by both wills, the order should not be made.		
Estate Kroese v. Kroese and others	392	
Native area—Act 28 of 1883, sections 21 and 22—Acceptance of licence subject to condition—Aboriginal native.		
Where the Governor has by Proclamation defined any area as one, within the limits of which it shall not be competent for any Licensing Court to authorize licences in terms of the 21st section of Act 28 of 1883, it lies upon any one who denies the validity of the Proclamation to prove that the area is not one to which the section is applicable.		
The acceptance of a licence purporting to be subject to such a Proclamation issued by the Governor is an admission by the licence-holder that the area within which his licence holds		

PAGE

good is one to which the Act is applicable.

Rex v. Keese... .. 724

Native Territories Penal Code—
Fraud—False pretences.

The appellant was charged with a contravention of the 196th section of the Native Territories Penal Code, 1886, and the fraud relied upon was the giving of cheques on a Bank in which he had not sufficient funds. It appeared, however, that he had made arrangements before giving the cheques for the sale of some property, which afterwards fell through, but which at the time he believed would enable him to supply the necessary funds to the Bank in time to meet the cheques when presented.

Held on appeal against the conviction, that there was not sufficient proof of fraud to justify a conviction under the 196th section, which applies to fraud, not amounting to a false pretence.

Rex v. Hayes... .. 989

Native Succession Act, 1864—
Community of property—
Setting aside appointment of
executor.

A native, to whose property Act 18 of 1864 would apply, having died, the respondent was appointed as executor, and two years after his appointment the applicant, a son of the deceased, applied to have the appointment and all proceedings thereunder set aside, alleging as a cause of prejudice that one-half of the estate had been awarded to the widow of the deceased, whom he had married according to Christian rites.

Held, that in the absence of an antenuptial contract, the deceased must be presumed to have been married in community, and that, although letters of administration were

PAGE

not necessary on his death, yet as the appointment had been made and the estate fully administered without any prejudice to the applicant, there was no good ground for setting the proceedings aside.

Estate Tantsi v. Executors
Estate Nchela 943

Natives—Private location - Lease
—Act 30 of 1899.

The accused had housed a considerable number of natives on his property. He was not their employer and had not taken out a licence under Act 30 of 1899 for a private location. Several groups of these natives hired, on lease, certain specified rooms, at a monthly rental of £11 5s., for each group. The Magistrate held that these leases were not bona fide, and convicted the accused.

Held on appeal, that as the accused (now appellant) had kept within the letter of the law, the conviction must be quashed.

Rex v. Jaffa 193

Native law—Custody of illegitimate child.

The plaintiff, a native woman in the Transkeian Territory, had an illegitimate child by the defendant, who was also a native, and she afterwards married another native. Her father gave the custody of the child to the defendant, who paid for its education.

Held on appeal from the Chief Magistrate, that as the case was between natives, native law was applicable, and that the Court below had properly dismissed an action by the plaintiff, claiming the custody of the child.

Bewbew v. Dennis 238

Native reserve, see Divisional
Council 905

	PAGE		PAGE
Native territories—Suits between natives—Succession to intestate estates—Marriage between natives before 1879—Eldest son—Executor dative.		<i>cow died. There was no expert evidence as to the cause of the cow's death.</i>	
<i>The applicant was the eldest son of a native who married a native woman before 1879 in Tembulund. The father died intestate in 1903, the respondent was appointed executor dative, and he proposed to distribute the estate according to the Colonial law of intestate succession.</i>		Held, on appeal, that the Magistrate had properly given judgment for the defendant.	
Held, that the estate should be administered and distributed according to native law and custom, under which the eldest son was entitled to obtain possession of the whole estate, subject to certain onerous obligations in favour of the widow and other children of the deceased.		Makek v. Set... .. 275	
Held further, that an executor under Colonial law was not the proper person to administer and distribute the estate, and the appointment of the respondent as executor dative was accordingly set aside.		Negligence—Damages—Pleading.	
Sekelini v. Sekelini 225		Petersen v. Griffith 718	
Negligence, <i>see</i> Bailment... .. 980		Negligence—Neighbouring proprietor—Injury to property.	
„ <i>see</i> Architect... .. 268		Friedmond v. Solomon ... 629	
Negligence—Damage to property.		Negligence, <i>see</i> Party wall ... 185	
Kaiser v. Shenker & Co. ... 477		Negotiable instruments—Share certificates indorsed in blank—Agency—Estoppel.	
Negligence, <i>see</i> Divisional Council	355	<i>The plaintiff having purchased 100 shares in a Transvaal gold mining company, and accepted as sufficient delivery a certificate indorsed in blank by the registered holder, deposited the certificate with his broker for safe custody. The broker delivered the certificate for valuable consideration to the defendant who had no notice of the plaintiff's interest in the shares, and he having purchased them under stock exchange rules, had them registered in his name. In an action for a return of the shares,</i>	
„ <i>see</i> Harbour Board ... 331		Held, that as the further act of having the shares registered in the transferee's name was necessary to perfect his right the certificate indorsed in blank by the registered owner was not a negotiable instrument.	
„ <i>see</i> Personal injury ... 458		Held further, that although the instrument was not negotiable, the universal custom in South Africa being to accept certificates so indorsed as being “in order,” the plaintiff was estopped by his conduct in leaving the instrument in that form in the hands of a share broker from asserting his right to the shares.	
Negligence—Risk—Export.		Van Blommestein v. Holliday	64
<i>While the plaintiff's cow was calving, M. attempted to remove the afterbirth, but failed. The defendant, who did not profess to be a veterinary surgeon, offered to try the removal, and the plaintiff consented and held the cow's head while the defendant operated. The operation proved unsuccessful, and the</i>			

	PAGE
Net price, <i>see</i> Agency ...	260
Non-joinder, <i>see</i> Purchase and sale	861
Notice of hearing, <i>see</i> Irregularity	507
Notice of revocation of agent's authority, <i>see</i> Principal and agent ...	370

Notices in English and Dutch papers.

Where the Court orders a notice to be published in an English and a Dutch newspaper, it must in each case be published in the respective languages of those papers.

Ex parte The Consistory of the Dordrecht Dutch Reformed Church ... 815

Novation—Promissory note.

Provisional sentence refused where plaintiff still held a promissory note which defendant had given in lieu of that sued upon.

Pedersen v. Kennedy ... 85

Novation, *see* Promoter ... 851

Noxal action, *see* Pauperies ... 720

Nudum pactum, *see* Consideration 408

Objections to renewal, *see* Liquor licence... 400

Occupation, *see* Will ... 883

Onus of proof—Magistrate's jurisdiction as to amount.

Van Wyk v. Terblans ...1003

Option of purchase — Sale by auction—Interdict.

The respondent held an option to purchase a farm belonging to the applicant at a certain price. Without exercising such option, the respondent advertised the farm for sale by public auction.

Held, that the respondent should be interdicted from proceeding with such sale unless and until he should exercise his option.

King Bros. v. Rowan ... 239

	PAGE
Option, <i>see</i> Consideration ...	823

Ordinance 72 of 1830, Sec. 12, *see* Evidence ... 505

Ordinance 6 of 1843, *see* Culpable insolvency ... 21

Ordinance 6 of 1843, Sec. 86 and 88, *see* Insolvency ... 744

Ordinance 6 of 1843, Sec. 84 and 88, *see* Undue preference ... 742

Ordinance 15 of 1845, *see* Will ... 617

Ordinance 15 of 1845, *see* Will ... 132

Owner or occupier of land—Dog—Trespass—Minor—Act 40 of 1889.

The defendant, a minor, was sued in a Magistrate's Court for damages for shooting the plaintiff's dog while trespassing at night on land occupied by him, and he raised the defence of minority. It appeared, however, that the power to defend had been signed by the defendant, purporting to be assisted by his father and natural guardian, who, as such, also signed the power.

Held, that the power cured any defect in the summons.

Held further, that under the 226th section of Act 40 of 1889, the defendant was entitled to shoot the dog trespassing on property in his lawful occupation and not being under the charge of any person.

Willmer v. Rance ... 605

Pactum de non petendo—Forgery.

Where to an application for provisional sentence, the defendant pleaded plaintiff's written agreement to accept payment of a debt by annual instalments, which agreement the plaintiff alleged to be a forgery, the Court, judging from the admissions of the plaintiff that his contention was improbable, refused provisional sentence

	PAGE
<i>and directed plaintiff to prosecute defendant for forgery and then go into the principal case.</i>	
Choritz v. Shoolman ...	317
Particulars of complaint by female, see Criminal Law ...	374
Partnership—Insolvency.	
<i>The applicant and S. bought certain property for the purpose of making profit out of cottages which they built thereon. Being unable to pay the creditors who had supplied goods to the partnership, S. informed the applicant that he would have to surrender the estate of the partnership. The applicant did not pay any of the debts, and S. surrendered the estate by petition, signed by himself on behalf of the partnership. After a trustee had been appointed, the applicant applied to set aside the sequestration.</i>	
<i>Held, that as the estate was insolvent and no benefit would accrue to anyone from an order setting aside the proceedings, the application should be refused.</i>	
Ross v. Hazell and Schwab...	457
Partnership, see Quantity surveyor	393
Partnership—Racehorse—Costs.	
Warner v. Schultz ...	574
Partnership — Condition — Account.	
<i>The plaintiff signed two promissory notes in favour of L., the consideration alleged being that the plaintiff should become a partner with L. in the purchase and sale of certain Government blankets. The notes were discounted and afterwards paid by L., who handed the notes back to the plaintiff and treated the arrangement as to a partnership as being at an end and sold all his interest in the matter to the defendants. The</i>	

	PAGE
<i>price of the blankets was paid by the defendants, who employed the plaintiff to supervise the packing and export of the blankets at a salary, which was duly paid. All the expenses of the enterprise were paid by the defendants. There was further evidence that the partnership with L. was to be conditional on the plaintiff's contributing his share of the capital and that the defendants, when they bought the interest of L., were not aware of his previous arrangement with the plaintiff.</i>	
<i>Held, that the plaintiff was not entitled to claim an account of profits from the defendants.</i>	
Lobascher v. Cohen and Carn	249
Partnership, see Copyright ...	97
Partnership—Death of partner—Directions to surviving partner to carry on business for benefit of a third party.	
<i>Ex parte Naggs</i> ...	20
Partnership—Principal and agent—Plea in abatement—Liability of partner for goods supplied to firm.	
<i>In an action against two members of a firm, the defendant, one of the members, took the objection that he was not liable, as the plaintiff had in the first instance debited the other member alone in their books. It appeared from the evidence that the goods had been ordered on behalf of the firm, that they had been delivered to the firm for the purpose of a contract entered into by the firm, that the firm had received the amount of the contract and that the defendant had himself written to the plaintiff on behalf of the firm, promising to pay the amount claimed.</i>	
<i>Held, that the fact of the plaintiff's having in the first instance debited the defendant's partner alone did not prevent them</i>	

from rectifying the mistake and afterwards suing the defendant also.

Guardian Insurance Company v. Lovemore's Executors distinguished.

Murray v. Findlay & Co. ... 237

Partnership—Dissolution—Profits.

The plaintiff and defendant being partners, agreed upon a dissolution, to take effect only on payment by the defendant to the plaintiff of two post-dated cheques given to the plaintiff as his share of the partnership assets. The defendant remained in possession of the partnership assets, part of which he sold at a considerable profit, but he failed to pay the amount of the cheques which were dishonoured at their due date.

Held, that the plaintiff was entitled to recover not only the amount of the cheques but the amount of profits actually made by the defendant, pending the actual dissolution of the partnership, after deduction of such portion of the amount of the cheques as had been devoted to the purchase of the goods on which the profit was made.

Aronstain v. Maisel ... 601

Party wall—"Common wall"—Servitude—Destruction or rebuilding of common wall—Agreement—Interdict.

The rights to a common wall partake of the nature of a servitude, but the wall itself is also regarded in many important respects as common property.

The neighbouring proprietors are not co-owners, in the proper sense of the term, of the wall, because the land on which the wall stands is not their common property, but they have the rights of co-owners to this extent that each is entitled to the maintenance of the wall on his neighbour's property as

well as of the part standing on his own property.

The applicant and respondent, being co-owners of a certain building, agreed to subdivide the same and to erect a party wall on and along the boundary line, such party wall to take the place of a partition wall then existing and separating the portions allotted to each. It was also agreed that the party wall should be constructed in manner directed by arbitrators. Their award was given, but the party wall was not constructed. A fire occurred, in consequence of which the partition wall had to be demolished.

Held, that one of the parties to the agreement was not entitled to an interdict restraining the other from building a party wall in the manner directed by the award.

Wiener v. Van der Byl ... 180

Party wall—Subsidence of building—Negligence—Damages.

Wiley & Co. v. Isaacs & Co. 185

Patent defect, *see* Sale and purchase ... 105

Patent defect, *see* Guarantee ... 975

Pauperies—Noxal action—Horse—Damages—Abrogation of law by disuse—Culpa.

The plaintiff's horse, while standing in harness before a farrier's door, was kicked by the defendant's horse which had been brought there to be shod, and was being led by the servant of O., to whom the defendant had lent the horse. There was no proof of negligence on the part of the servant, nor was there any evidence that the defendant's horse had previously been known to kick or injure any person or other horse.

Held, that although under the Roman and Dutch Laws the

	PAGE
<i>defendant would, as owner, have been liable for damages, unless he tendered to surrender his horse as compensation, he cannot, under the law of the Colony, be held liable in the absence of any culpa.</i>	
<i>The case of Seavill v. Colley (9 Juta 39) followed.</i>	
Parker v. Reed	720
Payment by cheque, <i>see</i> Agent ...	701
Payment of debts, <i>see</i> Executor...	438
Payment to agent, <i>see</i> Principal and agent	288, 472
Payment to agent, <i>see</i> Promissory note	357
Payment by husband to enable wife to bring action for surgical expenses—Alimony.	
Maxey v. Maxey	819
Pension, <i>see</i> Insolvent	902
Perjury—Proof.	
<i>In the course of three separate trials respecting the ownership of certain cattle, M. had made contradictory statements on oath. His statements at the first and third trials agreed, but were contradicted by his statement at the second trial. He was thereupon tried and convicted in the R.M. Court for perjury committed at the second trial. No evidence was led to show that the statement he then made was false.</i>	
<i>Held on appeal, that the perjury had not been proved and the conviction must be quashed.</i>	
Rex v. Mangoba	507
Personal injury — Negligence — Damages.	
Anderson v. Caledon Baths, Ltd.... ..	458
Personal injury — Negligence — Responsibility of building contractor.	
Stracey v. Adams	898

	PAGE
Personal injury—Negligence.	
Alexander v. Muir	576
Personal injury — Negligence — Orders of superior officers.	
Mulvey v. Cape Government Railways	894
Personation, <i>see</i> Election petition	949
Penalty Forfeiture—Liquidated damages — Statutory confirmation of contract.	
<i>The plaintiff, under an agreement with the defendant, obtained a concession to construct a line of railway within a prescribed period, and the defendant undertook to pay a subsidy for such construction, but stipulated by clause 17 that in case of non-completion within such prescribed period certain large sums of money lodged with or retained by him as security should be forfeited as and for liquidated damages, and that thereupon such agreement should cease and determine, and it should be lawful for the defendant to take possession of the incomplete line and pay to the plaintiff the actual cost, less the moneys so lodged or retained. By the following clause the parties agreed that the ordinary rules of law regarding the recovery of penalties for breaches of contract should not apply to certain specified breaches by the plaintiff after completion of the line.</i>	
<i>Held, that the ordinary rules relating to the recovery of penalties for breaches of contract should be applied in case of a breach by the plaintiff of any obligations entered into by him under the 17th clause. The 9th clause of Act 19 of 1900 enacted that the agreement, which was set forth in a schedule to the Act, "is hereby confirmed, and shall have the same force and effect as if it</i>	

	PAGE
<i>were set forth fully in the body hereof."</i>	
<i>Held, that this enactment would not justify the Court in applying different rules of construction to the 17th clause from those which would have been applied if the agreement had not been so confirmed.</i>	
<i>Held further, that as the large amounts stipulated to be forfeited, exceeding £110,000, are manifestly out of all proportion to the damages suffered or inconvenience undergone by the defendant by reason of the non-completion of the subsidy line, the penalty of forfeiture should not be enforced notwithstanding that the sums are made payable "as and for liquidated damages."</i>	
Hills v. Colonial Government	39
Peritia Artis, <i>see</i> Architect	... 747
Petition—Transfer—Act 19 of 1891.	
<i>A firm was owned by several proprietors in undivided shares, and a partition was effected by which the applicant and two other proprietors obtained a share, divided from the shares of the remaining proprietors, but the share thus obtained by the applicant and two proprietors remained undivided as between them.</i>	
<i>Held, that the 12th section of Act 19 of 1891 was not applicable to the applicant's undivided portion.</i>	
Nieuwoudt v. Registrar of Deeds	... 231
Petition of creditors, <i>see</i> Sequestration, compulsory	... 83, 148
Plans, <i>see</i> Engineer	... 201
Plays, <i>see</i> Copyright	... 97
Plea—General denial—Exception.	
<i>The defendant by his plea referred to each paragraph of</i>	

	PAGE
<i>the declaration and denied the allegations therein contained.</i>	
<i>Held, there was no ground for exception taken to the plea, but the costs of the exception were allowed to stand over until it should appear at the trial whether or not every allegation was intended to be denied.</i>	
Price & Co. v. Webner	... 631
Plea in abatement, <i>see</i> Promoters of company	... 995
Pleading—Libel.	
<i>If it intended to plead justification in an action for libel, that defence must be pleaded specifically.</i>	
Wright and another v. the Cape Times, Ltd.	... 581
Pleading <i>see</i> Negligence	... 718
Police Offences Act, section 14—Proof of authority—Police officer.	
<i>In a prosecution for a contravention of the 14th section of Act 27 of 1882, the demand for admittance was made by a policeman, but there was no proof that he had been thereto authorized by any officer of police or chief constable.</i>	
<i>Held, that in the absence of such proof, the defendant had been wrongfully convicted of such contravention.</i>	
Rex v. Lang	... 301
Power to sue, <i>see</i> Company	... 492
Power of attorney to sue—Signature by trustee for self and co-trustees.	
<i>Where an action is brought by two or more trustees of an insolvent estate, the power of attorney to sue must be signed by or on behalf of all the trustees, but where one of the trustees produces a power signed by his co-trustee or co-trustees to sign the power to sue on his or their behalf, it is not a sufficient objection to</i>	

	PAGE
<i>such power to sue that it is signed by on'y one trustee "for self and co-trustees."</i>	
<i>The cases of Trustees of Dodds v. Watson (1 Menz. 140) and Walker v. Beetons Trustees (Buch. for 1868, p. 225, and for 1869, p. 38) distinguished.</i>	
Muller Bros. v. Lombard ...	973
Practice—Ejectment—Motion.	
<i>Where the plaintiff had issued summons for ejectment.</i>	
<i>Held, that ejectment could not under the circumstances be granted on motion.</i>	
Roos v. Chetty ...	714
Pre-emption, right of, <i>see</i> Consideration ...	408
Preference, <i>see</i> Debentures ...	551
Prescription, <i>see</i> Registration ...	614
Presentment, <i>see</i> Promissory note	691
Previous conviction—Lashes.	
<i>B. was convicted of having broken into a store on April 2nd. He was, being a minor, ordered to complete the term of his apprenticeship till his majority. He was subsequently convicted of a theft committed on February 1st, and sentenced to lashes. The latter sentence was quashed.</i>	
Rex v. Bezuidenhout ...	496
Principal and agent—Payment to dishonest agent.	
<i>Defendant had made a payment by cheque to one S., who had sold certain sheep to him as plaintiff's agent. S. there-upon forged plaintiff's indorsement on the cheque and converted it to his own uses.</i>	
<i>Held, that as S. was known to the plaintiff to be a man of doubtful character, and the defendant had acted bona fide, this payment to plaintiff was good.</i>	
Abel v. Elliott & Co. ...	288

	PAGE
Principal and agent—Promissory note—Payment to agent.	
<i>J. had engaged one S. to raise a loan. S. approached H., who advanced the money on J.'s promissory note, "payable to H. or order at S.'s office." J. paid the money to S., who, before paying it over to H., became insolvent. H. now sued J. on the promissory note.</i>	
<i>Held, that H. was not entitled to recover.</i>	
Heydenrych v. Jeffery ...	472
Principal and agent—Tacit agency	
Notice of revocation of authority.	
<i>The defendant Club had for several years been in the habit of buying their market supplies on credit from the plaintiff Company, through the Club steward, until the appointment of G. as steward. G. continued for two months to buy market supplies on credit from the plaintiff Company, and the Club continued to pay for them. The Club then entered into an agreement with G., by which he was appointed manager, charged with the duty of catering for the Club, but without authority to pledge the credit of the Club. No public notice of this agreement was given nor was private notice given to the plaintiff Company, which continued for seven months, to supply goods on credit to G., in the belief that they were selling to the Club.</i>	
<i>Held, that in the absence of any knowledge on the plaintiff Company's part of the change in G.'s position, they were entitled to recover from the Club the price of the goods thus supplied.</i>	
Bulawayo Market Co. v. Bulawayo Club ...	370
Principal and agent—Onus of proving agency.	
Levenson v. Vurick ...	858

	PAGE
Principal and agent—Payment to authorized agent.	
Heydenrych v. Dunman ...	909
Principal and agent, <i>see</i> Verbal lease ...	879
Principal and surety—Construction of contract—Interest.	
<p><i>The defendants, as sureties and co-principal debtors, undertook to pay to the plaintiff Bank on demand all sums of money which the principal debtor should from time to time owe to the Bank, "provided, nevertheless, that the total amount to be recoverable from them shall not exceed in the whole the sum of £3,900, together with such further sum for interest, charges and costs as shall from time to time have accrued or become due and payable thereon."</i></p> <p><i>Held, that the defendants were liable for interest on the debtor's overdraft of £3,900 for the whole period covered by the guarantee and not merely from the date of demand for payment made on them.</i></p>	
National Bank v. Graaff ...	680
Procedure, <i>see</i> Commission ...	671
Promissory note—Note payable at a particular place—Maker—Holder—Presentment for payment—Agency.	
<p><i>On the due date of a promissory note for £105, made by the defendant in favour of the plaintiff, and payable at the office of one S., the plaintiff presented the note for payment at the office of S., where a letter, written by the defendant, asking for a fortnight's extension, was handed to the plaintiff. The plaintiff accordingly allowed the extension of time, after the expiration of which he repeatedly requested S. to pay, but was put off with the excuse that he had not yet</i></p>	

	PAGE
<p><i>succeeded in raising a permanent loan for the defendant. In fact, S. had raised the loan, and out of the proceeds had, at the end of the fortnight's interval, received payment of the note, which, however, he had not in his possession and could not hand over to the defendant. S. having absconded, the plaintiff sued the defendant, who set up the defence that S. was the agent of the plaintiff to receive payment of the note.</i></p> <p><i>Held, on failure of proof of such agency, that the defendant, as maker, remained liable on the note of which the plaintiff was still the legal holder.</i></p>	
Heydenrych v. Jeffery ...	691
Promissory note—Principal and agent—Agent's authority to receive payment.	
Heydenrych v. Hoctor ...	357
Promoter of company—Novation.	
<p><i>The defendant, who at the time was promoting a limited liability Company, bought certain goods from the plaintiff for the use of the intended Company, but he bought the goods in his own name, and the plaintiff debited the defendant in his books with the price. The Company was afterwards formed, and the plaintiff on one occasion sent an account for payment to the Company, but on another occasion the defendant gave him his own cheque in part payment.</i></p> <p><i>Held, that the mere sending of the account by the plaintiff to the Company did not constitute a novation or release the defendant from his liability.</i></p>	
Price & Co. v. Webner ...	851
Promoters of company—Partners—Joint and several liability—Nonjoinder—Plea in abatement.	
<p><i>The defendant and S. and K. employed the plaintiffs, who</i></p>	

	PAGE
<i>were attorneys, to do the professional work in connection with the promotion and registration of a company, and afterwards S. and K. each paid one-third of the professional charges, but the defendant refused to pay his share.</i>	
<i>Held, that the promoters of a company are not necessarily partners, and that the defendant could not lawfully object to the nonjoinder of S. and K. as defendants in an action brought against himself by the plaintiffs for one-third of their claim.</i>	
Walker and Jacobsohn v. Norden	995
Proof of authority of police officer, <i>see</i> Police Offences Act	301
Proof of status, <i>see</i> Medical practitioner	296
Provisional sale, <i>see</i> Sale and purchase	328
Provisional sentence—Damages.	
<i>Damages cannot be set up as a defence against a claim for provisional sentence.</i>	
Hales, Caird & Co. v. Boesen	485
Provisional sentence — Incorrect plan.	
<i>The Court refused provisional sentence for the purchase price of certain property where defendant alleged that the plan exhibited at the sale was incorrect.</i>	
Buykes v. Truike Bros. ...	377
Provisional sentence—Promissory note—Proof of allegations in affidavit.	
<i>The Court granted postponement of a provisional case, in order to enable the defendant to produce proof of certain allegations contained in her affidavit, which, if proved, would be a good defence to plaintiff's claim.</i>	
Heydenrych v. Frame ...	377

	PAGE
Provisional sentence—Surety.	
<i>The Court refused provisional sentence against a surety, the principal debtor not having been excused; although the principal debtor was absent from the country, and it was alleged, but not proved, that he was insolvent.</i>	
Verster and another v. Pienaar	318
Provisional sentence—Conflict of evidence.	
<i>The plaintiff sued defendant on an acknowledgment of debt signed by her as surety and co-principal debtor on behalf of her husband (an insolvent). The husband alleged that this debt had been paid, and in this he was supported by the affidavit of another deponent, but no receipt was produced.</i>	
<i>Held, that provisional sentence must be refused and the parties directed to go into the principal case</i>	
Heydenrych v. Frame ...	632
Provisional sentence — Legal holder of bill—Knowledge of equities.	
<i>On a claim for provisional sentence by the holder of a bill of exchange against the acceptor, the defence was raised that the goods for the price, of which the bill had been accepted, did not correspond to the goods actually bought, but the plaintiff denied any knowledge of any defence which the acceptor might have against the drawer.</i>	
<i>Held, that the plaintiff was entitled to provisional sentence.</i>	
Northampton Bank v. Ward & Co.	566
Provisional sentence—Renunciation of benefits by woman.	
<i>Where the Court was not satisfied that the legal effects of renunciation of benefits had been duly explained to a woman who had signed a</i>	

	PAGE
<i>promissory note as a co-principal debtor, provisional sentence was refused.</i>	
Smalberger v. Keller	... 772
Purchase and sale—Transfer—Tender—Divisible obligation—Non-joinder of parties—Exceptions.	
<i>The plaintiff and one R. bought from the defendant four farms for £11,500, the price being payable in two instalments and by bond to be passed by the purchasers for the balance. After paying half an instalment, R. became insolvent, and the plaintiff, after paying half an instalment, tendered to pay half of the second instalment and to pass a bond for half the balance, and he claimed transfer of one-half undivided share of the farms.</i>	
<i>Held, on exceptions to the plaintiff's declaration, that the obligation to pass transfer is indivisible, and that the plaintiff's tender of half the purchase price does not entitle him to claim transfer of half the farm.</i>	
Delpont v. Nesper	... 861
Purchase "on call," see Share broker...	... 271
Qualifications, see Law agent	... 781
Quantum minoris, see Guarantee	... 975
Quantum minoris, see Sale and purchase	... 609
Quantity surveyor, see Architect	747
Quantity surveyor—Partnership—Division of profits.	
Holland v. Sherwood	... 393
Railway, see Freight	... 563
Railway bye-laws, see Act 19 of 1861	... 261
Rebel—Belligerent rights—Commandeering.	
Estate Williams v. Nel	... 998

	PAGE
Rebellion, see Treason	... 118
Receipt—Payment of money—Cheque—Stamp.	
<i>The appellant wrote to V. and B., who owed him money, asking them to send a cheque for the amount. They sent their cheque, whereupon the appellant gave them a receipt, as follows: "Received cheque." V. and B. had funds in the bank which was solvent, and honoured the cheque when presented.</i>	
<i>Held, that the receipt was equivalent to a receipt for the payment of money and required a penny stamp.</i>	
Rex v. Standen	... 397
Receivers, see Liquidation	... 87
Rectification of register, see Trade mark	... 404
Registration, see Ante-nuptial contract	... 381
Registration of title—Prescription.	
<i>The applicant bought one-eighth of a farm and entered into occupation. He afterwards sold one-sixteenth and remained in occupation of that portion. The total period of his occupation exceeded 30 years. After the applicant had sold one-sixteenth, it was discovered that the person from whom he had bought was the registered owner of one-sixteenth only. The applicant obtained a rule, calling on persons claiming the one-sixteenth, to show cause why the applicant should not by reason of his occupation for over 30 years be registered as the owner of the one-sixteenth. The owner of the one-sixteenth in question was dead, and his heirs did not oppose the application. A person claiming to have derived a title from such owner opposed, but as he shewed no better title than the</i>	

	PAGE
<i>applicant, the rule was made absolute.</i>	
<i>Ex parte Malherbe</i> ...	614
Release from civil imprisonment.	
<i>The Court granted an order for the release of a debtor from civil imprisonment on its appearing that he had no means of paying his debt.</i>	
<i>Taboriski v. Hoffenberg</i> ...	396
Remit to Magistrate—Act 20 of 1856.	
<i>Where a charge of house-breaking had been remitted to a Magistrate for trial under Act 20 of 1856, and the Magistrate had imposed a sentence of nine months' imprisonment; the sentence was, on review, reduced to three months.</i>	
<i>Rex v. Plaatjes</i> ...	312
Removal of bar.	
<i>Laidlaw, Mackill & Co. v. Baker, Baker & Co.</i> ...	1019
Removal of building, see Encroachment ...	135
Removal of trial from Circuit Court to Criminal Sessions of Supreme Court — Postponement of trial.	
<i>Ex parte Vyner</i> ...	228
Removal of trial, see Jury ...	783
Rent, see Interdict ...	504
Rent—Breach of condition by lessor—Cancellation of lease—Damages.	
<i>In an action for rent the defendant filed a counter claim for damages alleged to have been sustained by him by reason of the plaintiff having let adjoining premises to a fruiterer in breach of a condition of the lease. The counter claim, however, was withdrawn, but the Magistrate gave judgment for the defendant, on the ground that the plaintiff having broken</i>	

	PAGE
<i>a condition of the lease, was not entitled to rent.</i>	
<i>Held, that as the defendant remained in occupation, and did not claim a cancellation of the lease and had withdrawn the counter claim for damages, the Magistrate ought to have given judgment for the amount of the rent.</i>	
<i>Levy and another v. Coliwas</i> ...	236
Rent, see Interpleader ...	240
Repudiation of contract.	
<i>The plaintiff entered into a contract for the purchase of 100 bottles of milk a day from the defendant. The milk was to be fetched by the plaintiff, but on the day on which the first delivery was to be made, the plaintiff did not appear, nor on the second day. From this and other circumstances the defendant came to the conclusion that the plaintiff had repudiated his contract. The plaintiff having subsequently found a purchaser of the milk at a profit, claimed it from the defendant. The Magistrate having found from the whole of the evidence that the plaintiff repudiated the contract; the Court, on appeal, refused to disturb the finding.</i>	
<i>Green v. Le Roes</i> ...	38
Rcs religiosa—Burial ground.	
<i>The Court refused to grant leave on motion to remove the bodies from a certain burial ground and to sell the same.</i>	
<i>Ex parte Van Niekerk</i> ...	482
Resident Magistrate's jurisdiction — Trespass—Right to occupy land.	
<i>Yolo v. Majiyezi</i> ...	308
Resident Magistrate's Court—Jurisdiction — Damages — Trespass — Right of way — Bona fide defence.	
<i>To a summons for trespass in a Magistrate's Court, the de-</i>	

PAGE	PAGE
<i>fendant excepted on the ground of want of jurisdiction, inasmuch as he claimed a right of way over the plaintiff's land. The Magistrate thereupon took the evidence of the defendant's witnesses, and finding that there was no prima facie case in support of the existence of such a right of way, he overruled the exception.</i>	Retail sale, <i>see</i> Liquor laws ... 650
Held on appeal, that, as in the absence of such a prima facie case, the defence could not be held to be a bona fide one and that consequently the jurisdiction was not ousted.	Return of goods, <i>see</i> Sale and purchase ... 754
Haak v. Basson ... 946	Review—Admission and rejection of illegal evidence.
Resident Magistrate's Court—Civil action—Noting appeal—Leave to appeal.	<i>The defendant was charged in a Magistrate's Court with the offence of obstructing a public road, and the only evidence given by the prosecution was the record of a conviction against another person of having obstructed the same road. The defendant tendered evidence to prove that the road was not a public road, but the evidence was rejected, on the ground that after the previous conviction the road must be held to be a public road.</i>
<i>The defendant, in a Magistrate's Court, against whom judgment was given in an action for rent, noted an appeal with the Clerk three days after the next Court day, under a mistaken impression as to the days on which the Court usually sat.</i>	Held on review, that the evidence tendered ought to have been admitted, as it was material to the issue, the proceedings were set aside.
Held, that it was competent for the Supreme Court to give leave to appeal notwithstanding the omission to note an appeal on the next Court day after judgment, and as important interests were involved and the appeal was not shown to be frivolous, the Court granted leave to appeal.	Rex v. De Stadler ... 398
Afrika v. Rhenish Mission Society ... 945	Review—Appeal—Irregularity of proceedings.
<i>Restitutio in integrum, see</i> Executor 591	<i>On a summons for a review of proceedings in an inferior Court, it is not competent for the applicant to raise the question, whether upon a fair survey of the evidence the decision ought not to have been in his favour, but the applicant should confine himself to the grounds of review authorized by the law.</i>
Restitution of conjugal rights.	Rex v. Ball ... 488
<i>The Court granted a decree for restitution of conjugal rights even though the applicant appeared somewhat unwilling to rejoin her husband. The husband was directed to furnish the applicant with means wherewith to defray costs of her journey.</i>	Review, <i>see</i> Valuation Court ... 220
Stevens v. Stevens ... 131	Right to land, <i>see</i> Alien ... 247
	"Right of way"—Cancellation of sale—"Right of way" is equivalent to "via."
	<i>Where G. sold land to P. on the following condition of sale: "Purchaser to have a right of way over the remaining extent,"</i>
	Held, that on offer by G. to P. of a passage 3 feet wide did

	PAGE
<i>not comply with the above condition.</i>	
<i>Semble, that 8 feet was the least width that P. could be compelled to take.</i>	
Pietersen v. Estate of Gabrielse	320
"Right of way," <i>see</i> R.M. Court	946
Right to occupy land, <i>see</i> R.M.'s jurisdiction	308
Rule of Court, No. 8, <i>see</i> Misjoinder of parties	939
Sale and purchase—Breach of contract.	
Cook v. Schreiber	446
Sale and purchase—Provisional sale — Agency — Scope of agent's authority.	
<i>W. had instructed one C. to buy certain property for him at a public auction for £7,000. A portion of the property was put up provisionally and knocked down to C. for £4,500. W. at once repudiated C.'s agency. W. being sued to complete his purchase and take transfer.</i>	
<i>Held, that as C. had not acted within the scope of his authority, and moreover as a provisional sale binds neither purchaser nor vendor, W. was justified in repudiating C. as his agent, and that absolution must be granted from the instance.</i>	
Cohen v. White	328
Sale and purchase—Theft.	
Rex v. Louw	432
Sale and purchase—Verbal contract.	
Langford v. Miles, Boyd & Co.	502
Sale and purchase—Conditional purchase.	
Cunningham and Cortese v. Rutherford	144

	PAGE
Sale and purchase—Patent defect.	
Van Holdt v. Blake	105
Sale and purchase—Principal and agent — Promissory note — Consideration.	
Wrensch v. Crafford	115
Sale and purchase, <i>see</i> Fixtures ...	205
Sale and purchase—Locatio operis — Price—Tailor.	
<i>The plaintiff, a tailor, having delivered a suit of clothes ordered by the defendant, the latter refused to take it, on the ground that the coat did not fit, and refused to give the plaintiff the opportunity to alter it, so as to make it fit. It was proved that the coat might have been so altered if the defendant had allowed the plaintiff to fit it in the ordinary manner.</i>	
<i>Held, that the plaintiff, who tendered the suit, was entitled to recover the price agreed upon.</i>	
Theunissen v. Burns	606
Sale and purchase—Suitability of goods supplied for a specific purpose.	
Toucher v. Oosthuizen	875
Sale and purchase—Warranty of quality— <i>Quanti minoris.</i>	
<i>The defendant having bought a quantity of eggs from the plaintiff, asked him not to deliver them at once. The plaintiff kept the eggs, ready packed, for about fourteen days, and then sent them to the defendant, who found that some of them had gone bad and had them publicly sold at the plaintiff's risk.</i>	
<i>Held, in an action by the plaintiff for the price, that although the plaintiff must be held to have warranted the eggs to be fit for the purpose for which they had been intended, this warranty did not extend</i>	

PAGE	PAGE
<i>beyond the time when the defendant ought to have accepted delivery, and that the defendant was not entitled to deduct from the purchase price the difference between such price and the amount realised at the public sale.</i>	Sale and purchase—Return of goods.
Moritz v. Murray ... 609	Oosthuysen v. Wassung ... 754
Sale and purchase—Magistrate's finding on facts.	Sale and purchase—Time limit—Damages.
Stofberg v. Altschul ... 752	Scott v. Vellinghausen ... 658
Sale and purchase—Non-delivery of goods sold according to sample—Damages.	Sale and purchase, <i>see</i> Contract ... 870
<i>The defendant, a merchant in this Colony, purchased boots in separate lots and at different prices from the plaintiff, a manufacturer in London, and paid part of the price. On arrival of the boots in the Colony, the defendant rejected several lots, which were wholly unmerchantable and not according to sample, and gave notice to that effect to the plaintiff.</i>	Sale and purchase, <i>see</i> Hotel licence... ... 923
Held in an action to recover the balance of the price and the cost of insurance and freight paid by the plaintiff, that as the plaintiff had failed to deliver certain boots according to sample, the defendant was entitled, by the <i>actio empti</i> , to claim in reconvention delivery of such boots or damages for non-delivery.	Sale by auction, <i>see</i> Option of purchase ... 239
Held further, that the measure of damages was the difference between the contract price and the price at which the defendant could purchase goods according to sample in the local market, and that in the amount of the contract price should be included the expenses which under his contract the defendant had to bear for the conveyance of the boots to South Africa.	Sale of bequeathed property, <i>see</i> Legacy ... 755
Solomon v. Stefani ... 729	Sale to Non-combatants, <i>see</i> Trading with enemy... 699
	Salesman, <i>see</i> Servant ... 621
	Sanitation, <i>see</i> Municipal regulations ... 401
	Scab Inspector—Acts 28 of 1889 and 20 of 1894.
	<i>M., a duly appointed scab inspector, during the Martial Law regime failed to obtain a permit from the Military to visit his district and discharge his duties. The evidence showed that he was always ready and willing to perform the same. He was thereupon suspended by the Agricultural Department, but did not receive the letter notifying his suspension.</i>
	Held, that he was entitled to the full amount of his salary accruing during the period of such suspension.
	Van der Merwe v. Colonial Government ... 732
	Scots' Law Agent, <i>see</i> Attorney... 890
	Security, <i>see</i> Lease ... 448
	Seller and purchaser—Claim in reconvention — Independent contractor.
	Sivertsen v. Austin ... 35

	PAGE		PAGE
Sequestration, compulsory—Petition of creditor.		of money which, as salesman, he ought to have put into the till.	
<i>The petition of a creditor who applies for the sequestration of an estate must either allege that the debtor has committed an act of insolvency, or (1) that his claim is for £100 or more, (2) that the debtor is insolvent, and (3) that it is for the benefit of his creditors that his estate should be sequestered.</i>		Held, that this was an act of misconduct which justified the plaintiffs in dismissing the defendant, that they were not liable for his current month's salary, and that they were entitled to a refund of the passage money.	
Hoffmann v. Black ...	83	Robertson & Co. v. Heathorn	621
Sequestration, compulsory—Petition of creditors—Proof of insolvency.		Service of articles outside Colony, see Attorney ...	836
<i>The petition of creditors for the compulsory sequestration of a debtor's estate must state clearly that the estate is insolvent and that it is to the advantage of the creditors that it should be sequestered. The facts that considerable debts are due and unpaid and that judgments obtained against the debtor remain unsatisfied are not conclusive proofs of insolvency, but coupled with other circumstances, raise a strong presumption of insolvency.</i>		Service of stallion.	
Krumm v. Black ...	148	<i>The plaintiff, having let his donkey stallion to the defendant, for the purpose of serving the defendant's mares, brought an action in the Magistrate's Court for money alleged to be owing to him for such service, and proved that the stallion had run with the mares, but gave no evidence that he had actually served the mares or that any of them were in foal.</i>	
Sequestration—Provisional order—Discharge.		Held on appeal, that the Magistrate had properly granted absolution from the instance.	
Friedman Bros. v. Morrison	790	Vermeulen v. Swart...	407
Servant — Salesman — Salary — Misconduct.		Service, short—Costs.	
<i>By a contract entered into between the plaintiffs and the defendant in England, the former engaged the services of the latter as a salesman in this Colony for three years at a monthly salary, and agreed to pay for his passage to the Cape, with a condition that in case he should leave without sufficient cause before the expiration of the three years, the plaintiffs should be entitled to a refund of the passage money. After serving for two years, the defendant was discovered to have concealed a sum</i>		Jacobssohn v. Pretorius ...	61
		Services of minors—Contract with parents—Manager of operatic troupe.	
		<i>The applicant was the manager of a juvenile operatic troupe, consisting of girls under age, who had been engaged by H. in Australia by agreement with the parents for a tour in South Africa. During the tour H. died, and his wife was employed after his death by the applicant (who claimed to have been a partner of H.) as matron of the children. The applicant having dismissed her, she started an operatic troupe of her own, which was joined by several of the girls.</i>	

PAGE	PAGE
Held, in the absence of any indication of the parents' wishes, that the applicant had no better right to the services of the children than Mrs. H., and that he was consequently not entitled to an order that they should return to his service.	Subscription dance, <i>see</i> Liquor Acts 305
Seccombe v. Hall 5	Subsidence of buildings, <i>see</i> Party wall 185
Servitude, <i>see</i> Party wall... .. 180	Substitution, <i>see</i> Will 593
Set off, <i>see</i> Magistrate's jurisdiction 244	Succession to (Native) intestate estates, <i>see</i> Native Territories 225
Shares, <i>see</i> Broker 583	Suits between Natives, <i>see</i> Native Territories 225
Share broker—Purchase "on call"—Evidence, oral and written.	Surety and principal debtor—Guarantee—Giving time—Novation.
Colton v. Van Almelo ... 271	<i>The plaintiff obtained judgment in a Magistrate's Court against H. for £60, but a stay of execution was ordered on his undertaking to pay off the debt in monthly instalments of £5, and the defendants guaranteeing the due payment of such instalments. On the debtor's failure to pay the first instalment, a decree of civil imprisonment was obtained against him, to be suspended pending payment by him of £1 per month.</i>
Shareholders' liability, <i>see</i> Company 360	Held, in an action against the defendants for the payment of the first instalment of £5 under their guarantee, that they were not discharged by reason of such order suspending execution.
Share certificates endorsed in blank, <i>see</i> Negotiable instruments 64	Skelton v. Shelvoke and Smith 981
Short delivery, <i>see</i> Arbitrator ... 827	Surety, <i>see</i> Provisional sentence 318
Slander.	Surety and principal debtor—Undue preference—Costs of defending action for undue preference.
Du Plessis v. Blumberg ... 138	<i>The plaintiff advanced to D. the sum of £40, for which the defendant became surety, and the defendant and D. signed an I.O.U. in favour of the plaintiff. In due course D. paid the amount, but afterwards became insolvent, upon which the trustee of his insolvent estate brought an action for undue preference against the</i>
Specific purpose, goods supplied for, <i>see</i> Sale and purchase ... 875	
Spoliation—Costs.	
Wilson and Cathcart v. Young 1017	
Spoor evidence.	
<i>Evidence that a certain spoor might have been made by the foot of an accused, the spoor being an old one and not clearly traceable all the way to accused's hut, held not be of itself sufficient evidence to support a conviction.</i>	
Rex v. Mofnking and Kotzé 864	
Stamp, <i>see</i> Receipt 397	
Stay of execution, <i>see</i> Judgment 216	
Stock theft, <i>see</i> Acts 44 of 1885 and 35 of 1893 1005	
Subletting, <i>see</i> Landlord and tenant... .. 331	

	PAGE		PAGE
<i>plaintiff. The plaintiff gave notice of the action to the defendant, and informed him that he would be held liable for the costs, but received no answer. The trustee succeeded in his action, but the Court found that there was no collusion with plaintiff, and ordered the trustee to give an indemnity under the 90th section of the Insolvent Ordinance.</i>		<i>found there was no identity and not such a resemblance as would be calculated to deceive.</i>	
<i>Held, in an action brought by the plaintiff to recover the £40 and the costs of the previous action from the defendant, as surety, that he was entitled to succeed.</i>		<i>Held, that as both marks had been in use for several years, as no case of actual deception had been proved, and as there was no proof whatever of fraud on behalf of the defendants, who were not aware of the applicants' mark when they designed theirs, there was no ground for the rectification of the register.</i>	
Hattingh v. De Wet...	334	Exshaw & Co. v. Van Ryn Wine and Spirit Co. ...	404
Survivor's election, <i>see</i> Will ...	16	Trade mark—Similarity of trade marks—Decision of Registrar.	
Suspension, <i>see</i> Attorney ...	223	Rosebank Match Co. v. Jonkopingssoch Vulcans Tandsticksfabricks Akne- bolag ...	616
Tacit agency, <i>see</i> Principal and agent ...	370	Trading with the enemy—Sale to non-combatant.	
Tacit agreement, <i>see</i> Harbour Board ...	351	Rossouw v. Vlok ...	699
Theft from employer—Rules of firm.		Trading without licence—Carrying on business of general dealer.	
Rex v. Parent ...	997	<i>The accused, a shunter on the railway, bought a job lot of goods at a sale without knowing what was in the parcel and without any intention of dealing in the contents. Finding that the parcel contained watches, he gave away three and sold the remaining three to some railway workmen.</i>	
Theft, <i>see</i> Defamation ...	728	<i>Held, that the sale was an isolated act which was not sufficient to prove that the accused had carried on the business of a general dealer.</i>	
Time limit, <i>see</i> Building contract	712	Rex v. Kukard ...	302
Time limit, <i>see</i> Sale and purchase	658	Transkeian Territories—Governor's Proclamation— <i>Ultra vires.</i>	
Trade-mark — Rectification of register—Deception.		<i>The Governor, acting under powers conferred on him by Statute, issued a Proclamation, whereby it was enacted, inter alia, that in case a certain</i>	
<i>The respondents' trade-mark having been registered for nine years, an application was made to the Registrar by the applicants to have their trade-mark registered, but he refused, on the ground of what he conceived to be the similarity of the marks. The applicants thereupon applied to the Court for the rectification of the respondents' registered mark, on the ground that the applicants had used their mark and registered it in France before the respondents registered theirs in this Colony. On a comparison of the marks, however, the Court</i>			

PAGE	PAGE
<p>general rate assessed in the Transkeian Territory should remain unpaid for a period of three months, it should be lawful for the Magistrate to issue his warrant, authorizing the levy of the amount by sale of the goods and chattels of the defaulter. The petitioner being in default, some of his goods were attached under such warrant, whereupon he applied for an interdict, restraining the sale on the ground that the enactment was <i>ultra vires</i>.</p> <p>Held, that the provision as to levy of goods was within the power of the Governor in regard to rates actually due.</p> <p>The Proclamation further enacted that should the proceeds of the sale be insufficient to meet the payments due, the defaulter shall, on conviction, be liable to be punished as an idle and disorderly person.</p> <p>Held, that until the petitioner had been proceeded against under this part of the Proclamation, the Court was not in a position to decide as to its validity.</p> <p>Ngono v. Colonial Government ... 635</p> <p>Treason — Rebellion — Acts of regular warfare.</p> <p>The appellant was tried before a jury for five distinct assaults, with intent to do grievous bodily harm. The evidence shewed that the accused, who was a British subject, committed the assaults while engaged in rebellion, that the assaulted persons were severely beaten, and in some cases kicked without previous trial, and that the accused himself had not been tried for treason or rebellion. There was no evidence that the accused had been recognised by the British authorities as a belligerent, or that the acts complained of were acts of regular warfare, and the best evidence was not</p>	<p>produced that he had been commanded by his superior officers to commit the acts complained of. The judge, at the trial, charged the jury that such evidence would constitute no defence to the indictment.</p> <p>Held, that even if the charge was not correct in law, the judgment should be confirmed in the absence of proof that the acts complained of were regular acts of warfare.</p> <p>Rex v. Louw ... 118</p> <p>Trespass — Damages — Cultivated land.</p> <p>Where a person has the right to enter upon the land of another for the purpose of repairing a watercourse, the right should be exercised in such a manner as to do no unnecessary damage to the land entered upon.</p> <p>The appellant having such a right, repaired the watercourse by digging up portion of a lucerne field, although there was material available outside the lucerne field, a few yards from the watercourse.</p> <p>Held, that this constituted a trespass for which the appellant was liable in damages.</p> <p>Lipschitz & Toooh v. Sapiero 673</p> <p>Trespass, <i>see</i> Intordict ... 571</p> <p>Trust funds—Religious purposes — Right of subscribers to an account.</p> <p>Voerasamy v. Subbaya and another ... 590</p> <p>Trustee, right of, <i>see</i> Insolvent ... 901</p> <p>Trustee, signature of, <i>see</i> Power of attorney ... 973</p> <p><i>Ultra vires</i>, <i>see</i> Transkeian Territories ... 635</p> <p><i>Ultra vires</i>, <i>see</i> Municipal regulations ... 948</p> <p>Undue preference, <i>see</i> Insolvency 744</p>

	PAGE		PAGE
Undue preference—Ord. 6, 1843— Sec. 84 and 88.		Voluntary payment—Protest— Duress of goods.	
Insolvent Estate Eshack v. Allie	742	<i>The plaintiff having under protest paid licence money demanded from him by the C. Municipality for the grazing of his cattle on municipal pasture land, sought to recover back the money so paid, but produced no evidence that the cattle would have been detained unless the money were paid, or that there was duress of any kind.</i>	
Undue preference, <i>see</i> Insolvency	510	<i>Held, that the payment must be regarded as voluntary and that the plaintiff was not entitled to succeed.</i>	
Undue preference, <i>see</i> Insolvency	129	Vergotine v. Ceres Municipality	92
" " <i>see</i> Insolvent		Voluntary winding up, <i>see</i> Com- panies' Act	93
" Ordinance	140	Voluntary winding up, <i>see</i> Judg- ment	216
Unlawful detention of child, <i>see</i> Masters' and Servants' Act...	597	Wages, <i>see</i> Master and servant ...	546
Usufructuary.—Expenditure on usufructuary estate—Law costs.		Waiver, <i>see</i> Fixtures	205
<i>A usufructuary and adminis- trator should obtain the leave of the Court before incurring costs of defending an action in respect of a usufructuary estate in which minors are interested.</i>		Waiver, <i>see</i> Letting and hiring ...	916
<i>Ex parte Latogan</i>	78	Warranty, <i>see</i> Adulteration of foods	303
Valuation Court Over valuation —Mistake—Review.		Warranty, <i>see</i> Sale and purchase	609
City Tramways Co. v. Cape Town Town Council	220	Water—Municipal regulations— Act 39 of 1879, Secs. 35 and 37.	
Verbal injury, <i>see</i> Defamation ...	728	<i>Under certain regulations framed under Sec. 37 of Act 39 of 1879, the Municipality of G. forbade persons residing within a certain Municipal area to water gardens by means of hose pipes attached to pipes connected with the public water supply within certain hours. One F., being convicted of contravening this regulation, urged (on appeal) that it was ultra vires, inasmuch as the Act gave the Municipality no power to regulate the supply of water.</i>	
Verbal lease—Principal and agent —Pleading—Estoppel.		<i>Held on appeal, that under Sec. 37 of the Act the Council had power to make such regula-</i>	
<i>C. had entered into a lease of certain premises to F. verbally. C. afterwards refused to exe- cute a written lease, embodying the same terms. In an action to compel C. to execute this lease, or for damages, it was argued that F. was merely an agent.</i>			
<i>Held (1) That C. was bound by the verbal lease. (2) That F.'s agency should have been specially pleaded, and (3) That this not having been done, C. was now estopped from denying that F. was a principal.</i>			
Fleming v. Commins	879		
Verbal revocation, <i>see</i> Guarantee	72		
Vesting, <i>see</i> Will	761		

	PAGE
<i>tions as they might deem expedient for carrying out the powers as to supply of water, &c., thereby entrusted to them, and that hence the said regulations were intra vires.</i>	
Rex v. Farquharson...	865
Water—Weir—Reference to District Water Court.	
Estate De Wet v. Marais ...	214
Whipping, <i>see</i> Act 19 of 1861 ...	316
Wholesale butcher — Standing order.	
Pinnoy v. African and United Cold Storage ...	296
Wholesale licence, <i>see</i> Liquor Acts ...	307
Will—Construction.	
<i>The words in a will: "Should any of my children die" refer to the death of such children after the making of the will and not merely to death after the death of the testatrix.</i>	
De Smidt v. Estate Marting	200
Will—Foreign executor—Security—Rule 397.	
<i>Ex parte</i> Skelton and others	18
Will—Ordinance 15 of 1845.	
<i>The Court set aside a will, the testatrix having neither signed it nor acknowledged her signature in the presence of one of the witnesses.</i>	
Dunn v. Estate Dunn ...	132
Will, privileged—Administration—Survivor's election.	
<i>Ex parte</i> Huskisson and another ...	16
Will — Prohibition against alienation—Mortgage.	
<i>Ex parte</i> Slabbert and others	62
Will — Purchase of estate by beneficiaries—Transfer.	
<i>Ex parte</i> Theunissen and others ...	17

	PAGE
Will—Construction—Occupation—Legacy—Habitation—Rates and taxes—Rent.	
<i>A testator by his will directed as follows: My wife shall, so long as she shall decide to live in and occupy my house and grounds in my occupation at the time of my death, have the right of free occupation of the same." At the time of his death he was living in a hired house at R., but a residence was in course of construction for him, by contract, on part of an estate acquired by him at K. There was another house on this estate which, at the time of his death, had for two years been and still was in the occupation of a lessee.</i>	
<i>Held, in an action by the testator's wife against his executors for a declaration of rights, that the plaintiff was entitled to the free occupation of the estate at K., including the newly-built residence, but not the house occupied by the lessee.</i>	
<i>Held further, that the plaintiff was not entitled to claim exemption from the payment of water rates or electric light charges or municipal tenant's rates, but that the estate was liable to pay the Divisional Council rates and the Municipal owners' rates and the necessary expenses to keep the residence in a habitable state of repair and was not entitled to demand from her payment of any rent.</i>	
Crosbie v. Crosbie's Executor and another ...	883
Will—Construction—Children—Grandchildren.	
<i>Husband and wife, by their joint will, bequeathed certain farms after the death of the survivor to the collective children (gezamenlijke kinderen) of the marriage, on condition that the farms should remain "perpetual family property so</i>	

PAGE

long as the law would allow it" to be possessed in succession by the male descendants of the testators' children aforesaid. At the time of the survivor's death there were several sons and daughters living, but one daughter C. had died during the lifetime of both testators, and her sons now claimed the life interest in the share which their mother would have enjoyed for her life if she had survived the testators.

Held, that it sufficiently appeared from the context of the will that in appointing their children as fiduciary legatees, the testators had regard to descendants of a remoter degree than the first, and intended to include children of their deceased daughter C.

Vermaak v. Vermaak ... 687

Will—Construction—Legacy to a class—Grandchildren—Distribution—Vesting—Executors.

The testator by his will made the following disposition: "The immovable property belonging to my estate shall continue under the administration of my executors for the benefit of my grandchildren, and the fruits, rents and interests therefrom accruing shall accumulate and remain with the immovable property under the administration of the executors until my youngest grandchild shall attain his 21st year of age, when, and no sooner, my immovable property shall be realized by public auction and my estate wound up, and the net proceeds be equally divided among my grandchildren, then alive, share and share alike.

Held, that grandchildren born after the testator's death and alive at the time of the youngest grandchild attaining his 21st year will be entitled to share in the distribution.

PAGE

Held further, that the grandchildren acquire no right transmissible to their heirs until the youngest grandchild born, or still to be born, shall attain his or her 21st year: that no distribution can take place so long as any of the testator's children are capable of procreating children, and that in the meantime the dominium is in the executors who hold the property in trust for those who in due time shall be entitled to share in the distribution.

Wentzel v. Brink's Executors (9 Juta, 328) followed.

Black's Heirs v. Estate Black and another ... 761

Will—Legacy—Construction—Direct substitution—Fidei commissary substitution.

Husband and wife, by will, bequeathed certain farms to their three sons subject to certain conditions, one of them being that the sons should show obedience to the testators during the lifetime of the latter. The will added that, if contrary to expectation, any of the three sons should die, the bequest should devolve on their respective sons, subject to the same conditions, including that of obedience to the testators.

Held, that a direct and not a fidei commissary substitution of the grandsons was intended.

Van der Merwe v. Executors of Van der Merwe ... 593

Will—Ord. 15 of 1845.

The Court granted an order, recognizing the validity of a certain will which, per incuriam, had not been signed on each leaf.

Ex parte Meyer ... 671

Winding up as insolvent, see Company ... 360

Winding up, see Company ... 918

	PAGE
Withdrawal of application for renewal of Liquor Licence, <i>see</i> Licensing Court ...	215

Witness—Committal for contempt—Hard labour.

Where a person duly summoned to give evidence in a criminal case before a Resident Magistrate fails to attend without any lawful excuse allowed by the Court, and having been fined in the sum of £5, admits his inability to pay the fine, the Court may commit him to gaol under Ordinance 6 of 1839, but no hard labour can be imposed.

Rex v. Bloem ...	988
------------------	-----

Witness—Privilege—Defamation

A witness is civilly liable for any defamatory statements he may volunteer in the course of his evidence in any judicial proceeding respecting the character of any person not before the Court if such statements are made falsely, maliciously and without reasonable or probable cause. Diepnaar v. Haumann (Buch. 1878, 135) followed.

Cohen v. Carn ...	362
-------------------	-----

Wood-cutting—Power of forest officer.

Peverett v. Gova ...	992
----------------------	-----

Wrongful dismissal, <i>see</i> Master and servant ...	204
---	-----



TABLE OF CASES.

VOL. XIV.—1904.

PAGE	PAGE
Abel, Estate of, <i>ex parte</i> 821	Arderne v. Berman 258
Abel v. Eliot Bros. 246, 288	„ v. Boyce... .. 259
Abel v. Storey 685	„ v. Dauw... .. 1008
Abrahams v. Esmail and Co. 775	„ v. McNaughton and
Abrahamse Bros. v. Kempman	Another 612
and Another 281	Arderne v. Pinkus 29, 1008
Ackerman v. Ackerman and	„ v. Pulvermacher ... 685
Another 263	„ v. Shunshundien ... 1008
Adam v. Adam 95	Arderne and Co. v. Stephan... 10
Adams v. Mohamed 568	“Argus” Company v. Mad-
Adamson v. Ackerman 345	docks 376
Adonis v. Mketshane 507	“Argus” Company v. Peacy 544
Africa v. A.M.E. Church 281	“Argus” Company v. Phil-
African Job Buying Co. v.	lips 319
Phillips 524	“Argus” Company v. Taylor 261
Africa v. Rhenish Mission	Ariefdien v. Siebett and Ste-
Society 945	phan 10
Agenberg and Others, <i>ex parte</i> 778	Armstrong v. Armstrong 571
Ahlbom Gullander and Co. v.	Arnold, Estate of, v. Denefs 454
Merry Bros. 164	Aronstain, <i>ex parte</i> 624
Albertyn, <i>ex parte</i> 817	Aronstain v. Maisel Bros. ... 280
Alford, Wills and Abbot v.	586, 601, 684, 738
Marks 28, 85	Askew and Co. v. Bray and
Alford, Wills and Abbot v.	Another 427
Cootes and Co. 2	Askew and Co. v. Wright ... 775
Alexander v. Muir 509, 576	Ashman v. Van Ellewee 489
Aling v. Durandt 611	Aspeling v. Allie and Another 487
Allen v. Milner 315	Aston v. Aston 90, 431, 1011
Allie v. Hardie 118, 292	Atkins v. Ings and Another... 486
Allie and Others v. Porter	Atmore v. Twine 452
and Barsdorf 55	Attridge v. Heyns 665
Ally, <i>ex parte</i> 90, 157	Attwell and Co. v. Chance ... 61
Ally v. Mohamed 260	Auret, <i>ex parte</i> 360
Amer v. Van der Bijl and Co. 580	Auret v. Davidson 525
Amsinck and Co., <i>ex parte</i> ... 317	Auret v. Smith 437
Anderson v. Caledon Baths	Auret, Estate of, v. Levitan... 854
135, 458	Austen, <i>ex parte</i> 487
Anderson v. Koen 486	Austin v. Morrel and Others 904
Andrews v. Vriedman 916	Austin v. Palmer and Others 671
Annear, <i>ex parte</i> 778	
Annear v. Annear ... 218, 481, 686	Bailey v. Bailey 775
Antesoeske v. Stephan ... 30, 256	Bailey v. McDonald 792
Appel, <i>ex parte</i> 822	Bailey v. Colonial Govern-
Appel and Another v. Appel 901	ment 19
Appollis v. Cyster 295	Bakst, Creditors in Estate of,
Arderne v. Bashew 1008	<i>ex parte</i> 927
„ v. Bennen 631	Bam, Estate of, v. Talanda 376, 684

	PAGE
Bam, Estate of, v. Wilson ...	423
Bam and Oliff v. Bloom...	486, 701
Bamford v. Brown ...	313, 426
Bank of Africa v. Epstein and Others ...	665
Bapoo v. Mahomed ...	240
Barker, <i>ex parte</i> ...	337
Barker v. Fountain ...	116
Barnett v. Seidener ...	10
Barret v. Barret ...	614
Barron v. Hennessy ...	281
Barry v. Barry ...	282, 381
Barry Bros. v. Goldstein...	1006
Bartlett, <i>ex parte</i> ...	1012
Bartram v. Burrill and Another ...	28
Bartram and Son, <i>ex parte</i> ...	493
Basson v. Basson ...	471
Basson v. Van Reenen ...	635
Batchelors v. S.A. Breweries 918, 938, 1017,	1021
Bate, <i>ex parte</i> ...	790
Bate v. Allcock...	28
Battenhausen v. Du Plessis...	568
Bayley and Others, <i>ex parte</i> 79,	167
Beake v. Caroleessen ...	715
Bears, Son and Co., <i>ex parte</i> ...	717
Beaufort West Municipality v. Edgcombe ...	319
Becker, <i>ex parte</i> ...	389, 822
Becker v. De Villiers ...	715
Becker v. Hazell ...	436
Beckley, <i>ex parte</i> ...	613
Behr and Others, <i>ex parte</i> 455,	570
Behr and Co. v. Cohen ...	376
Bekker and Others, <i>ex parte</i> 167	
Bell, <i>ex parte</i> ...	496
Bell, Estate of, v. Bell ...	755
Beneke, <i>ex parte</i> ...	255
Benner v. Benner ... 62, 274,	570
Bennett v. Bennett and Another ...	91
Bennett v. Cape Estates Syndicate ...	164, 216
Bennett and Baker v. Barry 524,	793
Benning v. Cowling ...	28
Berdien, <i>ex parte</i> ...	778
Bergh, <i>ex parte</i> ...	340
Bergh v. Conrad ...	281
Berhr and Co. v. Cohen ...	376
Berman v. Timrie ...	891
Bernard v. Dampers ...	916
Berning and Another, <i>ex parte</i> 94	
Bethune v. Key ...	296
Bevern, Estate of, v. Myburgh 776	
Bewbew v. Dennis ...	238

	PAGE
Beyer v. Van der Lith ...	210
Beyers v. Groenewald...	78, 117
Beyleveld, <i>ex parte</i> ...	720
Bezeidenhout, <i>ex parte</i> ...	262
Bird v. Bird and Another...	79, 343
Bird v. Philip ...	1006
Bisset v. Phillips and Another ...	210
Blaberg and Co. v. Ajam...	1010
Black, Estate of, v. Allie and Others ...	817
Black, Estate of, v. Cresswell	426
Black, Estate of, v. Jackson and Co. ...	23, 573, 653
Black, Executors of, <i>ex parte</i> 821	
Black, Heirs of, v. Estate Black ...	761
Blackall v. Robertson ...	635
Blake v. Fobian and Others...	314
Blignault, <i>ex parte</i> ...	341
Blignault v. Weintrob ...	454
Blignault v. Wepenaar and Others ...	527, 720
Bloemberg v. Bloemberg ...	274
Blomestein, <i>ex parte</i> ...	10
Board of Executors v. Fisher	484
Board of Executors v. Van Schalkwyk ...	664, 684, 738
Board of Executors and Others v. Hadien ...	285
Robbins v. Le Roux ...	319
Boer v. Delarou...	1
Boesen v. Day ...	180
379, 714, 771, 796,	813
Boisson v. Boisson ...	1014
Boldt and Another v. Heina-man ...	700
Bonsiel and Co. v. Behn ...	931
Boosey and Co. v. Simmons...	9
Booth and Sons v. Harris ...	715
Bosman, <i>ex parte</i> ...	262
„ v. Kets ...	256
„ v. Lewin ...	423
„ v. Roystowski ...	259, 281
Bosman and Arderne v. Win-nitzky ...	893
Bosman, Powis and Co. v. Mialls ...	1010
Botes and Another v. Venter and Another ...	684
Botha v. Botha ...	608
Botha v. Buckley ...	684
Botha v. De Bruin ...	388, 426
Botha and Another, <i>ex parte</i> 341	
Bothman, <i>ex parte</i> ...	767
Bothman v. Botes ...	378
Bouchaill and Another v. Drake ...	208

	PAGE		PAGE
Boulton v. De Wit	314	Cape Auction Co. v. Prideaux	1010
Bouwer, <i>ex parte</i>	234	Cape District Building Society	
Boyce v. Don	33	v. Jacobsohn	740
Bowers, <i>ex parte</i>	779	Cape Divisional Council v.	
Bowers v. Hooper	797	Walsh	261
Boyd and Wife, <i>ex parte</i>	819	Cape Government v. Van der	
Boyce v. Coetzee	455	Venter	685
Bracht v. Hansen and Schra-		Cape Marine Suburbs, <i>ex parte</i>	
der	686	234, 282	
Bradfield, <i>ex parte</i>	1	Cape of Good Hope Savings	
Bradfield, Roole and Co. v.		Bank v. Gow and Others	796
Hayward	4	Cape of Good Hope Savings	
Brady v. Van Schalkwyk	917	Bank v. Harrison	793
Brand v. Kotzé	150	Cape Produce Agency v.	
Brandon v. Stone and Another	916	Peake	9, 219
Breabley v. Cape Glass Co. ...	570	"Cape Times" v. Aron	213
Bredell, <i>ex parte</i>	790	"Cape Times" v. Gibbons and	
Brett v. Divisional Council,		Co.	32
Victoria West	283, 355	"Cape Times" v. Herman ...	525
Breytenbach, <i>ex parte</i>	437	"Cape Times" v. McKay ...	213
Brink, <i>ex parte</i>	916	"Cape Times" v. McKenzie	
Brink v. Avenant	628	and Co.	1016
Brink v. Strydom	454	"Cape Times" v. Mills	87
Brins, <i>ex parte</i>	934	"Cape Times" v. Pfuhr Bros.	87
B.S.A. Asphalte Co. v. Cape		Cape Town Building Society	
Town Gas Co. ... 229, 637,	870	v. McKillop	376
Bromley and Co., Liquidator		Cape Town Gas Co. and Others	
of, v. Schenker	93	v. Nyman	792
Brown v. Cohen	739	Cape Town Hebrew Congrega-	
Brown v. Kelly	932	tion, <i>ex parte</i>	21
Bubb v. West Indian Building		Cape Town Town Council v.	
Association	256	Abrahams	613
Buchanan, <i>ex parte</i>	39	Cape Town Town Council v.	
Buchanan, Estate of, v. Way	212	Boyce	116, 613
Budge v. Budge's Executors ...	591	Cape Town Town Council v.	
Buffalo Cold Storage Co.,		Colonial Government and	
Liquidator of, <i>ex parte</i> ...	850	Another	152, 586
Buffalo Supply Co. v. National		Cape Town Town Council v.	
Bank	934	Friedman	211
Buirski v. Phipps	738	Cape Town Town Council v.	
Bulawayo Market Co. v. Bula-		Thomas	613
wayo Club	370	Cape Town Town Council and	
Bull, Estate of, v. Le Roux		Another v. Goldsmidt ...	664
and Another	150	Caporn and Co. v. Dumas and	
Burdett v. Wiggett	485, 934	Another	423
Burger v. De Vos	916	Carney, <i>ex parte</i>	1011
Burns, <i>ex parte</i>	437	Carr and Co. v. Leenders and	
Butler v. Butler	262, 858	Co.	779, 783
Butler v. O'Dowd	260	Carson and Another, <i>ex parte</i>	153
Buyskes v. Truike Bros.	377	Cartwright and Co. v. Grif-	
Bydien v. Estate Samoa	132	fiths	1015
Byrne, <i>ex parte</i>	420	Cathcart v. Way	167
Byrne v. Byrne	406	Cavanagh v. Hansen ... 60, 166,	258
		Cavanagh v. Thomas	32, 150
		Cavanagh v. Sharpe	892
		Cave's Brewery v. Cape Gov-	
		ernment Railways	563
		Celliers v. D'Oliveira	281
Cachet, <i>ex parte</i>	611		
Cairncross v. Nortje	205		
Campbell, <i>ex parte</i>	571		
Cantum v. Cantum	712		

PAGE	PAGE
Channer and Others, <i>ex parte</i> 767	Cohen and Another, <i>ex parte</i> 725
Chapman, <i>ex parte</i> ... 421	Cohen and Kaplan v. Said and Others ... 740, 892
Chaubaud v. Hartmann ... 89	Cohoon v. Cohoon ... 341, 640, 814
Chinn, Estate of, v. Johannes 931	Coker v. Coker ... 275
Chorits v. Schoolman ... 317	Coleman and Others, <i>ex parte</i> 396
Christie v. Estate Strasm... 776	Coleman and Co. v. Colonial Government ... 235
Cilliers v. Du Toit ... 453	Colesberg D.R. Church, <i>ex parte</i> ... 932
Cilliers v. Van der Merwe 423, 484	Collins, <i>ex parte</i> ... 776
Chubb, <i>ex parte</i> ... 147	Collins and Co. v. Meyers ... 892
City Flour Mills v. Wurth ... 261	Collison, <i>ex parte</i> ... 768
City Tramway Co. v. Siege ... 378, 612	Collison v. Clink ... 666
City Tramway Co. v. Town Council of Cape Town ... 230	Colonial Building Corporation v. Goldstein ... 151
Claassens, Estate of, v. Fourie and Others ... 525	Colonial Government v. Aliwal North Municipality ... 765
Claremont English Church v. Friedman ... 283	Colonial Government v. Bailey ... 877
Claremont Municipal Council v. Blake ... 798	Colonial Government v. Bechuanaland Estate Syndicate, 14, 423
Claremont Municipality v. Clews ... 213	Colonial Government v. Bishop ... 285
Clark v. McNamara ... 276	Coonial Government v. Blaauw ... 797
Clarke v. Mackey ... 5	Colonial Government v. Bonner and Others ... 704
Clarke and Another v. Herman ... 421	Colonial Government v. Connolly ... 634
Clarke and Creswell v. Gordon and Others ... 429	Colonial Government v. Hoole and Co. ... 34
Clear, Estate of, v. Lonsdale 856	Colonial Government v. Kirby ... 775
Cleghorn, <i>ex parte</i> ... 820	Colonial Government v. Lurie ... 342
Cleghorn and Harris v. Corballis ... 891	Colonial Government v. Milborrow ... 210
Clewer v. Cummings ... 1007	Colonial Government v. Onman ... 213
Cloete, <i>ex parte</i> ... 283, 404	Colonial Government v. Padon ... 10
Cloete v. Cloete ... 732	Colonial Government v. Poole ... 9
Cloete v. Edwards and Another ... 791	Colonial Government v. Price ... 213
Cloete v. Taylor ... 62	Colonial Government v. Rich ... 379
Close and Others, <i>ex parte</i> ... 545	Colonial Government v. Van Dyk ... 213
Close and Another v. Hendricks ... 544	Colonial Mutual Life Assurance Co. v. Broomberg ... 742
Coaton and Louw v. Erasmus 8	Colonial Orphan Chamber v. Wahl ... 792
Cochrane and Cherry v. Woodstock Municipality and Others ... 838, 929, 1014	Colton v. Van Amelo ... 271
Coetzee, <i>ex parte</i> ... 342, 798	Combleholme v. Marks, Highman and Co. ... 433
Coetzee, Estate of, v. Coetzee and Another ... 740	Combrinck and Co. v. Lochner ... 376
Coghill v. Queen's Town Licensing Court ... 400	Condes v. Sophie ... 611
Coghlan and Others, <i>ex parte</i> 618	Connolly v. Connolly ... 72
Cohen, <i>ex parte</i> ... 854	Conradie v. Gray ... 675
Cohen v. Carn ... 232, 362	Constein v. Lewis ... 29
Cohen v. Cramer ... 261	Contat Collieries v. Contat ... 388
Cohen v. Hermann and Candard ... 927	Continental Caoutchouc Co. v. Stockill ... 918
Cohen v. Rawbone ... 266	
Cohen v. White ... 328	

PAGE	PAGE
Continental Consontelium Co. v. Trye and Co. 3	Damons v. Damons 897
Cook v. Cook 666	Daniell v. Ross 313
Cook v. Schreiber 446	Danvers and Co. v. Hernfel... 1008
Cook and Co. v. Young 797	Dart v. Weintrob and Co., 776, 779
Cooke and Others v. Bethell... 8	Darter v. Darter and Another 716, 776
Cooke and Others v. Ochanee... 33	Darter Bros. v. Kretzschmar, 13, 167
Coomer v. Hartford 87	Dauids, <i>ex parte</i> 262
Corballis v. Phillips and Co. 89	Dauids v. Estate Dauids 686, 717, 816
Corbean v. Matthys 30	Davidson, <i>ex parte</i> 890
Corbett, <i>ex parte</i> 376	Davies v. Solomon 664
Cordes v. Pulvermacher ... 618, 770	Davis v. Stevens 389
Cordes v. Van Weenen ... 618, 770	Davies and Katz v. Bernhardt and Another 424
Cornelius, <i>ex parte</i> 667	Davison, <i>ex parte</i> 614
Coronation Estate Co. v. Saber 775	Davitt v. Stephan 319
Cortis v. Broomberg 313	De Beer, <i>ex parte</i> 262, 379
Cotterell, <i>ex parte</i> 816	De Beer, Estate of, v. De Beer 118, 330
Couch v. Martin 855	De Biassis v. Harrison 669
Coulton v. Bull 690	De Blenquy, <i>ex parte</i> 526
Courtenay, <i>ex parte</i> 893, 1011	De Breyn v. Loxton 258
Cowie and Co. v. Israelson Bros. 797	De Bruyns, <i>ex parte</i> 63
Cowley v. Lewis and Another 772	De Lange v. Theron 979
Cowley v. Stephan... .. 319	Dedusey v. Osman 914
Cowley and Co. v. Vassies ... 942	De Greef, <i>ex parte</i> 184
Cowling v. Stableford and Co. 452	De Heton v. Cohen and Another 715
Craford v. Fourie 524	De Jager, <i>ex parte</i> 407
Crauford v. Crauford 193	De Jager v. De Jager 481
Crawford v. Crawford 233	De Jager, Estate of, v. Thyse and Others... .. 19, 571
Creaghe v. Zinkendorf 791	De Jongh, <i>ex parte</i> 667
Cressy v. Shaw 509	De Klerk, <i>ex parte</i> 481, 777
Cronje, <i>ex parte</i> 387	De Kock, <i>ex parte</i> 570
Crosbie, <i>ex parte</i> 387	De Lange v. Theron 948
Crosbie v. Estate Crosbie... .. 857	De Leeuw v. Louw 797
Crosbie v. Crosbie's Executors and Another 833	Delpport v. Nesor 861
Crosbie v. Hennessey 917	Dempers v. Saalmin 612
Cross, Executors of Estate of, <i>ex parte</i> 821	Dempers v. Saalmon 612
Croydon Brick Co. v. Hayward 211	Dempers and Van Ryneveld v. Isaacs 29
Croydon Brick Co. v. Cotterell 1007	Dempers and Van Ryneveld v. Peterson 30
Croydon Brick Co. v. Lance and Co. 32	Dempers and Van Ryneveld v. Strydom... .. 773
Cunha and Co. v. Shalowsky and Another 3	Dempers, Moore and Co. v. Friedgood 774
Cunningham and Another v. Bethel 454	Den v. Den 870
Cunningham and Another v. Rutherford 144	Dennis and Another, <i>ex parte</i> 799
Cunningham and Another v. Salonika 485	De Smidt v. Estate Marting... 200
Cutler v. Stephan 281	De Smidt v. Trunt 485
Dalvi and Another v. Ahmed 178	De Swardt, Estate of, and Others v. Surveyor General and Others 389
Daly v. Lategan 86	De Villiers, <i>ex parte</i> 1, 80, 337, 367, 386, 455, 820, 875

	PAGE		PAGE
De Villiers v. De Kock	486	Drewfs v. Drewfs	128
De Villiers v. Dow... ..	422	Dreyer and Others v. Duke...	1010
De Villiers v. Haupt	931	Dubis v. Hyman	792
De Villiers v. Honikelsky and Another	257	Duffus and Co. v. De Villiers	498
De Villiers v. Louw	568	Duggan, <i>ex parte</i>	456
De Villiers Bros. v. Twine and Another	421	Duminy v. Day	309
De Villiers, Larsson and Co. v. De Kock... ..	831	„ v. Dreyer	5, 314
De Villiers and Others v. False Bay Fish Co.	918	„ v. Gamba	258
Devenish and Another, <i>ex</i> <i>parte</i>	778, 934	„ v. Vink	2, 8
De Vries, <i>ex parte</i>	686	Dunn v. Broomberg	738
De Waal v. Ahberg	259	Dunn v. Estate Dunn	132
De Waal v. Marks	421	Du Plessis, <i>ex parte</i>	720
De Waal v. Van der West- huysen	340	„ v. Blumberg	138
De Waal and Another, <i>ex</i> <i>parte</i>	904	„ v. Mandelstam	212
De Waal and Co. v. Burger...	261, 281	„ v. Minnaar	9
De Waal and Co. v. Colyn ...	424, 631	Du Preez v. Reid	379
De Waal and Co. v. Du Ples- sis	212	Du Preez v. Stoman	991
De Waal and Co. v. Fick ...	213	Durand, <i>ex parte</i>	816
De Wet v. Bernade	29	Durant and Co. v. Poole... ..	210
„ v. Bloom	402, 583	Duthie v. Uhrbrook	931
„ v. Dusseau	775	Du Toit, <i>ex parte</i>	262
„ v. Manchester	424	Du Toit v. Domingo	661
„ v. Prinsloo	376	Du Toit and Others, <i>ex parte</i>	167
„ Estate of, v. Marais	169, 214	Dyason v. Nortje	613
De Witt v. Skippon	783	Dyer, <i>ex parte</i>	224, 341, 455
Deyzel v. Deyzel	716	Eaton v. Eaton... ..	96
“Diamond Fields Advertiser” v. Peacey	379	Eaton v. Van der Spuy	486
Dickenson and Co. v. Whales	212	Eaton, Estate of, v. Luyt ...	738
Dicker, <i>in re</i> Insolvent Estate of	283	Eaton, Robins and Co. v. Miller	28
Dienar, <i>ex parte</i>	1011	Eaton, Robins and Co. v. Steensma	1005
Diepnaar v. Nel	256	Eaton, Robins and Co. v. Swanepoel	426
Dimdore v. Dimdore	882, 932	Ebroiken v. Vink	29
Distributing Syndicate and Others v. Frank	259	Edmeades, <i>ex parte</i>	337
Dominicus v. Taylor and An- other	4	Edwards, <i>ex parte</i>	233, 821
Donaldson, <i>ex parte</i>	932	Edwards v. Myburgh	612
Dordrecht D.R. Church, <i>ex</i> <i>parte</i>	799, 815	Efroiken v. Outram	10
Dormehl v. Scholtz	617, 796	Eilenberg v. Abrahams ...	1006
Dose, <i>ex parte</i>	790	Elfert Co., Insolvent Estate of, v. Elfert	262
Douglas, <i>ex parte</i>	219, 819	Eliason v. Eliason	525
Douglas v. Glass	28	Elliot Bros v. Bartlett ...	612, 857
Dreyer v. Dreyer	830	Elliot, <i>ex parte</i>	823
Dreyer v. Samsodien	116	Ellis v. Kemp	799, 878
		Ellis v. Smith	717
		Ellis, Kislingbury and Co. v. Bergl	1013
		Elson, <i>ex parte</i>	570
		Elston, <i>ex parte</i>	613
		Elton v. Elton and Another...	95
		Elton and Others, <i>ex parte</i> ...	20
		Embeson v. Mitchelmore...	260
		Engelbrecht, <i>ex parte</i>	818
		Epsiken v. Priem	1
		Epstein v. Sieradski	5

	PAGE
Equitable Fire Insurance Co. v. La Grange	454
Erasmus, <i>ex parte</i>	452, 498
Erasmus v. Van der Merwe...	377
Eshack, Estate of, v. Allie...	739
Estenberg v. Cooper	728
Euviard, <i>ex parte</i>	452
Evans, <i>ex parte</i>	368
Everett and Another v. Ellenbogen	213, 258
Exshaw and Co. v. Van Ryn Wine and Spirit Co.	404
Eyre v. Moriarty	379
Fairbairn v. Pepper	243
Falkiner, <i>ex parte</i>	487, 819
Farmer, Estate of, v. Seldon	684
Farmers' Co-operative Society v. Long	151
Farmers' Co-operative Society v. Roberts	525
Farmers' Co-operative Society v. Quinn	151
Faudel and Another v. Tuckey	901
Faure, Estate of, v. Van der Bijl	580
Faure and Zietsman v. Weintrob	28
Faure, Van Eyk and Co. v. Estate Richards	1010
Faure, Van Eyk and Co. v. Zin	340
February, <i>ex parte</i>	934
Federal Supply Co. v. Africa	454
Federal Supply Co. v. Buffalo Supply Co.	165, 570
Federal Supply Co. v. Coetser	379, 1007
Federal Supply Co. v. Logan Bros.	684
Feltham v. Schlater	939
Fernandez v. Fernandez	863
Festus v. Jonker	667
Fichat, <i>ex parte</i>	255
Field and Co. v. Lewin	634
Fincham, Estate of, v. Christie	772
Finday and Co. v. Hempel, 476,	535
Findlay and Co. v. Zaland...	424
Firnhaber and Another, <i>ex parte</i>	720
Firth, <i>ex parte</i>	168
Flaun v. Gerhaad and Hay...	404
Fleming v. Commins	879
Fletcher, <i>ex parte</i>	769
Fletcher v. Viviers	854
Fletcher's Retail and Others v. Van Dyk	281
Fletcher's Wholesale v. Lewin and Sons	797

	PAGE
Fletcher's Wholesale and Others v. Skuy	150
Foot, <i>ex parte</i>	765
For. v. Lawrence Co. and Others	809
Ford v. Christ	564
Ford v. Murray	1005
Forrest v. Alexander	634
Fortuin v. Weintrob	8, 485
Fouches, <i>ex parte</i>	777
Foster v. Du Plessis	376
Foster and Others v. Roestoff and Others	388
Fouche and Others, <i>ex parte</i>	499
Foulds v. Foulds	224, 431
Fourie, <i>ex parte</i>	481
Fourie v. De Vries	377
Fourie v. Fourie	493
Fourie and Others, <i>ex parte</i> ...	816
Fourie and Others v. Mostert and Others	1014
Fowlie and Another v. Henson	213
Frank v. Mellon 257...	257
Fraser, <i>ex parte</i>	406
Fraser and Another, <i>ex parte</i>	1011
Freeman v. Cape Divisional Council	668
Freemantle, <i>ex parte</i>	949
Freemantle v. Mills	799
Friberg v. Lloyd and Another	426
Friedlander and Du Toit v. Hatschen	797
Friedlander and Du Toit v. Griffiths	1010
Friedlander and Du Toit v. Manchester	775
Friedman v. Adendaal	780
Friedman v. Belman, 212, 258,	794
Friedman v. Shapiro	774
Friedman Bros. v. Morrison 771, 790,	814
Friedmond v. Solomon	629
Fryer v. Estate Petersen...	610
Fuller, <i>ex parte</i>	283, 456, 768, 816, 857
Furman v. Zerf and Another	423, 740
Gacula v. Dickerson	204, 297
Garage Continental Co. v. Van der Riet	578, 796
Gardiner and Co. v. Mackie and Co.	485, 543
Gardiner and Easton v. New Zealand Steamship Co.	1017
Garlick v. Lurie	775
Garlick v. Vink and Co.	209

	PAGE		PAGE
Garlick v. Zackon	257, 796	Grand Junction Railways, Debenture Holders of, v. Hills and Others	551
Garlick and Others v. Albert	856	Grand Junction Railways, Liquidators of, v. Hills and Others	551
Garlick and Others v. Dicker	426	Grand Junction Railways, Receivers of, v. Wal ker	233, 1018
Garlick and Others v. Kuhl- man	209	Greef, <i>ex parte</i>	686
Garner, <i>ex parte</i>	163	Green v. De Kock	164
Gately, <i>ex parte</i>	256	Green v. Le Roes	38
Gazo, <i>ex parte</i>	666	Green v. Theron	777
General Estate and Orphan Chamber v. Tahaar and Another	1008	Green and Co. v. Kretzsch- mai	32, 167
Gep v. Gep and Another	897	Green, Estate of, S.A. Mutual Green and Sea Point Muni- cipality v. Boyce	498
Gericke v. Wagemann	32	Greenberg and Co. v. Lewis, 855,	891
Gezwint, <i>ex parte</i>	778	Greenshields and Stephan	86
Gibbs v. B.S.A. Asphalte Co.	917	Griffiths and Others, <i>ex parte</i>	168
Gibson, <i>ex parte</i>	614	Grill v. Luckol	524
Giddings v. Giddings, 406, 620,	798	Gripper and Another, <i>ex parte</i>	1011
Ginsberg, <i>ex parte</i>	499, 525	Grobelaar, Tromp and Co. v. Christie	286
Ginsberg v. Hoffman and Others	814	Gromer, <i>ex parte</i>	854
Glass v. Glass ... 14, 16, 685,	716	Grundling, <i>ex parte</i>	1
Glasgow v. Glasgow	700	Gruneberg v. Dreyer	426
Gluck v. Nathan	796	Gruneberg v. Schiefelbein	204
Glynn v. Joseph and Another	916	Gulley v. Gavin	33
Godeham v. Estate Hutt	613	Guthrie v. Miller and An- other	857
Goedhals v. Stegman	1006	Guthrie and Theron v. Jacobs and Co.	211
Goldberg, Insolvent Estate of, v. Bert	740	Guthrie and Theron v. Vil- joen	164
Goldblatt, <i>ex parte</i>	1	Gutsche, <i>ex parte</i>	147
Goldschmidt v. Day	772	Haak v. Basson	946
Goldschmidt, <i>ex parte</i>	819	Haakensen v. Haakensen	893
Golder v. Howes	499	Haarhoff, <i>ex parte</i>	613
Goldman v. Botha	61	Hack v. Dreyfus and Co.	492
Goldschmidt, <i>ex parte</i>	1011	Hackenberg v. Hackenberg	260
Goodson, Estate of, v. Ingram	1008	Hadie, <i>ex parte</i>	246
Gordon, <i>ex parte</i>	769, 810	Hadie v. Hadie	134
Gordon, Estate of, v. Wood ...	715	Halbroth and Son v. Calcraft	319
Gordon Mitchell and Co. v. Bakst	791	Hales, Caird and Co. v. Boe- sen	485, 740
Gordon Mitchell and Co. v. Kaplan	116	Hall v. Hall	129
Gordon Mitchell and Co. v. Rawbone	524	Hall, Estate of, <i>ex parte</i>	18
Gotze v. Bergl	771, 821	Hall, Estate of, v. Wallis	339
Gourlay, Cavanagh and Co. v. Davis	548	Hamilton v. Albert	257
Gourlay, Cavanagh and Co. v. Meyers	891	Hamilton v. Matthie	318
Gourlay, Cavanagh and Co. v. Moss	86, 218	Hamilton and Another v. Alexander	454
Gow, <i>ex parte</i>	720	Hamp v. Hamp	717
Graamans Bros. v. Reynard ...	95	Hanau v. Buchanan	4, 32
Graham v. Graham	55, 214	Hanau v. Sterner	856
Graham, Estate of, v. Smith and Another	116		
Grand Junction Railway, <i>in re</i>	1015		
Grand Junction Railways <i>in re</i>	1015		

INDEX.

ix

	PAGE
Hanau v. Van der Krast ...	318
Hands, <i>ex parte</i> ...	499
Hanover D.R. Church, <i>ex parte</i> ...	548
Hansant v. Manchester ...	86
Hansen, <i>in re</i> ...	902
Hansen v. Estate Hansen...	1012
Hanson v. Kahn ...	151
Hammersley-Heenan v. Thomas	140
Harbrodt v. Herman ...	497
Hardy v. McSweeney ...	13
Hardy v. Wilks ...	2
Harness, Estate of, <i>ex parte</i> ...	893
Harkeson v. Harkeson ...	773
Harpur v. Fincham ...	712
Harries and Co. v. Haniball...	256
Harris, <i>ex parte</i> ...	918
Harris v. Doyle ...	497
Harrison v. Harrison, 218, 319,	342
Harrison v. Myburgh ...	776
Hartman, <i>ex parte</i> ...	455
Hartz v. Garlick ...	816
Hasseriis v. Marks...	725
Hassiem, <i>ex parte</i> ...	546
Hattingh v. De Wet ...	334
Hattingh v. Robertson ...	294
Haylett, <i>ex parte</i> ...	184
Hazell and Another, <i>ex parte</i>	230
Hedding, <i>ex parte</i> ...	255, 280
Heddon v. Sawkins ...	193, 570
Behir v. Table Bay Harbour Board ...	808
Heide v. Boyce ...	86
Heinemann v. Berry ...	1006
Hellig v. Hellig ...	292
Hendrick v. De Beer and Another ...	792
Hendricks v. Hendricks ...	264
Hennessy v. Estate Carmichael	770
Hennessy v. Mutter ...	568
Herald v. Tyler ...	761
Herbert, G. and T., v. Twine	378
Herman v. Fryer ...	313
Herman v. Kadir ...	150
Herman v. O'Bree ...	10
Herman v. Uhrbrock ...	611
Herman v. Viviers ...	423, 453, 716, 916
Hermans v. McMullen ...	8
Hertzog, Estate of, v. McMullen ...	86
Heinaman v. Scholtz ...	86
Hendricks v. Keyser ...	212
Hendricks v. Wood ...	211
Heydenrych, <i>ex parte</i> ...	15
„ v. Dunman ...	566, 812, 909
„ v. Frame... ..	377, 632

	PAGE
Heydenrych v. Hootor... ..	357
„ v. Jeffery... ..	472, 691
„ v. Salodien ...	2
„ v. Sonning ...	32, 1006
„ v. Taylor ...	1006
Hiddingh v. Estate Hertzog	79, 168, 219, 246
Hiddingh v. Wooding ...	212
Higgs, <i>ex parte</i> ...	717, 1012
Highman and Others v. Fra-sewisky and Others ...	792
Higrant, Chantrey and Co. v. Pratt ...	664
Higson v. Higson ...	935
Hildebrant, <i>ex parte</i> ...	235
Hildebrant v. Hildebrant, 455,	611
Hill and Co. v. Catto... ..	891
Hill and Co. v. McLachlan ...	164
Hill and Co. and Another v. McGregor ...	163
Hills v. Colonial Government	39, 233
Hillier v. Hillier ...	571, 811
Hime, <i>ex parte</i> ...	147, 255
Hirshberg, <i>ex parte</i> ...	115
Hitchcock, <i>ex parte</i> ...	916
Hitge, Estate of, v. Botha ...	421
Hobden v. Risely and McIntyre ...	491
Hogdson, <i>ex parte</i> ...	778
Hodgson v. Estate Hodgson ...	588
Hodgson, Executors of, <i>ex parte</i> ...	476
Hoffman v. Black ...	83
Hoffman v. Soker ...	115
Hofmeyer, <i>ex parte</i> ...	280
Hofmeyer v. Valentyne and Co. ...	32
Hofmeyer and Son v. Lategan	423
Hohn v. Leach ...	39
Holdenson and Another v. McKenzie and Co. ...	775
Holiday v. Johns ...	931
Holland v. Sherwood ...	393
Holtenhoff v. Ginsberg and Another ...	814
Honiball v. Cape Central Railways ...	546
Hopkins v. Platjes ...	715
Hotz v. Du Plessis ...	259
Hovey v. Hine ...	798
Howitz, <i>ex parte</i> ...	798
Hudson, Estate of, v. Wurth...	261
Hudson, Vrede and Co. v. Finkestein Bros. ...	685
Hudson, Vrede and Co. v. Reuck ...	544
Hugo, <i>ex parte</i> ...	407, 455

	PAGE
Hugo v. Penderis	30
Hugo v. Snyders	931
Hugo, Executors of, <i>ex parte</i> ...	381
Hugo, Estate of, v. Kriegler...	568
Hulin v. James	61
Hull v. Mulder	916
Humansdorp Divisional Council, <i>ex parte</i>	1011
Humpel v. Humpel	640
Humphreys v. Humphreys ...	243
Hunter, <i>ex parte</i>	169, 714
Huskisson and Another, <i>ex parte</i>	16
Hutchons, Estate of, v. Galpin	154
Hutt v. Melekov and Another	545
Hutton v. Strydom	28
Hyman v. Hyman	97
Hynd v. African Banking Corporation Co.	19
Ilaum v. Gerhard and Hay...	637
Immelman and Co. v. Hoffman... ..	151
Imperial Cold Storage Co. v. Adams	423
Imperial Cold Storage Co. v. Bartie and Sons	423
Imperial Cold Storage Co. v. Dieterle	544
Imperial Cold Storage Co. v. Epstein	544
Inglesby v. Hermann	665
Ingram, <i>ex parte</i>	341
Ingram v. Ingram	778
Innes v. McElmee	738
Ireland v. Penkin	85
Irwin v. Thomson	536
Jackson v. Haupel... ..	213
Jackson v. Hammond	1004
Jackson and Spence v. Colonial Government	892
Jacobs, <i>ex parte</i>	933
Jacobs v. Jacobs	63, 432
Jacobssohn v. Du Plessis ...	29
Jacobssohn v. Pretorius ...	61, 115
Jagger and Co. v. Havenga ...	376
Jagger and Co. v. Myers ...	1009
Jagger and Co. and Others v. Gruskin and Polliack ...	313
James v. Friedrikson	686, 799
Janneck, <i>ex parte</i>	234
Jarsedine v. Maquinnolt ...	569
Jeffrey v. Herbert	339
Jeffrey v. Herman, I and J ...	544
Jelliman v. Coetzer... ..	1009
Jeppe, <i>ex parte</i>	312

	PAGE
Johnson v. Cunningham and Cortese	282
Johnson v. Ernie	716
Johnson v. Lacy	5
Johnson v. Scarr	33
Jones v. Herold	256
Jones v. Stephan	60
Jones and Co. v. Blake	797
Jonker, Estate of, v. Jonker...	931
Jordaan and Wife, <i>ex parte</i> ...	822
Joseph v. Le Roux... ..	211
Joseph v. Nathan	358
Joseph and Co. v. Pretorius...	2
Joubert, <i>ex parte</i>	151
Joubert and Others, <i>ex parte</i>	686
Jurgons v. Baitels	378
Juritz v. Payne	613
Juta and Co. v. Shawe ...	281, 319
Kaiser v. Banks	150
Kaiser v. Shenker and Co. ...	477
Kaiser Bros. v. Cape Town Town Council	354
Kaiser Bros. v. Rosen	331
Kalk Bay Municipality v. Joseph	94
Karmer, Estate of, v. Daly ...	456
Kannemeyer v. Chetty Bros...	3
Kanterowitz v. Stranack ...	772
Kaplan, <i>ex parte</i>	613, 716
Karriem v. Harris	583
Katz and Co. v. Schemer... ..	931
Keller v. Steyn and Others. 15.	94
Kelly and Co. v. Hermann ...	632
Kendrick v. De Beer and Another	1009
Kennedy, Executors of, <i>ex parte</i>	856
Kenner and Co. v. Israelson Bros.	715
Kent, <i>ex parte</i>	667
Kerr, <i>ex parte</i>	820
Kets v. Noorden	84
Kichnan v. Marais	634
Kieft, <i>ex parte</i>	437
Kilfoil, <i>ex parte</i>	255
Kilgour v. Sonnenberg	201
Kilfoil, <i>ex parte</i>	27
King, <i>ex parte</i>	455
King Bros., <i>ex parte</i>	232
King Bros. v. Rowan... ..	239, 315
Kitchin, <i>ex parte</i>	162
Klaas, <i>ex parte</i>	10
Klein, <i>ex parte</i>	821, 857
Kleinhaus, <i>ex parte</i>	283
Kleyn, <i>ex parte</i>	719
Knee Bros. v. Sebha Bros. ...	281
Knoesen v. Theron	292

	PAGE
Kobbler Bros. v. Delpport...	544
Koch v. Clays	1
Koch and Dixie v. Ross	261
Koenig v. Landeschut...	73, 90, 97
Konigsberg v. Stanislaws and Another	978
Konza v. Konza	898, 923
Koppel, Ltd., v. Kirby	740
Koster v. Braaf	917
Kosher Supply Co. v. Gold- berg Bros.	259
Kotzé, <i>ex parte</i>	1013
Kotzé v. Andrews	714
Krijnau v. Hyte	34
Kreft, <i>ex parte</i>	570
Kriel v. Union-Castle Co....	686
Krige v. De Villiers	776
Krige and Others, <i>ex parte</i> ...	1011
Kroese, Estate of, v. Kroese and Others	392
Kroon v. Kroon	811
Kruger, <i>ex parte</i>	15, 821
Kruger v. Faesche and Co. ...	856, 1016
Kruger v. Price	640
Kruger v. Venter and An- other	1008
Krumm v. Black	148
Kuils v. Union-Castle Co. ...	616, 717, 881
Kupfer, <i>ex parte</i>	456
Labe and Another v. Paterson and De Hertton	510
Lacey v. Jacobs	821
Laidlaw, Mackill and Co. v. Baker, Baker and Co. ...	1019
Laité and Co. v. Goldsmid ...	616
Laité and Co. v. Hessen ...	11, 74
Laité and Co. v. Peregrino ...	33
Laité and Co. v. Scarles	1009
Lambrechts, <i>ex parte</i>	773
Lands Development Co. v. Miles and Another	1009
Landsberg v. Weeber	685
Landsberg v. Wilnach	684
Landsberg, Estate of, v. Rah- man and Another	633
Lang v. Colonial Government	782
Langenhoven v. Keller	611
Langford v. Miles, Boyd and Co.	502
Lapidus v. Hoffman	317
Lategan, <i>ex parte</i>	78, 685
Lategan v. Colonial Govern- ment	935
Lategan v. Holm and Another	612, 774

	PAGE
Law Society v. Greening...	169, 223
Law Society v. McLeod	836
Lawrence v. Gross and Others	916
Lawrence v. Lawrence... ..	940
Lawrence and Others, <i>ex parte</i> 429, 897	
Lawrence and Co. v. Bruhns...	2
Lawrence and Co. v. Bailey and Co.	891
Lawrence and Co. v. Hartford	32
Lawrence and Co. v. Matz and Another	210
Lawrence and Co. and Others, <i>ex parte</i> ...	923
Lawrence and Co. and Others v. Ah Young	337
Lawrence and Co. and Others v. Lurie	792
Lawrence and Co. and Others v. Segal... ..	2
Lawrence and Co. and Others v. Symthe and Co.	855
Lawrence and Co. and Others v. Swatt and Another ...	210
Lefevre and Others v. Bordi- goni	425
Leng v. Roode... ..	666
Lennon, Ltd., v. Lewis ...	261, 497
Lennon, Ltd., v. Schapera ...	1010
Lennox, <i>ex parte</i>	916
Lennox v. Murray and Ste- wart	850
Le Roes, <i>ex parte</i>	167, 235
Le Roex, <i>ex parte</i>	935
Le Roux, <i>ex parte</i>	285, 570, 818
Le Roux v. Malherbe	833, 867
Le Roux v. Theunissen ...	224, 260
Leslie v. Parkins	796
Levenson v. Vurick	858
Levin and Co. v. Schimpers...	209
Levy v. Koenig	793
Levy v. Lazarus	428
Levy and Another v. Coliwas	236
Lewin and Others, <i>ex parte</i> ...	675
Lewin and Others v. Luntz and Another	211
Lewin and Son v. Fourie ...	1006
Lewis, <i>ex parte</i>	166, 611, 892
Lewis v. Ferris	454
Lewison v. Appel	339
Liberman and Buirski v. Day	426
Liberman and Buirski v. Estate Cilliers	498
Liberman and Buirski v. Ros- souw	454
Liberman and Buirski v. Stain- dien	1
Liebenberg v. Liebenberg...	211

PAGE	PAGE
Lillienfeld v. Waldek... .. 770	Lots v. Vos... .. 114
Lillienfeld v. Walker... .. 686	Loubser, <i>ex parte</i> 19
Lind v. Nathan... .. 61	Louw, <i>ex parte</i> 1006
Lindenberg v. De Jongh... .. 86	Louw v. Winterbach... .. 930
Lindenberg and De Villiers v. Wesner... .. 773, 931	Louw v. Wahl... .. 1006
Lindsay, <i>ex parte</i> 214	Lucke, Estate of, v. Anderson... .. 8
Lippert, <i>ex parte</i> 685	Lucke, Estate of, v. Bell... .. 740
Lipschits v. Botha... .. 61	Luckie v. Oman... .. 515
Lipschits v. Delpport... .. 314	Luckhoff, <i>ex parte</i> 893
Lipschits v. Fourie and Others... .. 813	Luckhoff v. Herman... .. 524
Lipschits and Another v. Sapiro... .. 673	Lumb, <i>ex parte</i> 16
Liquidator Grand Junction Railways v. Receivers Grand Junction Railways and Others... .. 639	Lumaden v. East London Municipality... .. 500
Lissack and Co. v. Cartwright... .. 856	Lumaden and Others, <i>ex parte</i> 168
Lithman, Landsberg and Co. v. Bishop... .. 917	Luntz v. Baetz... .. 917
Lithman, Landsberg and Co. v. Bryars... .. 1007	Luyt, <i>ex parte</i> 545
Lithman, Landsberg and Co. v. Cohen... .. 378	Luyt v. Allnutt... .. 612
Lithman, Landsberg and Co. v. Feldman... .. 150	Lyons, <i>ex parte</i> 611
Litton, Insolvent Estate of, v. Boas... .. 210, 422	Lyons v. Greenland, 544, 568, 793
Lloyd v. Lloyd... .. 381, 807	Lyons v. Kellaway... .. 12, 89
Lloyd, Estate of, v. Galpin... .. 154	
Lobascher v. Cohen and Carn... .. 249	Maberly v. Brocklebank... .. 4
Lobascher v. McFarlane... .. 980	McAlister, <i>ex parte</i> 166
Lochner, Estate of, v. Pienaar... .. 795	Macauley v. Jumbo Co. and Another... .. 171
Lochner and Another v. Gro-man... .. 4, 76	McAteer, <i>ex parte</i> 15
Logan v. Colonial Government... .. 341	McCallum, <i>ex parte</i> 28
Logan and Co. v. Clews... .. 314, 421	McCrum v. Dulcken and Co... .. 33
Logie v. Vorster... .. 543	McGrath, <i>ex parte</i> 255
Lombard, <i>ex parte</i> 527	McGregor v. Penkin... .. 61
Logie v. Vorster and Another... .. 543	McKay v. Mahomet... .. 774
Lombard, <i>ex parte</i> 527	McKenzie and Co. v. Table Bay Harbour Board... .. 285, 535, 827
Lombard v. Estate Clarke, 741, 855	McKillop v. Hedden... .. 164
Lomnitz v. Steensma... .. 791	McKillop v. McKillop... .. 815, 892
London and Lancaster Fire Insurance Company v. Andrews... .. 524	McLeod, <i>ex parte</i> 765
London and Westminster Bank v. Receivers of Grand Junction Railways... .. 178, 639	„ v. Barnard... .. 793
London Ham Co. v. Scholtz... .. 261	„ v. La Grange... .. 86
London Wagon Works v. Hoffman... .. 379	„ v. Mare... .. 793
Longlands v. Busch... .. 260	„ v. Strydom... .. 793
Lord and Another, <i>ex parte</i> 224	„ v. Welcome... .. 793
Lorents v. Lorents... .. 114, 525	McNaughton v. Smellerkamp... .. 775
Lotter v. Botha... .. 777, 819	McQuirk v. Abrahams... .. 151
Lotter v. De Wit... .. 612	McQuirk v. Brennan... .. 151
Lots, <i>ex parte</i> 262	Makgosa v. Flag Mini... .. 934
	Maitland, <i>ex parte</i> 337
	Maisel Bros. v. Aronstain... .. 534
	Maisel Bros. v. Clingman and Another... .. 856
	Makek v. Moore... .. 263
	Makrai, <i>ex parte</i> 819
	Malan v. Strydom... .. 567
	Malan and Another, <i>ex parte</i> 157
	Malcolmson, <i>ex parte</i> 255
	Malcomess and Co., <i>ex parte</i> 666
	Malcomess and Co. v. Cary, 715, 930
	Malcomess and Co. v. Farmers' Co-operative Co... .. 124

	PAGE
Malherbe, <i>ex parte</i> ...	208, 255, 614
Mallah and Co. v. Allie ...	797
Malmesbury Board of Executors v. Kennedy ...	567
Malmesbury Board of Executors v. Van der Spuy ...	543
Mamewecke v. Olinski ...	535
Maney v. Maney ...	918
Mangold Bros v. Keun ...	1009
Mann, <i>ex parte</i> ...	527
Mann, <i>ex parte</i> , in re Moss... 215	215
Marais, <i>ex parte</i> ...	165, 388, 455
Marais v. Marais ...	282
Marais v. Harrison ...	567
Marais v. Van Zyl ...	423
Marais, Estate of, v. Bauermeester ...	772
Marchand v. Talanda ...	566
Marcus v. Goodman ...	3
Maree, <i>ex parte</i> ...	616
Marks, Estate of, v. Penkin	257
Marnitz, <i>ex parte</i> ...	342
Marona v. Blackbeard ...	638
Marquard v. Feinberg... 525	525
Marquard and Co. v. Robertson and Co. ...	213
Marsh, <i>ex parte</i> ...	616
Marsh, Estate of, v. Clews ...	856
Marsh, Estate of, v. Colyn ...	5
Marsh, Estate of, v. Dumas... 916	916
Marsh, Estate of, v. Jordaan and Another ...	378
Marsh, Estate of, Nottage ...	5
Marsh, Estate of, v. Savage... 28	28
Marsh, Estate of, v. Smith ...	4
Marshall v. Marshall ...	668, 798
Martens v. Martens, 527, 668, 798	798
Martin v. De Jongh ...	60
Master v. Cotton ...	918
Marting, Estate of, v. Berghuys ...	164
Masmkey v. Table Bay Harbour Board ...	613
Mason, <i>ex parte</i> ...	301
"Master," The, v. Executors Estate Alexander ...	618
"Master," The, v. Cotton ...	918
"Master," The, v. Executors Estate Goldberg ...	618
"Master," The, v. Executors Estate Hoffman ...	3
"Master," The, v. Executors Estate Liebenberg... 4	4
"Master," The, v. Executors Estate Pienaar... 714	714
"Master," The, v. Viljoen ...	314
"Master," The, v. Wiggett ...	1009, 1011

	PAGE
Matare, Burns and Co. v. Nuns ...	423
Matare, Burns and Co. v. Smallberger ...	568
Maw v. Fox ...	391, 399
Max v. Max ...	320
Maxey v. Maxey ...	819
Maxwell and Earp v. Blumberg ...	210
Maxwell and Earp v. Cohen... 212	212
Maxwell and Earp v. Kleger... 743	743
Maxwell and Earp v. Lewis ...	255
Mayisela v. Resident Magistrate, Somerset East ...	781
Maynard v. Maynard ...	850
Mbulwana, <i>ex parte</i> ...	14, 224
Mecca Café, <i>ex parte</i> ... 439, 545	439, 545
Mecca Café, Liquidator of, v. Webner ...	360
Meiring, <i>ex parte</i> ...	1014
Mendelsohn and Co. v. Broude	379
Mendelsohn and Co. v. Nel ...	379
Mengers and Another, <i>ex parte</i>	935
Mentor, <i>ex parte</i> ...	1011
Merrington v. Le Grange... 422	422
Metelerkamp, <i>ex parte</i> ...	635, 932
Metropolitan Advertising Co. v. Taylor ...	29, 258
Meyer, <i>ex parte</i> ...	34, 617
Meyer v. Boasaf and Another... 61	61
Meyer v. Cornelis and Another ...	684
Meyers and Others, <i>ex parte</i> ... 157	157
Michau and De Villiers v. Honikelsky and Another ...	33
Middleton v. Porter and Barsdorf ...	634
Mihaly v. Moskovik ...	640
Milborn, Gullander and Co. v. Hempel ...	486
Miles v. Jagger and Co. ...	742
Miller and Co. v. McFadyen and Thorn ...	4
Mills and Sons v. Van der Spuy ...	260
Milne and Sladdin v. Jackson and Co. ...	9
Minnaar, <i>ex parte</i> ...	1005
Mitchelson, <i>ex parte</i> ...	1014
Mohamet v. Ishmail ...	506
Mohr v. Twycross ...	336
Moll v. Arend ...	798
Moll v. Heineman ...	164
Moller v. Crowe ...	281
Moller v. Lloyd and Another, 1, 163	163
Mongamele, <i>ex parte</i> ...	90
Moodie, <i>ex parte</i> ...	340
Moody, <i>ex parte</i> ...	526

PAGE	PAGE
Moody, Tutors in Estate of late, <i>ex parte</i> ... 527	Naude, <i>ex parte</i> ... 739
Moolman v. Bernade and Another ... 30	Naude v. Roberts ... 257
Moore v. Colonial Medical Council ... 483	Nchorin and Another, <i>ex parte</i> ... 90
Moore v. Moore ... 15, 263, 570	Negrini v. Frost ... 797
Moorrees v. Hoffman ... 498	Nel and Others, <i>ex parte</i> ... 690
Moorrees v. Pentz ... 716	Nelson, <i>ex parte</i> ... 892
Moritz v. Murray ... 609	Nelson v. Nelson ... 574, 685, 1020
Morris, <i>ex parte</i> ... 376	Nepgen, <i>ex parte</i> ... 255
Morrison v. Langton ... 770	Netherlands Bank v. Brand ... 932
Morser and Co. v. Morris and Co. ... 257	Netherlands Bank v. Gordon and Co. ... 612
Morum, <i>ex parte</i> ... 381, 437	Netherlands Bank v. Russell ... 770
Mostert, <i>ex parte</i> ... 115, 1015	Nettleton v. Nettleton ... 109, 565
Mostert v. Muller ... 568, 1009	New Hudson Cycle Co. v. Stevens ... 775
Mostert v. Rous ... 2	Newman and Another, <i>ex parte</i> ... 184
Motroden v. Hassiem ... 814	Newton and Stewart v. Hermann ... 568
Mouat, <i>ex parte</i> ... 545	Ngatwyn v. Ngatwyn ... 870
Mountain View Quarry Co., <i>ex parte</i> ... 783	Ngili v. McLeod ... 241
Mouton v. Karg ... 665	Ngono v. Colonial Government ... 635
Mowbray Municipality v. Muller ... 401	Niekoles and Co. v. Aigiros ... 317
Mtembu v. Webster ... 408	Nicolas v. Nicolas ... 499
Muir v. Alexander ... 525	Niekerk, <i>ex parte</i> ... 1005
Muller v. Hobbs ... 975	Nieuwoudt v. Registrar of Deeds ... 231
Muller v. Koonin ... 667	Niven and Another v. Redfern and Another ... 798
Muller v. Sibbert and Others ... 685	Noach v. Raubenheimer ... 792
Muller Bros. v. Lombard ... 973	Nolan v. Sibbett and Another ... 339
Mulvey v. Cape Government Railways ... 894	Nolte Bros. v. Riach ... 376
Mulvihah and Others, <i>ex parte</i> ... 893	Nomadina v. Sissing ... 380
Murphy v. Colonial Government ... 776	Nones v. Farmlia ... 339
Murphy and Another, <i>ex parte</i> ... 166, 381	Noodtskop v. Twine ... 259
Murray v. Findlay and Co. ... 237	Noon v. Noon ... 1009
Murray and Co. v. Horsburgh and Another ... 486, 633	Norden v. Bosman, Powis and Co. ... 813, 923
Murray and Co. v. Nieburg ... 716	Norden v. Vink ... 116
Murray and Stewart v. Ramage ... 779	Norden and Others v. Kets ... 421
Myburgh v. Amardien ... 633	Northampton Bank v. Ward and Co. ... 566
Myburgh v. Myburgh ... 330	Nourse, <i>ex parte</i> ... 790
Mzubelo and Others v. Ndaba and Others ... 768, 817	Nourse v. "Cape Times Ltd.," and Others ... 283
Naggs, <i>ex parte</i> ... 20	O'Brien, <i>ex parte</i> ... 624
Nangle v. Orous ... 778, 817	Odendaal, <i>ex parte</i> ... 234
Nannelly v. Daria and Co. ... 775	Ohlsson v. Cohen, H. ... 426
Nasieba and Others, <i>ex parte</i> ... 499	Ohlsson v. Cohen, S. ... 426
Nathan v. Lipman ... 34	Ohlsson v. Magor ... 314
National Bank v. Graaf ... 680	Ohlsson's Breweries v. Magor ... 315
National Bank v. Kraemer and Co. ... 931	Ohlsson's Breweries v. McNeilage ... 685
National Bank v. Policansky and Others ... 524	Ohlsson's Breweries v. Thomson ... 153

PAGE	PAGE
Olivier and Co. v. Gouws ... 798	Peterson v. Griffith ... 718
Olivier v. Weintrob ... 212	Peeverett v. Gova ... 992
Olivier, Estate of, v. Van Zyl ... 129	Pfeiffer v. Hubach ... 1
Olivier and Another, <i>ex parte</i> ... 717	Philip Bros. v. Combrink ... 932
Oosthuisen v. Engelbrecht ... 917	Philip Bros. v. Walter ... 775
Oosthuisen v. Wassung ... 754	Phillips, <i>ex parte</i> ... 387
Oosthuisen, Executors of, <i>ex parte</i> ... 881	Phillips v. Louw ... 339
Oosthuys and Another v. Van Heerden ... 1009	Phillips and Co. v. Louw ... 454
Orchard v. Bredasdorp Licensing Court ... 569	Philpott v. Bromley ... 213
O'Reilly, <i>ex parte</i> ... 565	Philpott v. Bridges ... 814
Orlandini v. Collins ... 796	Philpott v. Holznichter ... 338
Orlandini v. Strydom ... 86	Philpott v. Philpott and Another ... 265
Osborne v. Osborne ... 388, 516	Pienaar, <i>ex parte</i> ... 424
Paarl Board of Executors v. Ecksteen ... 1007	Pienaar v. Executors Estate Sluiter ... 340, 516, 522, 531
Paarlse Landaankoop Maatschappij, <i>ex parte</i> ... 341, 437	Pieterse, <i>ex parte</i> ... 932
Pam, <i>ex parte</i> ... 581	Pietersen, <i>ex parte</i> ... 820
Pantry v. De Beer, Z., and C. ... 339	Pietersen v. Estate Gabrielse ... 320
Parker, <i>ex parte</i> ... 62	Pietersen v. McLachlan ... 378
Parker v. Parker ... 285, 381, 620	Pinn v. Elliot ... 504
Parker v. Reed ... 720	Pinnoy v. African and United Cold Storage ... 296
Parkin v. Spies ... 794	Pittman, <i>ex parte</i> ... 421
Parks v. Parks ... 661	Plate Wall Co v. Lipman ... 87, 259
Parrot and Co. v. Pierpoint ... 260	Plate Wall Co. v. McLeod ... 87
Parry v. Wright ... 810	Pollock v. Pulvermacher ... 667
Pascol, <i>ex parte</i> ... 719	Poolos, <i>ex parte</i> ... 779
Paterson and Another v. Pitt and Another ... 315	Port Elizabeth Cold Storage Co. v. Marnicowitz ... 314
Paterson and Another v. Twine and Another ... 515	Port Elizabeth Quoit Club, <i>ex parte</i> ... 21, 224
Paterson, Boyes and Co. v. Hamilton ... 904	Porter v. Kader ... 501
Paterson, Boyes and Co. v. Hamp ... 770	Porter and Maasdorp v. Alice and Others ... 260
Pauling, <i>ex parte</i> ... 545	Powrie v. Walker ... 30
Payne, <i>ex parte</i> ... 27, 854	Pretorius, <i>ex parte</i> ... 79, 820
Peacock and Others v. Bailey ... 780, 858	Pretorius v. Van Wyk ... 930
Pedersen v. Hempel ... 814	Pretorius and Co. v. Soekel and Another ... 524
Pedersen v. Kennedy ... 85, 209	Price and Co. v. Webner, 630, 851
Pedersen v. McKay ... 760	Price Bros. v. Wessels Bros. and Another ... 544
Peek Bros. v. Australian Brickfields ... 439	Priest v. Heaven ... 259
Peiser v. Booysen ... 396	Prince v. Myburgh ... 382
Penkin, Creditors of, <i>ex parte</i> ... 93	Pringle, <i>ex parte</i> ... 168
Percival, <i>ex parte</i> ... 255	Pritchard v. Newman ... 256
Perl and Co. v. McKendrick ... 1013	Proudfoot, <i>ex parte</i> ... 545
Perram and Besley v. Larey ... 282	Purcell, Yallop and Everett v. Auret ... 776
Perold v. Bailey ... 116	Purcell, Yallop and Everett v. Cosay ... 1010
Perold and Lewis v. Silverus ... 9	Purcell, Yallop and Everett v. Harck ... 814
Perserverance Society of Port Elizabeth v. Davis ... 882	Purcell, Yallop and Everett v. v. McLeod ... 281, 378

	PAGE
Purcell, Yallop and Everett v. Pentz	892, 1008
Purcell, Yallop and Everett v. Pfaff	498, 634
Purcell, Yallop and Everett v. Riddell	378
Purcell, Yallop and Everett v. Seaman	498
Purcell, Yallop and Everett v. Steensma	314
Quinn and Others v. Lalor ...	9
Rabinowitz, <i>ex parte</i> , 151, 214,	486
Rabolini v. Newman	771
Raffaele and Another v. Bindeman	176, 212
Raganelli v. Lipschitz... ..	624
Rainier, <i>ex parte</i>	769
Raner v. Colonial Secretary ...	247
Raphael v. May	850, 893
Rathfelder and Another, <i>ex parte</i>	14
Rautenbach, Executors of, <i>ex parte</i>	382
Reed v. Port Elizabeth Town Council	946
Reeler v. Cole	28
Rees and Another, <i>ex parte</i> , 20,	184
Reid v. Fish	611
Reid v. Lategan	568
Reid and Co. v. McGregor ...	892
Reid and Nephew v. Sellar ...	1007
Reiner's Trustees v. Boyce ...	792
Reitz, <i>ex parte</i>	930
Retief, <i>ex parte</i>	285
Retief v. Retief	12, 34, 271
Rex v. Anim... ..	368
„ v. Baartman	316
„ v. Ball	488
„ v. Benning	197
„ v. Bloem	988
„ v. Botha	565
„ v. Besuidenhout	496
„ v. Cohen	994
„ v. Charteris	646, 785
„ v. De Stadler	398
„ v. Du Toit	990
„ v. Easton	198
„ v. Endries	987
„ v. Enslin and Another ...	598
„ v. Farquharson	865
„ v. Fish	297
„ v. Grant	995
„ v. Greening	21
„ v. Griman	261
„ v. Hammerschlag... ..	600
„ v. Harris	429

	PAGE
Rex v. Hayes	989
„ v. Hess	906
„ v. Hope and Another ...	674
„ v. Jaffa... ..	193
„ v. Jenkinson	374
„ v. Jessub	368
„ v. Johns... ..	398
„ v. Jones... ..	650
„ v. Korton and Others ...	1006
„ v. Kreesse	724
„ v. Kriek... ..	504
„ v. Kukard	302
„ v. Lang	301
„ v. Liebenberg	597
„ v. Lis (alias Silver)... ..	833, 992
„ v. Louw... ..	118, 432, 530
„ v. Miller	303
„ v. Mangoba... ..	507
„ v. Marais	452
„ v. Matyolweni and Others	505
„ v. Mofuking and Another	864
„ v. Montsioa... ..	906
„ v. Myburgh	651
„ v. Niekerk	476
„ v. Parent	997
„ v. Paul	199
„ v. Plaatjes	312
„ v. Rathbone	487
„ v. Robbie and Others ...	1000
„ v. Roos	307
„ v. Sango	117
„ v. Standen	397
„ v. Taylor	304
„ v. Toooh	195
„ v. Torr	981
„ v. Walker and Others ...	305
„ v. Williams	833
„ v. Wilson	1006
„ v. Wynne	999
Reynolds, <i>ex parte</i>	455, 1012
Reynolds v. Goodmanson... ..	116, 382, 424
Reynolds Factory v. Blake ...	665
Reynolds Factory v. Maritz...	666
Reynolds Vehicle Co. v. Hill	87
Rhenish Mission v. Africa ...	908
Rhodes v. Rhodes and Another	779, 854
Rhodes, Estate of, v. Hartigan and Others	589
Ries, <i>ex parte</i>	255
Rige v. De Jager	783
Rimer v. White... ..	30
Rivas v. Black	268
Rix v. Rix	78, 368
Rix, Estate of, v. Clements ...	234
Robertson, <i>ex parte</i>	611
Robertson v. Robertson ...	169, 224

	PAGE
Robertson and Co. v. Garvie...	776
Robertson and Co. v. Heat-horn	621, 741
Robertson and Co. v. Wolf-aardt	87
Robinsky v. Norton	854
Rochester Brick Co. v. Ellen-bogen	213
Rondebosch Municipal Coun-cil, <i>ex parte</i>	716
Roos v. Ohetty	714
Roos v. Sacks and Another ...	814
Rosebank Match Co. v. Jonko-pingsoch Vulcans	616
Rosenberg v. Lurie... ..	5
Rosenberg v. Worthington ...	616
Rosenblatt v. Will	61
Rosenblatt and Another v. Will	61
Ross and Co. v. Rous	5
Rossouw v. Vlok	699
Rothman, <i>ex parte</i>	767
Rousseau, <i>ex parte</i>	683
Roux, <i>ex parte</i>	231, 1011
Roux and Another v. Cosay...	930
Rowe v. Fisher... ..	109
Rowe v. McGarry	551, 931
Rubin, <i>ex parte</i>	740
Rudiger v. Muller... ..	980
Runciman and Co., <i>ex parte</i> ...	39
Russell, Executors of Estate of, False Bay Fish Co. ...	918
Rutter v. Black and Another	715
Rutter v. Taylor	87
Saber v. Kansley	691, 982
Sachs v. Liebenberg	1007
Sachs v. Van der Merwe... ..	665
Sadler v. Seccombe... ..	29
Safeidien, <i>ex parte</i>	817
S. Leger v. Robinson	775
S. Saviour's Church, Clare-mont v. Friedman... ..	4
Samoa, Executors of Estate of, <i>ex parte</i>	156
Sanderson v. Rugg... ..	892
San Georges v. Epstein	611
Saunders v. Saunders	34
Savage and Sons, <i>ex parte</i> ...	640
Savage and Sons v. Venter ...	664
Scanlen v. Bert	918, 1011
Schalbe v. Smith	772
Schar v. Norman	33
Scheltema, <i>ex parte</i>	14
Scheuble, Estate of, v. Galpin	154
Schoeman, <i>ex parte</i>	617
Schoeman v. Potgieter	256
Scholtz, <i>ex parte</i>	819

	PAGE
Scholtz and Co. v. Lubalin ...	339
Schonnberg, <i>ex parte</i>	773
Schoonul and Co. v. Clarke ...	1010
Schreiber v. Schreiber	487, 812
Schultz v. Kets... ..	568
Schultz v. Rossouw	792, 1006
Schur and Another v. Loub-ser	423
Schwalbe v. Smith... ..	740
Schwartz v. Fick	223
Schwizer v. Ngqwabe	1008
Scott, <i>ex parte</i>	387
„ v. Dawson... ..	797
„ v. Heesen... ..	5, 150
„ v. Heineman... ..	261
„ v. Kirby	797
„ v. Starck	854
„ v. Thieme	823, 921
„ v. Vellinghausen	658
„ W. and G., <i>ex parte</i>	10
„ W. and G., v. Manches-ter	422
Seagull and Co. v. Aronson ...	743
Seale, <i>ex parte</i>	717, 767
Seale v. Toll and Courtis ...	292
Searight and Co. v. Attmore...	612
Searle and Co. v. Haise	917
Searle and Son v. Van Nie-kerk	742, 776
Seccombe v. Hall	5
Secretary for Agriculture, <i>ex parte</i>	153
Sedgwick, <i>ex parte</i>	87
Sedgwick v. Sedgwick	235
Sedgwick, Estate of, v. Nor-den	259
Sedgwick and Co., Receivers of, <i>ex parte</i>	315
Siefontein v. Fourie	454
Sekelini v. Sekelini	225
Sellar Bros. v. Clews	665
Sellar Bros. v. Higgs	892
Sellar Bros. v. Jackson	257
Sepel and Another v. Getz ...	1007
Serrurier v. Isaac	279
Seymour, <i>ex parte</i>	1
Shackell v. Shackell	545
Shanahan v. Shanahan	76
Shapiro v. Freedman	685
Shareholders in Buffalo Sup-ply Co., <i>ex parte</i>	817
Shaw, <i>ex parte</i>	714
Shaw v. Shaw	783, 816, 920
Sheldon, <i>ex parte</i>	930
Sheppard v. McIntosh and Another	793
Sheppard v. Heyns... ..	1009
Sheppard v. Van Reenen... ..	1009

PAGE	PAGE
Sheppard and Co. v. Steer ... 8, 23, 164	Sooye v. Lawrence and Co. and Others ... 800, 803
Sheriff v. Sheriff ... 34, 214	Sothron v. Gabier ... 378
Sherwood v. Holland ... 917	Sikengan, <i>ex parte</i> ... 381
Shunn v. South African College ... 613	Simcocks v. Wynberg Licensing Court ... 882
Shutler, <i>ex parte</i> ... 821	Simpson, <i>ex parte</i> ... 341, 551
Shutte v. Hedley Bros. ... 78, 158	Sindler v. De Villiers ... 900
Sibert, Master and Another v. Muller ... 1, 8	Siverton v. Austin ... 35
Siff v. Cohen ... 665	S.A. Association v. Clews ... 30
Silberbauer v. Karsten ... 163	S.A. Breweries v. Blomson ... 260
Silberbauer and Another v. Jones ... 814	„ v. De Villiers ... 613
Silberbauer, Wahl and Fuller v. Capes ... 9, 257	„ v. Harding, 792, 814
Silberbauer, Wahl and Fuller v. Stephan ... 9, 453	„ v. Hodgson ... 528
Sieberhagen v. Keller and Another ... 322	„ v. Martiensen ... 245
Skeaar v. Weintrob and Others ... 1010	„ v. Moss ... 164
Skead v. Twine ... 741, 775	„ v. Schippers ... 210
Skelton v. Shelvoke and Another ... 981	„ v. Nobbe ... 797
Skelton and Others, <i>ex parte</i> ... 18	„ v. Zin ... 281
Skippon v. De Wet ... 691	S.A. Brickfields v. Wilson and Another ... 10
Sklaar v. Insolvent Estate Weintrob ... 799	S.A. Live Stock Co. v. Lochner ... 376
Slabbert and Another, <i>ex parte</i> ... 15, 62	S.A. Milling Co. v. Miller ... 544
Slade, Alexander and Co. v. Lazarus ... 1008	S.A. Mineral Water Co. v. Chetty ... 33
Slinger, Estate of, v. Pienaar ... 213	S.A. Mineral Water Co. v. Cohen ... 33
Smalberger v. Keller ... 772	S.A. Mineral Water Co. v. Vincent ... 33
Smiles v. Freedberg, Cohen and Co. ... 448	S.A. Mutual v. Erasmus ... 931
Smit, <i>ex parte</i> ... 613	„ v. Notje ... 314
Smit v. Lazarus ... 1010	„ v. Lochner ... 339
Smit v. Makatesi ... 931	„ v. Verster ... 931
Smit and Another v. Duckworth and Another ... 934	S.A. Newspaper Co. v. Theunissen ... 776
Smith, <i>ex parte</i> ... 15, 219	S.A. Produce Co. v. Norman ... 210
„ v. Englebrecht ... 1007	S.A. Trade Protection v. Siedradski ... 685
„ v. Markatesi ... 855	Soyers v. Soyers ... 282, 439
„ v. Martin ... 612	Shannon v. Brodie ... 456
„ v. Pfister ... 619	Shapiro v. Friedman ... 456
„ v. Smith ... 62, 427, 619	Shaw Bros. v. Johnstone ... 454
„ v. Yudelman ... 525	Smit v. Wessels Bros. ... 453
„ and Another, <i>ex parte</i> ... 819	Spangenberg v. Spangenberg, 63, 94
„ and Another v. Elburgh ... 855	Spence v. Bromley ... 338
„ and Co. v. Herman ... 486	Spengler v. Aimian ... 854
„ and Co. v. Tupach ... 792	Spiers, <i>ex parte</i> ... 934, 1011
„ and Co. v. Van As ... 86	Spilhaus and Co. v. Ajam ... 665
Smithers and Another, <i>ex parte</i> ... 1013	Spilhaus and Co. v. Engel ... 798
Snyman, <i>ex parte</i> ... 820	Spilhaus and Co. v. Muller Bros. ... 338
Snyman and Another, <i>ex parte</i> ... 617	Spilhaus and Co. v. Newman ... 797
Solomon v. Stefani ... 729	Spilhaus and Co. v. Romain and Another ... 797
	Spilhaus and Co. v. Vickers Bros. ... 211
	Spilhaus and Co. v. Werner ... 72

	PAGE
Stableford and Co., <i>in re</i> ...	498
Stableford and Co., <i>ex parte</i>	668, 767
Stableford and Co. v. Rimmel	613, 683
Stamper and Zoutendyk v. Heyns	149
Standard Flour Mills v. Cohen	150
Stande, <i>ex parte</i>	820
Stande v. Stande	286
Stansfield v. Stansfield	807
Star Aerated Water Co., <i>ex parte</i>	546
Stark v. Broomberg	135
Stassen, <i>ex parte</i>	39
Staude v. Staude	62, 570
Steer v. Chetty	546, 777
Steer v. Roelke	791
Steinhobel, <i>ex parte</i>	499
Stephan v. Myburgh	612, 854
Stephan v. Myers	771
Stephan Bros. v. Riach	1
Stevens v. Hager	423
Stevens v. Stevens	131
Stevenson, <i>ex parte</i>	799
Steyn v. Steyn and Others	755
Steyn v. Lochner	319
Steyn v. Steyn and Another	755
Steyn v. Vink	259
Steyn and Another v. Isaac	379
Steyn and Another v. Tahaar and Another	771
Steytler, <i>ex parte</i>	285
Steytler v. Auchmut	377
Steytler v. Khan	686
Steytler v. Venter and Another	544
Steytler and Others, <i>ex parte</i>	233
Stockenstrom and Others, <i>ex parte</i>	12
Stoffberg v. Altschul	743
Stoffberg v. Meyer	426
Stone and Another, <i>ex parte</i>	820
Stracey v. Adams	898
Strauss, <i>ex parte</i>	427
Struben v. Pitt	891
Strydom, <i>ex parte</i>	686
Strydom and Others v. Blignault and Others	572
Sturk Co. and Others v. Caralis	740
Stuttaford and Others v. Henson	259
Suburban Estates v. Jankelowitz	85
Suburban Estates v. Muslak and Another	4

	PAGE
Suburban Municipal Waterworks v. Cochrane and Cherry	169
Sullivan v. Sullivan	489
Sundstrom, <i>ex parte</i>	618
Sutherland v. Sutherland	427, 621, 798
Sutton, <i>ex parte</i>	20
Sutton, <i>ex parte</i>	23
Sutton v. Philip Bros.	73
Swan, <i>ex parte</i>	714
Swanepoel v. Wentzel	891
Swart v. Swart	11
Swartz v. Fick	153
Swartz v. Oelofse	237
Swemmer v. Calitz	792
Swinton v. Corballis	340
Syfret, <i>ex parte</i>	381
Syfret, Godlonton and Low v. Harris	524
Syme v. Colonial Government	527
Synker v. Estate Westerman	258
Synne, <i>ex parte</i>	301
Syrkin, <i>ex parte</i>	498
Table Bay Harbour Board v. Bucknall Line	351
Table Bay Harbour Board v. McKenzie and Co.	260
Table Bay Harbour Board v. Marx	427
Taborski and Co. v. Bruckner	213
Taborsyski and Co. v. Hoffenberg	29, 396
Tait, Estate of, v. Cilliers	256
Tait, Estate of, v. Heesen	256
Talanda v. Aron	260
Tancred v. Beukes	616
Tantsi, Estate of, v. Executors Estate Nchela	943
Tarr, <i>ex parte</i>	1005
Taylor v. Tapnach	617
Taylor and Gibson v. Behr and Co.	419
Tearnan v. Parr	498
Telfer v. Cape Town Gas Co.	426
Tempest v. Tempest	455, 742
Templeman v. Robinson	2
Tennant v. Zwaigenhaft	326, 485
Ternan v. Tucker	793
Tetley and Fleming v. Buffalo Supply Co.	282
Theron v. Burger	150
Theron v. Green	73
Theunissen, <i>ex parte</i>	11, 15
Theunissen v. Burns	606

	PAGE		PAGE
Theunissen and Others, <i>ex parte</i> ...	17	Van Oler, Estate of, <i>ex parte</i> ...	545
Thompson, <i>ex parte</i> ...	17, 341	Van der Berg v. Mare... ..	567
Thompson v. Jameson... ..	770	Van der Byl, <i>ex parte</i>	668
Thompson v. McKenzie and Co.	346	Van der Byl v. Scott and Smuts	8
Thompson v. Thompson ...	63, 617	Van der Byl and Co. v. Barnard	260
Thorne v. Bataillou	1007	Van der Byl and Co. v. Cassiem... ..	544
Thwaites v. Mocke	164	Van der Byl and Co. v. Kaber	565
Tilly, Estate of, v. Gruneberg ...	150	Van der Byl and Co. v. Kulman	163
Titterton, <i>ex parte</i>	822	Van der Byl and Co. v. Merry	116
Toach, <i>ex parte</i>	579	Van der Byl and Co. v. Minnaar	164, 338
Toach v. Le Roux	644	Van der Byl and Co. v. Rossouw	1010
Toerin v. Dieterle	116	Van der Byl, Estate of, v. Snyman... ..	338
Tooch v. Le Roux	904	Van der Byl and Others, <i>ex parte</i>	933
Tothill v. Marshall... ..	33	Van der Byl and Others v. Abel... ..	813
Toucher v. Oosthuizen... ..	875	Van der Heever, <i>ex parte</i> ...	164
Townsend v. Irvine	339	Van der Heever v. Cloete... ..	90, 220
Townsend v. Sibbert and Another	484	Van der Heever v. Van der Heever	234
Townsend v. Stephan... ..	210, 260	Van der Hoff v. Paddon... ..	381, 634
Trachet, <i>ex parte</i>	892	Van der Horst v. Coley	1018
Tran, <i>ex parte</i>	738	Van der Merwe, <i>ex parte</i>	570, 616, 817, 818
Trediga v. Mellman and Another	792	Van der Merwe v. Colonial Government	526, 732
Treurnich and Another v. Estate De Villiers... ..	493	Van der Merwe v. Van der Merwe's Execufors	593
Trollip v. Orange River Irrigation Co.	498	Van der Merwe v. Van der Merwe and Another	131
Trott Bros. v. Marsel Bros.	570, 703	Van der Pas and Others v. Dusseau and Co.	933
Truter, <i>ex parte</i>	691, 934	Van der Riet, Estate of, v. Skippon... ..	798
Truter v. McMullen	3	Van der Sandt De Villiers and Co. v. De Wet	775
Truter v. Smit	856	Van der Sandt De Villiers and Co. v. Louw	797
Truter v. Truter	712	Van der Spuy v. Laing	1008
Tucker v. Tanner	855	Van der Spuy v. Van der Spuy... ..	455
Tule v. Attaway... ..	1010	Van der Spuy v. Van der Spuy... ..	618
Tunstall and Grant v. Paulse ...	652	Van der Venter and Others, <i>ex parte</i>	427
Turner v. Shepherd Bros.	283	Van der Vliet, <i>ex parte</i>	10
Turnbull v. Stewart	1015	Van der Vyver, <i>ex parte</i>	545
Turock v. Christopoulos and Another	50	Van der Walt and Another, <i>ex parte</i>	63
Twentyman, <i>ex parte</i>	34	Van der Westhuysen, <i>ex parte</i>	234, 427, 613
Uitenhage D.R. Church, <i>ex parte</i> ...	234		
Uitenhage and Port Elizabeth D.R. Churches, <i>ex parte</i> ...	341		
Uys v. Moll and Co.	677		
Uys v. Uys	404		
Van Aardt, <i>ex parte</i>	487		
Van Blerk v. Eckstein... ..	313		
Van Blommestein v. Holliday ...	64		
Van Bonde, <i>ex parte</i>	790		
Van Boom v. Viissier, 296, 406, 501			
Van Breda, <i>ex parte</i>	1014		
Van Breda v. Turok	854		

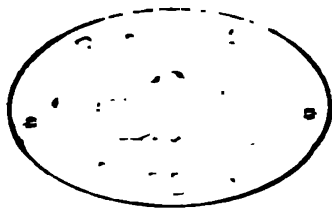
	PAGE
Van der Westhuysen v. Kruiehieft	453
Van Dijk, <i>ex parte</i>	778
Van Driel v. Venter and Another	819, 881
Van Drusen and Another v. Booysen... ..	792
Van Eaden, <i>ex parte</i>	819
Van Eaden v. Van Eaden, 742,	806
Van Es, <i>ex parte</i>	34
Van Heerden, <i>ex parte</i>	219
Van Heerden v. Estate Van Heerden	438
Van Heerden v. Van Heerden and Others	489
Van Heerden v. Werth	61
Van Holdt v. Blake	105
Van Niekerk, <i>ex parte</i> ,	351, 482, 611
Van Niekerk v. Will and Others	424
Van Niekerk and Co. v. Faber	1013
Van Reenen, Estate of, v. Vickar	261
Van Renen v. Cowley	1005
Van Rensburg and Another v. Trystman	668
Van Riet v. Mussett and Another	33
Van Rooyen v. Sack	282
Van Schalkwyk, <i>ex parte</i>	778
Van Tonder, <i>ex parte</i>	571
Van Wyk, <i>ex parte</i>	83, 664
Van Wyk v. Terblans... ..	1003
Van Wyk v. Marks and Others	151
Van Zyl v. Van Gerve	486
Van Zyl and Others, <i>ex parte</i>	822
Van Zyl and Buissinné v. Hardy	257
Vanner v. Bridges	813
Varkevisser v. Lewis	486
Vassiss v. Yaxoglong	798
Verasamy v. Subbaya and Another	590
Veir v. McNaughton	568
Venter, <i>ex parte</i>	234
Venter and Others, <i>ex parte</i> ...	777
Venter, Executors of Estate of late, <i>ex parte</i>	893
Vergotine v. Ceres Municipality	92
Vermaak v. Butchunsky	259
Vermaak v. Vermaak... ..	687
Vermulen v. Swart... ..	407
Versfeld v. Allie	794
Versfeld v. Donough	485
Verster v. Fletcher... ..	976

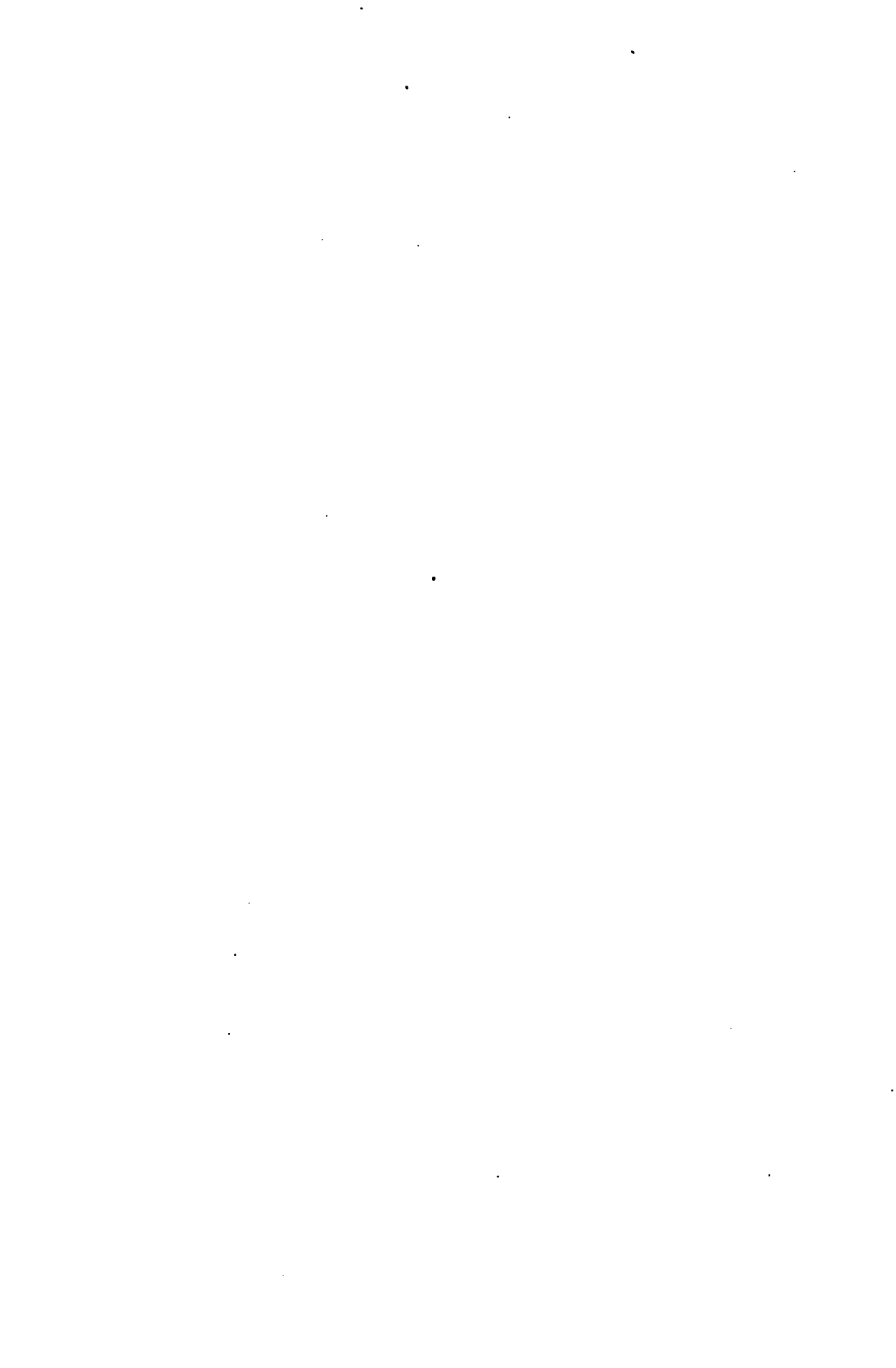
	PAGE
Verster and Another v. Pienaar	318
Verster, Van Wyk and Co. v. Pienaar	571
Vice, <i>ex parte</i>	19, 233
Vick v. Blake	150
Victor v. Estate Du Plessis ...	33
Vimpanz and Co. v. Van Gerve	498
Visser, <i>ex parte</i>	376, 1016
Visser v. Yaxoglong	798
Visser and Co. v. Jarus and Another	930
Viviers, <i>ex parte</i>	262
Vlok, <i>ex parte</i>	313
Vlotter, <i>ex parte</i>	393
Vogts, <i>ex parte</i>	396
Von Holdt v. Buhr	793
Von Holdt v. Bulders... ..	917
Von Holdt v. Martin	772
Von Welligh v. Von Welligh... ..	129
Vorster, <i>in re</i> Estate of late... ..	893
Vosloo v. Myburgh... ..	1001
Vyner, <i>ex parte</i>	228
Waddell and Another, <i>ex parte</i>	1014
Wadner and Another v. Todd	776
Waite v. Hansen and Schrader	740
Wakelin and Cunningham v. Frost	3
Wakelin and Cunningham v. Salonika... ..	211
Walden, <i>ex parte</i>	10
Walker v. Martin	1013
Walker v. Walker	72
Walker, Estate of, v. Kannes	30
Walker, Estate of, v. Karries	665
Walker and Jacobsohn v. Norden	995
Wallis v. Michelson	891
Wallwork v. Orange River Irrigation Co.	498, 817
Walsh, <i>ex parte</i>	743
Walsh and Walsh v. Erskine	284, 567
Walsh and Walsh v. Sadler...	820
Walton and Co. v. Peacy... ..	379
War Department v. Table Bay Harbour Board... ..	487
War Department v. Wahl... ..	612
Ward, <i>ex parte</i>	151
Warner v. Honikman	772
Warner, <i>ex parte</i>	935
Warner v. Schultz	574
Warner and Co. v. Banso ...	791

PAGE	PAGE
Warner and Co. v. Graham and Another 376	Wiehman, <i>ex parte</i> 182
Warner and Co. v. Impey ... 893	Wiggett v. Mortimer 453
Warrington, <i>ex parte</i> 427	Wiid v. Wiid 357
Watcham, <i>ex parte</i> 285	Wilcocks v. Berstein 224
Watson v. Pilbrow 10	Wiley and Co. v. Isaacs and Co. 184
Watson and Co. v. Jones, 856, 863	Wiley and Co. v. Van der Spuy... .. 257
Watson and Co. v. Wiener and Co. 211	Wilkinson v. Aron... .. 377
Weakley, <i>ex parte</i> 666	Will v. Shea 33
Wege v. Ally 257	Williams, <i>ex parte</i> 19
Wege v. Latagan 813	„ v. Jupp 117
Weideman, <i>ex parte</i> 427	„ v. Morris 665
Weidner v. Rabie 568	„ v. "The Master" ... 437
Weinand, <i>ex parte</i> 317	„ and Wife, <i>ex parte</i> ... 235
Weintraub and Co. v. Voesee 891	„ Estate of, v. Nel ... 998
Weintrob v. De Villiers and Schaverin 388	Williamson v. Bernhardt and Others 776
Weintrob and Co. v. Philip and Another 776	Williamson and Another v. Shepstone and Others ... 117
Weintrob and Penkin v. Steer 1012	Willmer v. Rance 605
Wells v. Wells 635	Willmot, <i>ex parte</i> 631
Wells v. White 800	Willmot, Estate of, v. Estate Sayers 544
Wentzel v. O'Brein 665	Wilson, <i>ex parte</i> 115, 437, 817
Wentzel v. Stephan 114	„ v. A.M.E. Church ... 1007
Wentzel and Another, <i>ex parte</i> 571	„ v. Boyce... .. 1006
Wernich, <i>ex parte</i> 667	„ v. Excelsior Benefit Society 607
Wessels v. Cohen 30	„ Phipps 211
Wessels v. Ferreira 855	„ v. Stephan... .. 164
Wessels v. Gamba 486	„ Son and Co. v. Dicker 340
Wessels v. Kyle 258	„ Son and Co. v. Nyman and Wife 740
Wessner v. Poggenpoel 792	„ and Cathcart v. Young 1017
Westerman and Penkin, Estate of, v. Blows 33	Windvogel v. Bishop of S. John's 499
Western Wine Co. v. Erk... .. 797	Winkelmann, <i>ex parte</i> 499
Western Wine Co. v. McDonald Bros. 261	Winkelmann and Others, <i>ex parte</i> 821
Western Wine Co. v. Norman 2	Wipner v. Holland 29
Weyers, <i>ex parte</i> 157	Wise v. Wise 224
White, <i>ex parte</i> 34, 882	Withinshaw v. Riddell ... 378
White v. Fotheringham ... 544	Wishart, Estate of, v. Van Muren 259
White v. Gibbons and Co. ... 9	Wolf, <i>ex parte</i> 717
White, Ryan and Co. v. Cohen 4, 544	Wolf and Wife, <i>ex parte</i> ... 285
Wiber v. Fish... .. 611, 942	Wood, <i>ex parte</i> 12, 499, 944
Wiber v. Van Weenen 684	Wood, Williams and Co. v. Duggan 855
Wibes, <i>ex parte</i> 821	Woelf, Heineman and Co. v. Gordon 613
Wicht v. Homewood 793	Woelf, Heineman and Co. v. Van Vuuren 797
Wienand v. Davids 257	Woolven v. Mitchell 932
Wiener and Co. v. Esack... .. 317	Worcester Butchery Co., <i>ex parte</i> 1012
Wiener and Co. v. Jacobs ... 741	Wordon, Estate of, v. Saiset... 738
Wiener and Co. v. Omar and Another... .. 259	
Wiener and Co. v. Rabinowitz 149	
Wiener and Co. v. Van der Byl 180	
Wiener, Schwab and Co. v. Jackson, B. and J. 376	

	PAGE		PAGE
Wrench v. Crafford	115	Zeederberg and Duncan v.	
Wright v. Wright	104	Davis	569
Wright v. Rossouw	665	Zeederberg and Duncan v.	
Wright and Another, <i>ex parte</i>	819	Godlieb	743
Wright and Another v. "Cape		Zeederberg and Duncan v.	
Times" Ltd.	581	Kisch	423
Wright and Others, <i>ex parte</i> ...	382	Zeederberg and Duncan v.	
Wrymon v. Solomon	605	Lipschutz	310
Wynn v. Wynn and Another	334	Zeederberg and Duncan v.	
		Margalis	259
Yolo v. Majujeze	308	Zeederberg and Duncan v.	
Young v. Mulvihall... ..	403	Sayers	32
Younghusband v. Brockle-		Zeederberg and Duncan v.	
bank	624	Van Biene	798
		Zeederberg and Duncan v.	
Zahn, Estate of, v. Vlok... ..	611	Weintrob	257
Zeederberg and Duncan v.		Zgili v. McLeod	241
Andrusier	379, 497	Zietsman v. Clifford	891
Zeederberg and Duncan v.		Zuid Afrikaansche Weeshuis,	
Cohen	424, 685	<i>ex parte</i>	816
		Zuidmeer v. Heynes	1006









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